No. 17-494	
Title:	**South Dakota, Petitioner** **v.** **Wayfair, Inc., et al.**
Docketed:	October 3, 2017
Lower Ct:	Supreme Court of South Dakota
Case Numbers:	(28160-a-GAS)
Decision Date:	September 13, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 02 2017	Petition for a writ of certiorari filed. (Response due November 2, 2017)
Oct 16 2017	Blanket Consent filed by Petitioner, South Dakota
Oct 19 2017	Blanket Consent filed by Respondents, Wayfair, Inc., et al., et al.
Oct 23 2017	Brief amicus curiae of National Association of Wholesaler-Distributors filed.
Oct 24 2017	Order extending time to file response to petition to and including December 7, 2017.
Nov 01 2017	Brief amicus curiae of Retail Litigation Center, Inc. filed.
Nov 01 2017	Brief amicus curiae of National Retail Federation filed.
Nov 01 2017	Brief amicus curiae of South Dakota Retailers Association filed.
Nov 02 2017	Brief amicus curiae of Tax Foundation filed.
Nov 02 2017	Brief amicus curiae of Streamlined Sales Tax Governing Board, Inc. filed.
Nov 02 2017	Brief amicus curiae of American Booksellers Association filed.
Nov 02 2017	Brief amici curiae of National Governors Association, et al. filed.

Nov 02 2017	Brief amici curiae of International Council of Shopping Centers, et al. filed.
Nov 02 2017	Brief amici curiae of American Farm Bureau Federation, et al. filed.
Nov 02 2017	Brief amici curiae of American Lighting Association, et al. filed.
Nov 02 2017	Brief amicus curiae of Four United States Senators, filed.
Nov 02 2017	Brief amici curiae of Multistate Tax Commission filed.
Nov 02 2017	Brief amici curiae of Colorado and 34 other States, et al. filed.
Nov 02 2017	Brief amici curiae of Law Professors and Economists filed.
Dec 07 2017	Brief amicus curiae of National Taxpayers Union Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 07 2017	Brief amicus curiae of NetChoice filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 07 2017	Brief of respondents Wayfair, Inc., et al., et al. in opposition filed. **Main Document** **Proof of Service** **Certificate of Word Count** **Other**
Dec 07 2017	Brief amici curiae of Hon. Representative, Robert W. Goodlatte, et al. filed. **Certificate of Word Count** **Main Document** **Proof of Service**
Dec 07 2017	Brief amicus curiae of Chris Cox, Former Member of Congress and Co-Author of the Internet Tax Freedom Act filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 07 2017	Brief amicus curiae of American Catalog Mailers Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 07 2017	Brief amicus curiae of Americans for Tax Reform filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 20 2017	DISTRIBUTED for Conference of 1/5/2018.
Dec 20 2017	Reply of petitioner South Dakota filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
Jan 12 2018	Petition GRANTED.
Jan 31 2018	Blanket Consent filed by Petitioner, South Dakota **Blanket Consent**
Feb 05 2018	Blanket Consent filed by Respondents, Wayfair, Inc., et al., et al.. **Blanket Consent**
Feb 23 2018	SET FOR ARGUMENT on Tuesday, April 17, 2018.
Feb 26 2018	Brief of petitioner South Dakota filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service** **Other**
Mar 01 2018	Brief amici curiae of National Association of Certified Service Providers and Software & Information Industry Association in Support of Neither Party filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 01 2018	Brief amicus curiae of Professor John S. Baker, Jr. in support of neither party filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 01 2018	Brief amicus curiae of City of Little Rock, Arkansas filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 02 2018	Brief amici curiae of National Governors Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 02 2018	Brief amicus curiae of South Dakota Retailers Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Brief amici curiae of National Congress of American Indians and Indian Tribes in South Dakota in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Brief amicus curiae of United States filed. **Main Document** **Proof of Service**
Mar 05 2018	Brief amicus curiae of Tax Foundation in support of neither party filed.

	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amici curiae of Retail Litigation Center, Inc., et al. filed.		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amicus curiae of Streamlined Sales Tax Governing Board, Inc. filed.		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amici curiae of Four United States Senators filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amicus curiae of Multistate Tax Commission, et al. filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amicus curiae of David A. Fruchtman supporting neither party filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amici curiae of International Council of Shopping Centers, et al. filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amici curiae of Brill, et al. filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amici curiae of Law Professors and Economists filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 05 2018	Brief amici curiae of Colorado and 40 other states, et al. filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 07 2018	CIRCULATED		
Mar 19 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.		
	Proof of Service	**Main Document**	

NAME	**ADDRESS**	**PHONE**
Attorneys for Petitioner		
Eric F. Citron Counsel of Record	Goldstein & Russell, P.C. 7475 Wisconsin Ave., Suite 850 Bethesda, MD 20814 ec@goldsteinrussell.com	(202) 362-0636

Party name: South Dakota

Attorneys for Respondents

George S. Isaacson Counsel of Record	Brann & Isaacson P.O. Box 3070, 184 Main Street Lewiston, ME 04243-3070 gisaacson@brannlaw.com	207-786-3566

Party name: Wayfair, Inc., et al.

Other

John S. Baker Jr. Counsel of Record	5209 Sea Chase Dr., # 5 Amelia Island, FL 32034 John.Baker@law.lsu.edu	2257735027

Party name: Professor John S. Baker, Jr.

Edward Joseph Bernert Counsel of Record	Baker & Hostetler LLP 200 Civic Center Drive, Suite 1200 Columbus, OH 43215 ebernert@bakerlaw.com	614-462-2687

Party name: American Catalog Mailers Association

Tillman J. Breckenridge Counsel of Record	Bailey & Glasser, LLP 1054 31st Street, N.W., Suite 230 Washington, DC 20007 tbreckenridge@baileyglasser.com	202-463-2101

Party name: National Governors Association, et al.

Clark Russell Calhoun Counsel of Record	Alston & Bird LLP 333 S. Hope St. 16th Floor Los Angeles, CA 90071 clark.calhoun@alston.com	213-576-1000

Party name: Americans for Tax Reform

Thomas Milton Carpenter Counsel of Record	Office of the City Attorney 500 West Markham, Suite 310 Little Rock, AR 72201 tcarpenter@littlerock.gov	501-371-6875

Party name: City of Little Rock, Arkansas

David William Tod Daniels Counsel of Record	Richards Kibbe and Orbe, LLP 701 8th Street, NW Suite 300 Washington, DC 20001 ddaniels@rkollp.com	202-261-2960

Party name: Brill, et al.

Warren L. Dean Jr. Counsel of Record	Thompson Coburn LLP 1909 K Street, N.W. Suite 600 Washington, DC 20006 wdean@thompsoncoburn.com	202-585-6908

Party name: National Taxpayers Union Foundation

Ruthanne Mary Deutsch Counsel of Record	Deutsch Hunt, PLLC 300 New Jersey Ave., NW, Suite 900 Washington, DC 20001 rdeutsch@deutschhunt.com	2028686915

Party name: National Association of Certified Service Providers and Software & Information Industry Association

Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: United States

David Allen Fruchtman Counsel of Record	Rimon, P.C. 245 Park Avenue, 39th Floor New York, NY 10167 david.fruchtman@post.harvard.edu	8476564823

Party name: David A. Fruchtman

Debra L. Greenberger Counsel of Record	Emery Celli Brinckerhoff & Abady, LLP 600 Fifth Avenue, 10th Fl. New York, NY 10020 dgreenberger@ecbalaw.com	(212)-763-5000

Party name: Law Professors and Economists

Deepak Gupta Counsel of Record	Gupta Wessler, PLLC 1900 L Street, NW, Suite 312 Washington, DC 20036 deepak@guptawessler.com	(202) 888-1741

Party name: American Farm Bureau Federation, et al.

Helen Hecht Counsel of Record	Multistate Tax Commission, 444 North Capitol Street Suite 425 Washington, DC 20001 hhecht@mtc.gov	202-650-0300

Party name: Multistate Tax Commission, et al.

Joseph Darcy Henchman Counsel of Record	Tax Foundation, 1325 G Street, N.W., Ste. 950	(202)-464-6200

Washington, DC 20005

henchman@taxfoundation.org

Party name: Tax Foundation

Sam Hirsch
Counsel of Record

Jenner & Block, LLC
1099 New York Avenue, NW
Suite 900
Washington, DC 20001

202-637-6335

SHirsch@jenner.com

Party name: National Congress of American Indians and Indian Tribes in South Dakota

Hyland Hunt
Counsel of Record

Deutsch Hunt, PLLC
300 New Jersey Ave., NW, Suite 900
Washington, DC 20001

202-868-6915

hhunt@deutschhunt.com

Party name: American Lighting Association, et al.

Neil J. Kuenn
Counsel of Record

Keeley, Kuenn & Reid
200 S. Wacker Drive
Suite 3100
Chicago, IL 60606-0000

312-782-1829

nkuenn@kkrlaw.com

Party name: National Association of Wholesaler-Distributors

Laura Kathleen McNally
Counsel of Record

Loeb & Loeb, LLP
321 N. Clark St., Suite 2300
Chicago, IL 60654

312-464-3155

lmcnally@loeb.com

Party name: Streamlined Sales Tax Governing Board, Inc.

Alan B. Morrison
Counsel of Record

George Washington University Law
School, 2000 H Street NW
Washington, DC 20052

202-994-7120

abmorrison@law.gwu.edu

Party name: Four United States Senators

David B. Salmons
Counsel of Record

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004

202-373-6283

david.salmons@morganlewis.com

Party name: Chris Cox, Former Member of Congress and Co-Author of the Internet Tax Freedom Act

Scott Alan Sinder
Counsel of Record

Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

202 429 3000

ssinder@steptoe.com

Party name: National Retail Federation

Grant Thomas Sullivan Counsel of Record	Office of the Attorney General, 1300 Broadway 6th Floor Denver, CO 80203 Grant.Sullivan@coag.gov	720.508.6000

Party name: Colorado and 40 other states

Charles A Trost Counsel of Record	Waller Lansden Dortch & Davis, LLP 511 Union Street, Suite 2700 Nashville, TN 37219 charlie.trost@wallerlaw.com	615-244-6380

Party name: Hon. Representative, Robert W. Goodlatte, et al.

William Gregory Turner Counsel of Record	TurnerLaw 1121 L Street, Suite 700 Sacramento, CA 95814 greg@turnersalt.com	916-251-7398

Party name: NetChoice

Adam G. Unikowsky Counsel of Record	Jenner & Block, LLP 1099 New York Avenue, NW Suite 900 Washington, DC 20001 aunikowsky@jenner.com	202-639-6000

Party name: American Booksellers Association

William Michael Van Camp Counsel of Record	Van Camp & Konrad, P.C. 117 E Capitol Ave., P.O. Box 66 Pierre, SD 57501 bvancamp@olingerlaw.net	605 224 8851

Party name: South Dakota Retailers Association

Donald B. Verrilli Jr. Counsel of Record	Munger, Tolles & Olson, LLP 1155 F Streeet NW, 7th Floor Washington, DC 20004 donald.verrilli@mto.com	(202) 220-1100

Party name: Retail Litigation Center, Inc.

Seth P. Waxman Counsel of Record	Wilmer Cutler Pickering Hale and Dorr, LLP 1875 Pennsylvania Ave, NW Washington, DC 20006 Seth.Waxman@wilmerhale.com	202-663-6000

Party name: International Council of Shopping Centers, et al.

RECORD AND BRIEFS

17-494

No. 17-____

FILED
OCT - 2 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

PETITION FOR WRIT OF CERTIORARI

MARTY J. JACKLEY
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General & Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3553

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Ronald A. Parsons, Jr.
JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP
101 S. Main Ave.
Sioux Falls, SD 57104
(605) 338-4304

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTION PRESENTED

In 1967, this Court held that the dormant commerce clause prohibits a State from requiring catalog retailers to collect sales taxes on sales into the State unless the retailer is "physically present" there. *Nat'l Bellas Hess v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967). That rule, questionable even then, became an isolated outlier when *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), held that only a "substantial nexus" was needed for other state taxes affecting interstate commerce. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court was asked to correct that aberration. But despite a vigorous dissent—and the lack of a similar, "physical presence" rule for *any* other type of tax, *id.* at 317—this Court tentatively retained the requirement on *stare decisis* grounds.

The legal and practical developments of the past 25 years strongly recommend revisiting that judgment. *Quill* has grown only more doctrinally aberrant, and has been roundly criticized by members of this Court, including Justices Kennedy, Thomas, and Gorsuch. But while its legal rationales have imploded with experience, its practical impacts have exploded with the rapid growth of online commerce. Today, States' inability to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike. "Given these changes ..., it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy J., concurring). The question presented is:

Should this Court abrogate *Quill*'s sales-tax-only, physical-presence requirement?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
PETITION 5
OPINIONS BELOW 5
JURISDICTION 5
STATEMENT 5
I. Background 5
II. Developments In Other States 8
REASONS FOR GRANTING THE WRIT 12
I. This Issue Is Exceptionally Important 12
A. Local governments are severely and increasingly harmed by *Quill* 12
B. *Quill* also unfairly harms local, brick-and-mortar businesses 15
C. *Quill* harms interstate commerce itself. 17
II. *Quill* Should Be Overruled 20
A. The physical-presence rule is incorrect 21
B. *Stare decisis* no longer justifies keeping the physical-presence rule 27
III. The Question Presented Requires Immediate Review. 35
CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Alleyne v. United States,
133 S. Ct. 2151 (2013) 33

Arizona v. Gant,
556 U.S. 332 (2009) 27, 32

Arizona v. Rumsey,
467 U.S. 203 (1984) 27

Camps Newfound / Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 24

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) ..... *passim*

Comptroller v. Wynne,
135 S. Ct. 1787 (2015) 1, 24, 33

Crutchfield Corp. v. Testa,
__ N.E.3d __, 2016 WL 6775765 (Ohio 2016) 26

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) ..... *passim*

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) ..... *passim*

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 27

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 33

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) 20

McBurney v. Young,
569 U.S. 221 (2013) 23

Montejo v. Louisiana,
556 U.S. 778 (2009) 34

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 35

Nat'l Bellas Hess, Inc. v. Dep't of Rev.,
386 U.S. 753 (1967) 1, 3, 22

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551 (1977) 18

Okla. Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 22

Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.,
987 N.E.2d 621 (N.Y. 2013) 31

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 27, 33

Pearson v. Callahan,
555 U.S. 223 (2009) 27, 28, 33

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Randall v. Sorrell,
548 U.S. 230 (2006) 32

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 37

Supreme Court v. Piper,
470 U.S. 274 (1986) 25

Constitutional Provisions

S.D. Const. art. XII, §7 6

U.S. Const. art. I, §10, cl. 2 24

U.S. Const. art. IV, §2, cl. 1 24

Statutes

28 U.S.C. §1257(a) 5

H.B. 1182, 91st Legis. Assemb. Session (S.D. 2016) 14

Other Authorities

Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* (2009) 13

Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1 (2014) 14

Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000) 16

Arthur B. Laffer & Donna Arduin, *Pro-Growth Tax Reform and E-Fairness* (2013), http://www.efairness.org/files/dr-art-laffer-sudy.pdf 16

Steven Strauss, *The Impact of Free Riding on Price and Service Competition in the Presence of E-Commerce Retailers* (Yale Sch. of Mgmt. Working Paper Series PHD, No. 2, 2002) 19

Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571 (Aug. 7, 2017) 30

INTRODUCTION

Before Amazon was even selling books out of Jeff Bezos's garage, this Court held in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), that it would not apply its by-then-settled "dormant commerce clause" jurisprudence to state sales-tax obligations. Instead, while recognizing that "contemporary Commerce Clause jurisprudence might not dictate the same result," *id.* at 311, this Court resolved to retain—"'*at least for now*'"—a mechanistic exception of older vintage that universally prohibited States from imposing sales-tax requirements on vendors with no "physical presence" therein. *Id.* at 317-19 (adhering to *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967)) (emphasis added). The Question Presented is whether the time has now come to take this "physical-presence rule"—which is, in fact, an ever-more-anomalous *exception* to core doctrinal principles—and finally retire it.

As several members of this Court have said, the answer is "yes." Calling it "unwise to delay any longer," Justice Kennedy—who voted for the result in *Quill*—recently urged "[t]he legal system" to "find an appropriate case for this Court to reexamine" it. *See Direct Mktg. Ass'n v. Brohl* (*DMA*), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Justice Thomas, the only other remaining Justice from *Quill*, likewise now advocates abandoning it, along with other "unworkable" products of the dormant commerce clause. *E.g.*, *Comptroller v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting). Meanwhile, Justice Gorsuch recently suggested that *Quill* gave its own rule an "expiration date," setting it up to "wash away with the tides of time." *See Direct Mktg. Ass'n v. Brohl* (*DMA II*), 814 F.3d 1129, 1151 (10th Cir. 2016) (concurring opinion).

Because circuit conflicts are impossible in cases squarely governed by this Court's precedent, *see* Pet.App. 14a, such criticisms represent the clearest possible signal that this case merits certiorari.

Nor could there be a better or more timely vehicle than this Petition. Answering Justice Kennedy's invitation, South Dakota enacted a law to challenge *Quill*'s physical-presence requirement, while also minimizing the interim burdens on affected taxpayers and facilitating this Court's review. *See* Pet.App. 6a-7a. The result is a case in which the sole, dispositive issue is *Quill*'s continuing applicability, presented in a context that highlights its shaky legal foundations and harmful results. This Court should take this opportunity to reconsider a precedent that was "questionable even when decided, [and] now harms States to a degree far greater than could have been anticipated." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

In fact, since Justice Kennedy's call to address this "urgent" issue two years ago, the urgency has only intensified. Although this is the cleanest and most timely vehicle this Court will see for the Question Presented, South Dakota is not alone: Many States have recently enacted similar taxation provisions, and active litigation respecting those laws is likewise underway. Those cases are years behind this one, however, and this Court can thus spare the States and numerous affected businesses the substantial expense of unnecessary audits and litigation by providing a definitive answer now on *Quill*'s continuing force. This Petition should thus be granted to provide the clarity the legal system needs—even without regard to whether, on the merits, *Quill* should be overruled.

That said, *Quill* clearly needs to go. When this Court considers overruling its precedent, it looks to whether the existing rule: (1) is constitutional or statutory; (2) has engendered reliance interests; (3) has been undermined by changed circumstances; (4) has been consistently criticized as inconsistent with broader doctrine; and (5) has proven "unworkable" or "outdated" with experience. *See infra* pp.27-35. *Quill* fares poorly on every measure. It is a severely criticized, constitutional holding that *itself* warned when decided that it might later be reconsidered. *See infra* p.20. It is also, in Justice Gorsuch's words, a "precedential island[] ... surrounded by a sea of contrary law." *DMA II*, 814 F.3d at 1151. And after 25 years of technological progress and economic changes, it has proven entirely out of date.

On the one hand, these changes have eliminated *Quill*'s sole animating concern—namely, the logistical burden national mail-order retailers might face in collecting sales tax in multiple jurisdictions. *See* 504 U.S. at 313 n.6; *see also Bellas Hess*, 386 U.S. at 759-60. Today, advances in computing have made it easy for retailers to collect different States' sales taxes. Implementing such technology poses a minimal obstacle for companies, like respondents here, that can instantly tailor their marketing and overnight delivery of hundreds of thousands of products to individual customers based on their IP addresses; these companies can surely calculate sales tax from a zip code. In fact, the record here shows that sales-tax collection is now uncomplicated for large-scale internet retailers, *see infra* pp.29-31, and that asking today's companies to undertake it when they do substantial business with a State's citizens imposes no undue burden on interstate commerce.

On the other hand, these same changes have rendered *Quill*'s outlier rule far more harmful and unfair. Under contemporary conditions, *Quill* does not alleviate special burdens on interstate, internet sellers—it gives them an unfair advantage over their brick-and-mortar rivals. *See DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). That is ironic, because equality of treatment between in-state and out-of-state businesses is now the overarching value of the dormant commerce clause. *Id.* Meanwhile, given the (ever growing) scale of e-commerce, the immediate effect is a "startling revenue shortfall" for State and local governments that cannot effectively collect tax on a growing proportion of retail purchases. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

In fact, *Quill* does double damage from a federalism perspective: It deprives States and local governments not only of critical revenue, but also of a power the Constitution and Tenth Amendment fully reserved to them. It is no answer to hope (as *Quill* did) that Congress might "fix" the problem created by this Court's own doctrine by devolving power back to the States. *See* 504 U.S. at 318-19. The damage to the Framers' design is done when the States must go begging to Congress for powers that belong to them by right, as 25 years of congressional inaction on this issue have vividly shown.

This Petition should be granted. The doctrinal tension created by *Quill*'s outlier, sales-tax-only exception requires resolution. And given all the harm it now causes, and the benefits it no longer delivers, the physical-presence requirement should be eliminated.

PETITION

Petitioner South Dakota respectfully seeks a writ of certiorari to review a judgment of the Supreme Court of South Dakota.

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (Pet.App. 1a-14a) is not yet published but is available at 2017 WL 4051554. The state trial court's decision (Pet.App. 15a-18a) is unreported.

JURISDICTION

The judgment below, affirming a final judgment on federal constitutional grounds, was entered September 13, 2017. Pet.App. 1a. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATEMENT

I. Background

In 2015, Justice Kennedy wrote separately to encourage this Court to reconsider *Quill*. *See DMA*, 135 S. Ct. at 1134-35. Though he had voted in favor of *Quill*'s result in 1992, he noted that it was "questionable even when decided," and that its legal and practical weaknesses had been exposed by the intervening decades and the birth of modern internet retail. *Id.* Calling it "unwise to delay any longer," he urged "[t]he legal system" to quickly find a vehicle for *Quill*'s reexamination. *Id.* at 1135.

South Dakota had good reason to answer the call. It "has no state income tax and relies on retail sales and use taxes for much of its revenue." Pet.App. 1a. And its low-density, rural population has a particularly strong

incentive to take advantage of tax-free sales from internet retailers, who now quickly deliver everything from major appliances to everyday necessities throughout the country. "As Internet sales by [these out-of-state] sellers have risen, state revenues have decreased," Pet.App. 2a, leading to serious shortfalls. Accordingly, the "South Dakota Legislature began its 2016 session concerned with its ability to maintain state revenue in the face of increasing Internet sales and their effect on sales tax collections," Pet.App. 6a-7a—particularly because, unlike Congress, it "must maintain a balanced budget." Pet.App. 7a; S.D. Const. art. XII, §7.

The result was "Senate Bill 106," which took up Justice Kennedy's invitation by requiring out-of-state sellers to collect and remit sales tax based not on their physical presence in South Dakota, but on their economic connection to the State. *See* Pet.App. 19a (§1) (imposing thresholds of $100,000 in sales or 200 separate transactions to trigger collection requirement). The Legislature took multiple steps to protect out-of-state sellers during the inevitable litigation process, including provisions insulating them from any interim tax obligations, *see* Pet.App. 20a-22a, 24a (§§3, 5-7, 8(10)), and promoting a clean and efficient vehicle for this Court's review, Pet.App. 20a-21a (§§2, 4). The law provided a cause of action the State could use to affirmatively sue out-of-state retailers who failed to comply, *id.*; an expeditious hearing and appeal process, *id.*; an automatic injunction staying the law's enforcement during this case's pendency, Pet.App. 20a (§3); and express protections against any retroactive tax collections, Pet.App. 21a, 24a (§§5-6, 8(10)). It also included detailed findings regarding the revenue shortfalls and

other changed circumstances supporting *Quill*'s reconsideration. *See* Pet.App. 22a-24a (§8). After multiple committee and public hearings, the bill passed with overwhelming support. Pet.App. 8a-9a.

The State sent direct notice about the new law to a large set of out-of-state retailers it believed would meet the statutory thresholds. It then sued four that failed to comply, seeking a declaratory judgment affirming the law's validity and applicability to them. Pet.App. 9a-10a. Three are respondents here; a fourth (Systemax) preferred not to assert its *Quill* defense. Instead, after the State agreed to dismiss its complaint in exchange, Systemax "voluntarily registered for a sales tax license and immediately began collecting taxes under the law" the next day. Pet.App. 10a.

Below, the State conceded that it could only prevail by convincing *this* Court to abrogate *Quill*'s physical-presence requirement. It thus acquiesced in respondents' summary judgment motion. The state trial court held that *Quill* invalidates "as a matter of law" a state regime that, like South Dakota's, applies to sellers lacking any in-state physical presence. Pet.App. 16a. Because it was "duty bound to follow applicable precedent of the United States Supreme Court," the court was compelled to rule for respondents, "even when changing times and events clearly suggest a different outcome." Pet.App. 17a.

The South Dakota Supreme Court reached the same result. It recited the history above, Pet.App. 3a-11a, taking note of the State's various arguments why *this* Court should reconsider the physical-presence rule for sales-tax obligations, *see* Pet.App. 13a, along with the recent criticisms levelled at *Quill* by Justices Kennedy and Gorsuch. Pet.App. 13a-14a. But, "mindful of

the Supreme Court's directive to follow its precedent when it 'has direct application in a case,' and to leave to that Court 'the prerogative of overruling its own decisions,'" the state court knew it had no choice: "However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled." Pet.App. 14a.

II. Developments In Other States

In the meantime, many other States have also responded to Justice Kennedy's invitation by enacting provisions materially identical to South Dakota's or otherwise challenging *Quill*'s physical-presence requirement. Many States (including South Dakota) also enacted various "expanded" definitions of "physical presence" after *Quill*. And yet more States are considering additional measures in their upcoming legislative sessions. The action throughout the Nation is extensive and complex, as seen in the following maps.

Current Law: Non-Physical Nexus and Notice/Reporting

State Sales & Use Tax laws/regulations which: 1) assert nexus solely based on sales activity in a state, without regard to traditional physical presence (all of these laws/regulations, except for Oklahoma's, have been adopted since 2015); or, 2) which require remote sellers to provide notice of potential use tax liability at the point of purchase as well as reporting to the consumer and to the state annual data regarding total purchases (as of September 27, 2017).

No State-Level Sales Tax

Source:

Current & Proposed:
Non-Physical Nexus and Notice/Reporting

State Sales & Use Tax current and proposed laws/regulations which: 1) assert nexus solely based on sales activity in a state, without regard to traditional physical presence, or 2) which require remote sellers to provide notice of potential use tax liability at the point of purchase as well as reporting to the consumer and to the state annual data regarding local purchases (as of September 27, 2017)

State Considered Laws re Nexus or Notice/Reporting in 2017 and May Adjust in 2018

No Economic Nexus or Notice/Reporting Provisions

No State-Level Sales Tax

Source: [illegible]

Current Law: Expanded Physical Nexus

State Sales & Use Tax laws/regulations which attribute nexus to a seller based on the physical presence of an affiliate in the state (i.e., a "related corporate entity), the activities of another party in the state (e.g., a website in the state directing sales to the remote seller, known as "click-through" nexus), or the use of software or other electronic presence in the state (as of September 27, 2017).

Notes

Source:

Litigation is proceeding in several of these jurisdictions. But those cases lag well behind this one, and are unlikely to reach this Court on the merits before October Term 2019. Conversely, given Justice Kennedy's exhortation against delay, *supra* p.5, South Dakota filed this Petition within weeks of the opinion below, to facilitate a possible decision this Term.

REASONS FOR GRANTING THE WRIT

There are three broad sets of reasons this Court should grant this Petition and reconsider *Quill*. First, under contemporary conditions, *Quill*'s rule is unusually (and increasingly) harmful. Second, *Quill* is not only incorrect, but also now the kind of mistake that should not be reinforced for the sake of *stare decisis*. And third, this issue cannot wait: The extensive activity in the States and uncertainty in the regulated industry now make it doubly "unwise" for this Court to delay any further.

I. This Issue Is Exceptionally Important.

The physical-presence exception for sales-tax collection duties is causing serious harms this Court could not have foreseen when it decided *Quill* in 1992. Those harms fall in three places: on the States, which are deprived of critical revenue; on brick-and-mortar retailers, who are deprived of a level playing field; and, ironically, on the very interstate commerce *Quill* aimed to protect.

A. *Local governments are severely and increasingly harmed by Quill.*

Justice Kennedy's *DMA* concurrence recognized the large and increasing harms that *Quill* causes to state and local treasuries. Current scholarship confirms this point. Justice Kennedy relied on a study by Professor

William Fox of the University of Tennessee and others to conclude that Colorado alone lost around $170 million in 2012 because it could not require out-of-state retailers to collect sales tax on Colorado sales. *See* 135 S. Ct. at 1135 (citing Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* 11 tbl.5 (2009)). That year, state and local governments as a whole were owed an estimated $23 billion in sales-tax revenues that out-of-state retailers were not obligated to collect under *Quill*.[1] An updated study projects their likely losses at $33.9 billion in 2018 and *$211 billion* from 2018-2022.[2]

It is thus no surprise that States are feeling the squeeze. Thirty-three "faced revenue shortfalls in 2017," and six had no budgets in place at the start of the fiscal year this July.[3] As Justice Kennedy emphasized, the revenue that *Quill* withholds amounts to billions that state and local governments can ill-afford to lose when it comes to paying for "education systems, healthcare services, and infrastructure." *DMA*, 135 S. Ct. at 1135.

Though this issue is clearly widespread, conditions in South Dakota illustrate the harm. The State is particularly dependent on its sales tax, and can ill-afford the losses *Quill* engenders. *See supra* pp.5-6. Indeed, at the very moment it enacted the law at issue, the Legislature was forced to increase the sales-tax rate substantially to help pay teacher salaries. *See* H.B. 1182,

---

[1] https://goo.gl/3Dj54Z.

[2] https://goo.gl/diFoLR.

[3] *See, e.g.*, https://goo.gl/o3D77c.

91st Legis. Assemb. Session (S.D. 2016). Governor Daugaard estimated the State's *Quill*-related losses at upwards of $50 million in his Budget Address for FY2018.[4] Even respondents, while making several self-serving assumptions, conceded below that South Dakota was losing at least $21 million/year, *see* Appellees' Br. 21[5]—a huge sum in a small State. Assuming the same per-capita loss, that very conservative estimate of *Quill*'s harm would amount to over $600 million in Texas, or $900 million in California.

This critical problem only grows worse as more and more sales move online. While overall retail grew only 1.9 percent from 2014 to 2015, internet retail grew by 14 percent.[6] *See DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (stressing that while "mail-order sales" at time of *Quill* totaled "$180 billion," "e-commerce sales alone totaled $3.16 trillion" in 2008). Absent this Court's intervention, state and local governments will only fall further and further behind.

That is doubly so because the already-brutal effects of the revenue shortfall can multiply in several ways. For example, to make up the shortfall, South Dakota must typically raise sales-tax rates. *See supra* pp.6-7. But higher rates only encourage more consumers to seek tax avoidance online—an effect economic research has shown to be particularly strong. *See, e.g.*, Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1, 24 (2014) ("[A] one percentage point increase in a state's sales tax leads to an increase of just under 2 percent in online purchasing from other states,

---

[4] https://goo.gl/16tvue.

[5] https://goo.gl/8ytvhs.

[6] https://goo.gl/nohxHu.

and a 3-4 percent decrease in online purchasing from home-state sellers."). Because rising rates shrink the tax base by pushing sales online (in a way *Quill* itself exacerbates), rates need to rise *even more* to make up the shortfall—shrinking the base even further.

Similarly, lower revenues and diversion of sales online cause downstream economic effects that further harm local governments and communities. Online sales do not support local jobs or spending the way local stores do, and local government can thus find itself called upon to deliver more support services with less revenue to do so. Meanwhile, the revenue shortfall means that already-burdened state and local governments hire fewer teachers, police officers, game wardens, and maintenance crews. Just as there is a "multiplier effect" on economic growth from fiscal outlays, disappearing fiscal fuel drains activity from the local economy at a multiplying rate that feeds back on itself in the form of even more revenue losses. The pain from *Quill* thus goes beyond even the "extreme harm and unfairness" Justice Kennedy identified. *DMA*, 135 S. Ct. at 1134.

B. *Quill also unfairly harms local, brick-and-mortar businesses.*

On top of *Quill*'s detrimental effects on local economies, its unfairness to brick-and-mortar retailers is itself a reason to grant certiorari. *Quill* tilts the economic playing-field against these companies—including many small, local businesses—draining the local economy and upsetting the fair, competitive dynamic that makes the free market work.

As Justice Gorsuch has emphasized, out-of-state vendors "don't seek comparable treatment to their in-state brick-and-mortar rivals" when they invoke *Quill*;

rather, "they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *DMA II*, 814 F.3d at 1150. Multiple studies by noted economists confirm this intuition by demonstrating that *Quill* in fact functions as a kind of subsidy for out-of-state internet retailers, who benefit from the very high rates at which consumers divert their purchases online to avoid taxes. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000); Arthur B. Laffer & Donna Arduin, *Pro-Growth Tax Reform and E-Fairness* (2013), http://www.efairness.org/files/dr-art-laffer-sudy.pdf. To match the price effectively available online *from tax avoidance alone*, local retailers must discount their prices 5-10%—which can erase their entire profit margin.[7] This, in turn, predictably exacerbates the recognized struggles now facing both national retailers and local mom-and-pop businesses.

The functional subsidization of internet retailers over their brick-and-mortar competitors is not just a practical economic problem, however; it is a doctrinal embarrassment. "[T]o the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence," it is the "anti-discrimination principle" that in-state and out-of-state businesses should compete on level ground. *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). But the practical effect of *Quill* is the opposite: It favors out-of-state businesses over local ones. The unjustifiable harm to main-street businesses and brick-and-mortar retail institutions demonstrates

---

[7] *See* https://goo.gl/wxEpJx (estimating average retail margin at 3%).

both the important, concrete issues at stake *and* how far *Quill* has strayed from core, dormant-commerce-clause principles.

Meanwhile, the struggles of main-street stores affect not only those businesses and the local and national economy, but the culture of their communities as well. Empty storefronts and abandoned retail institutions both contribute to creeping economic anxiety and signal the disappearance of shared spaces and experiences, in small towns and big cities alike. Modern market conditions are hard enough on brick-and-mortar retailers without preserving an isolated holding that severely tilts the economic playing field *against* them in the supposed name of *fairness*. No one could have foreseen in 1992 the ways that internet retail would remake the American economy in 2017. But today, at least, this Court must take account of how its own, outdated precedent has played a part in that development, pushing economic activity (and important entry-level jobs) from main street to distant tech companies, with a tangible effect on everyday American life.

C. *Quill harms interstate commerce itself.*

The purported point of the physical-presence rule that *Quill* preserved was to protect interstate commerce from a possible "undue burden" that would result if remote sellers had to collect sales tax in 50 States. But even *Quill* acknowledged that a "physical presence" rule is a fairly "artificial" and "formalistic" tool for achieving this result, 504 U.S. at 314-15; *see also DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring). For example, one consequence of *Quill* is that having a warehouse or sales agent in one tiny corner of California is enough to subject a business's *every* California sale to California's sales-tax requirements. *Nat'l Geographic Soc'y v. Cal.*

Bd. of Equalization, 430 U.S. 551 (1977) (so holding). And the upshot of this "artificial" approach is that *Quill* ends up burdening a lot of *interstate* commerce—achieving the opposite of its own design.

As an initial matter, note that establishing an in-state physical presence is itself often a form of interstate commerce. When a Missouri company builds a store in Montana, a Colorado firm hires a sales team in Connecticut, or an Alabama retailer makes deliveries to Arkansas with its own trucks, each is engaged in interstate commerce no less than a firm that ships goods interstate by common carrier. But because the *Quill* rule is "artificial," it discourages all this interstate commerce on its face: Firms maximize the effective subsidy from *Quill* if they minimize their *interstate* presence and instead stick to shipping from one State to all the others. It is hard to even imagine why the dormant commerce clause—a doctrine of interstate comity—should affirmatively encourage out-of-state business to avoid investing in jobs or infrastructure in other States. *Quill*'s rule is at war with its own ends; it undermines rather than advances the economic union the dormant commerce clause is meant to promote.

Worse, the *Quill* rule turns the "physical presence" requirement into a dangerous trap. If a sales representative from an internet retailer in Oklahoma goes to a conference in Texas and ends up making a sale there over lunch, his company is now arguably liable for millions in sales taxes it never collected from Texas purchasers—a result far worse than just collecting and remitting itself. Clearly, the far-more-relevant "nexus" in such instances is the extent of the company's Texas sales, rather than an *unrelated* interaction in Texas that happened to involve a "physical" presence there.

Yet *Quill* makes the former irrelevant and the latter dispositive, raising a risk of catastrophic error for firms engaged in interstate commerce. Again, this *burdens* interstate commerce rather than freeing it.

Not only is *Quill* self-defeating from the standpoint of its own constitutional values, it is also bad for the national economy writ large. Irrationally preferring one form of business organization over another makes the market inefficient: As several economists have explained, it means that there will be too much online commerce and too few brick-and-mortar stores. *See, e.g.*, *supra* pp.15-17. Subsidizing online retail pushes resources away from services only local stores provide: things like hands-on customer service, repairs and installations, or the chance to handle merchandise before paying for it. Because those services are "vital to channel profits," the effect "may be disastrous" for the entire market. Steven Strauss, *The Impact of Free Riding on Price and Service Competition in the Presence of E-Commerce Retailers* 50 (Yale Sch. of Mgmt. Working Paper Series PHD, No. 2, 2002).

It also leads to lots of economic waste. *Quill* encourages Californians to buy and ship from Wayfair in Massachusetts the same items that Bay-Staters are encouraged to buy and ship from Newegg in California. Both buyers get "free shipping" and "no tax" on the same items as they cross paths on pointless cross-country excursions.[8] A fair, free market naturally eliminates this kind of waste; only a distortion of interstate commerce creates it.

---

[8] *See, e.g.*, https://goo.gl/StcPYt (Wayfair); https://goo.gl/N3YUqz (Newegg).

In sum, *Quill* is an unusually harmful precedent from the perspective of not only local governments and affected industries, but the very national economy it ostensibly protects. The harms are serious and increasing. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). This Court should not hesitate to reconsider a *per se* rule that, in its artificial rigidity, does so much damage while undermining its own ends. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007).

II. *Quill* Should Be Overruled.

Quill is doubly costly from a federalism perspective: It not only harms state and local governments and economies, it also strips from States a power preserved by the Constitution and Tenth Amendment. Remarkably, however, *Quill* admits that this seizure is not compelled by "contemporary Commerce Clause doctrine," 504 U.S. at 311. Instead, *Quill* was willing to justify transforming the outdated physical-presence rule of *Bellas Hess* into an isolated exception from then-prevailing doctrine based solely on *stare decisis* and the supposed value of leaving a "bright-line" rule undisturbed. Even then, preserving such an unjustified incursion into the States' revenue powers was likely the wrong choice—*Quill* was "questionable even when decided," *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). But now, at least, it is also clear that "special justifications" exist to support jettisoning a sales-tax-only, physical-presence rule the Constitution does not support. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

That said, the Question Presented necessarily encompasses the antecedent question whether *Quill* must be formally overruled, or instead whether the Court can

limit that decision to its precise facts involving traditional catalog mailers rather than contemporary e-commerce. It is possible that traditional catalog businesses that do not maintain interactive, online storefronts specially rely on the *Quill* rule, or that e-commerce is "present in a meaningful way" that traditional catalog mailers are not. *See DMA*, 135 S. Ct. 1135 (Kennedy, J., concurring). The lower courts cannot make this distinction, however, because it requires rejecting the uniform physical-presence rule that *Quill* articulates for sales taxes. But whatever else it might permit—whether it is prepared to squarely overrule its precedent or not—this Court should not continue allowing internet retailers to seize an unfair advantage in the name of *stare decisis* protections *Quill* intended for a very different industry.

A. *The physical-presence rule is incorrect.*

The current, recognized touchstone for assessing state taxes challenged under the dormant commerce clause comes from this Court's 1977 decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Its four-part test imposes no physical-presence requirement; in fact, its purpose is to determine when *non-resident* businesses conducting interstate commerce in a State may be asked to contribute their "'just share'" to collecting that State's taxes. *Id.* *Complete Auto* permits state taxes that are (1) "applied to an activity with a substantial nexus with the taxing State," (2) "fairly apportioned," (3) "not discriminat[ory]," and (4) "fairly related to the services provided by the State." *Id.* The operative issue in cases like this one—and the sole issue respondents raised below—concerns the first element: the "nexus" between the taxing State and the person or activity taxed.

Were this test actually applied to a law like South Dakota's, it would pass with flying colors. A tax-collection obligation exactly equal to that imposed on local businesses and pegged solely to in-state sales is apportioned as fairly and evenhandedly as possible based on the precise extent to which the seller benefits from the State's market. Meanwhile, the "nexus" question—in *Complete Auto*'s words—concerns not just the nexus between the complaining *firm* and the taxing State, but rather the nexus between the taxed "*activity* ... [and] the taxing State." *Id.* (emphasis added). That test is clearly met where the taxed activities are sales made to people and businesses *inside the State*. *See, e.g.*, *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) (applying *Complete Auto* and explaining that "[i]t has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State"). When one adds South Dakota's safe-harbor limiting the tax-collection duty to companies that consummate 200 sales or $100,000 worth of business in its (very small) market, the existence of a "substantial nexus" is beyond dispute.

The problem, however, is that this Court has never straightforwardly applied *Complete Auto*'s governing test to laws like South Dakota's. That's because, ten years before *Complete Auto*, it held in *Bellas Hess* that the dormant commerce clause prohibits imposing a tax-collection obligation on a company whose only connection to a State is through a common carrier like the U.S. Mail. *See* 386 U.S. at 759-60. That holding was rooted in then-prevailing doctrines under both the Commerce and Due Process Clauses, which this Court described as "similar." *Id.* at 756. Accordingly, 25 years later—after

this Court's Due Process jurisprudence evolved beyond any physical-presence requirement, and *Complete Auto* signaled the same for the dormant commerce clause—the North Dakota Supreme Court upheld a sales-tax obligation placed on catalog retailers, reasoning in its *Quill* decision that this Court had functionally discarded *Bellas Hess*. *See Quill*, 504 U.S. at 301. The question confronting *this* Court in *Quill* was thus not whether *Complete Auto* would uphold such a law after this Court had settled on that test, but rather whether *Bellas Hess*'s physical-presence rule had already been overruled by *Complete Auto* and other intervening changes.

Going out of its way to signal the closeness of the question, this Court ultimately said no. It admitted that it had not applied a physical-presence requirement to *any* other tax; "agree[d] with much of the ... reasoning" in the state court's criticism of *Bellas Hess*; conceded that contemporary doctrine did not require such a rule; and even acknowledged that the results of keeping it would be "artificial." *Id.* at 302, 311, 315. Indeed, in an illuminating double-negative, the best *Quill* could muster was that a bright-line, physical-presence requirement for sales-tax obligations was "not inconsistent with *Complete Auto*." *Id.* at 311. Even that much was doubtful then, but it is obviously incorrect today: *Quill*'s sales-tax-only, physical-presence exception to *Complete Auto* lacks any constitutional basis and now sticks out from its surrounding precedent like a sore thumb.

The problems with the *Quill* rule on the merits begin with the constitutional text. As many members of this Court have noted—*see McBurney v. Young*, 569 U.S. 221, 234-35 (2013) (collecting citations)—the

dormant commerce clause is atextual, which may explain the problems that arise regarding many of its "ad hoc" rules and exceptions like *Quill*. *See DMA II*, 814 F.3d at 1148 (Gorsuch, J., concurring); *Wynne*, 135 S. Ct. at 1809, 1811 (Scalia, J., dissenting) (criticizing the "Imaginary Commerce Clause" for its "bestiary of ad hoc ... exceptions"). Put otherwise, *Quill* may be "unworkable" because Justice Thomas is correct that the entire "negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J. dissenting).

That proposition is unnecessary to decide this case, however, because *Quill*'s physical-presence requirement is particularly unmoored from the Constitution's text. As Justice Thomas has noted, many core principles attributed to the dormant commerce clause *are* reflected in the Constitution: The proscription against interstate tariffs is seen in the Import/Export Clause, *id.* at 621 (citing U.S. Const. art. I, §10, cl. 2); and the rule against taxes unevenly targeting other States' citizens or their commerce appears in the Privileges and Immunities Clause, U.S. Const. art. IV, §2, cl. 1. The dormant commerce clause rules prohibiting "discrimination against" or "undue burdens on" interstate commerce can thus claim at least some textual heritage. But nothing in the text remotely supports a rule that "physical presence" is required within a State before that State can ask a party to collect and remit a tax on sales made *into that State's jurisdiction* on *exactly the same terms* that apply to in-state businesses.

To the contrary, terms of "'substantial equality'" between residents and non-residents are the precise object

of the comity clauses that appear in the Constitution. *Supreme Court v. Piper*, 470 U.S. 274, 280 (1986). And that explains why this Court has, at least since *Complete Auto*, firmly rejected the view that interstate commerce enjoys any "free trade" immunity from non-discriminatory state taxes, recognizing instead that interstate commerce "may be made to pay its way." 430 U.S. at 278, 284. *Quill* itself acknowledged that the physical-presence rule was a product of an earlier era in which that now-foundational premise was undercut by a more formal and restrictive view of the dormant commerce clause that prevented States from imposing "direct" taxes or obligations on interstate commerce as such. *See* 504 U.S. at 310-11. In that context, in-state presence was necessary to provide some hook for the State's taxing power *other* than the interstate commerce itself. But the whole point of *Complete Auto* was to dispense with such formalisms, 430 U.S. at 279, 281, and it expressly overruled at least one such formalistic precedent in doing so. *Id.* at 288-89. Accordingly, the conclusion that keeping *Bellas Hess*'s formalistic rule was "not inconsistent," 504 U.S. at 311, with *Complete Auto* was dubious even when *Quill* was decided in 1992—explaining, perhaps, why Justices Thomas and Kennedy did not join it. *See id.* at 319-21 (joining Scalia, J., concurring in the judgment).

That said, *Quill*'s infirmities have become far more obvious in the 25 years since, as critical legal and technological changes have disproven its premises. For example, *Quill* presumed that a bright-line, physical-presence rule would at least promote the dormant commerce clause's purposes by providing a clear safe-harbor and minimizing compliance burdens on interstate busi-

nesses. *Id.* at 313-17. But, as explained in greater detail below, changes in state law and the nature of retail itself have made *Quill*'s safe-harbor far from clear, while also eliminating any reasonable concern about inordinate compliance burdens. *See infra* pp.34-35.

Meanwhile, lower courts have been forced, over and over, to cabin *Quill* to its facts. This Court has never even attempted to explain why sales-tax collection needs a *different* "nexus" rule from other kinds of taxes imposed on non-resident businesses, nor has it condemned laws that impose equal or potentially heavier burdens on interstate commerce without a physical presence. Instead, this Court has acquiesced in countless lower-court cases holding that "*Quill* does nothing to forbid states from imposing regulatory and tax duties of comparable severity to sales and use tax collection duties." *DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring) (collecting cases). And lower courts continue to hold that seemingly indistinguishable taxes—like a "Corporate Activities Tax" on out-of-state retailers calculated based on gross receipts from in-state sales—are not governed by *Quill* because they are not formally "sales taxes." *See, e.g.*, *Crutchfield Corp. v. Testa*, __ N.E.3d __, 2016 WL 6775765, at *1-2, *9-11 (Ohio 2016).

In short, experience since 1992 has shown that the supposed benefits of the physical-presence rule are illusory, and in no way justify the illogical distinctions foisted upon the lower courts. In today's environment, laws like South Dakota's impose not "undue burdens" on interstate commerce but quotidian costs of doing business that any company would expect to bear. Applying *Complete Auto*'s test to such laws should be a trivial exercise: As it makes clear, "it was not the purpose of the commerce clause to relieve those engaged in

interstate commerce from their just share of the state tax burden even though it increases the cost of doing business." 430 U.S. at 279. On that principle alone, *Quill* is plainly incorrect.

B. *Stare decisis no longer justifies keeping the physical-presence rule.*

Given the lack of merit for the underlying physical-presence rule—a point, again, that *Quill* virtually conceded—*Quill* largely rested its decision on the force of *stare decisis*. But looking to the *stare decisis* factors this Court identified in *Quill* and elsewhere now shows that the necessary "special justifications" exist for doing away with the physical-presence rule. These factors include whether the rule: (1) is constitutional or statutory; (2) has engendered legitimate reliance interests; (3) has been undermined by changed circumstances; (4) has been consistently criticized, and is now seen as sufficiently inconsistent with other doctrine that it is "a positive detriment to coherence ... in the law"; and (5) has proven "unworkable" and/or "outdated ... after being 'tested by experience.'" *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233 (2009); *Patterson*, 491 U.S. at 173-74; *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (collecting cases). Whatever was true in 1992, the physical-presence rule now fares poorly on each of these factors.

1. *Constitutional Rule*. To begin, it is "this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality); *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]dherence to precedent is not rigidly required in constitutional cases[.]"). And as this Court recently clarified, that includes "judge-made rule[s]," even when they are

technically subject to congressional reconsideration. *Pearson*, 555 U.S. at 233.

Quill's rule fundamentally alters the Framers' separation of powers; it seizes a power from the States and forces them to beg Congress to give it back. As demonstrated by twenty-five years of congressional inaction in response to this Court's explicit call in *Quill*, 504 U.S. at 318, Congress has little incentive to "correct" that error by devolving power back to the States. The dormant commerce clause is a court-fashioned doctrine, and the Court is responsible for correcting its distortionary effects—as demonstrated by the correction this Court made in *Complete Auto* itself. *See* 430 U.S. at 288-89. Experience now doubly confirms that the Court cannot rely on anyone else.

2. *Reliance*. As to the key question of reliance interests, there is also a marked difference between today and 1992. In *Quill*, this Court expressed concern that the physical-presence requirement had "become part of the basic framework of a sizable industry," attributing the growth of mail-order in part to *Bellas Hess*'s "bright-line exemption from state taxation." 504 U.S. at 316-17. Today, however, there are three reasons to discount such claims of reliance.

First, while *Quill* postulated that a "bright-line exemption from state *taxation*" had "become part of the basic framework" of the mail-order industry, *id.* (emphasis added), there *is no exemption* from state *taxation* for mail-order sales. Instead, the tax is still owed (as a use tax), and *Quill* only prevents the State from making the remote retailer *collect it*. *See DMA*, 135 S. Ct. at 1127. Missing this distinction is understandable because consumers almost never pay use taxes. And this also explains why remote sellers so jealously guard this

rule, to the point of frequently (and deceptively) advertising their sales as "no tax." *See* Pet.App. 22a (§8(3)) (so finding). But this is not a *legitimate* reliance interest: No one is entitled to rely on how their business model benefits from (and even encourages) widespread tax avoidance by their customers. A proper accounting of the physical-presence rule's legitimate reliance interests is limited solely to concerns about costs of *collection*—the functional tax advantage is a windfall no business can legitimately hope to retain.

Second, when it comes to those costs of collection, the practical realities have radically changed since 1967 and 1992. A mail-order transaction in those eras almost always involved consumers using paper checks to buy products by mail. In that context, accurately collecting sales tax would require nationwide mail-order companies to provide instructions for consumers to calculate their own sales-tax liability before handwriting a check. And even putting aside that special logistical challenge, it was surely much more difficult for companies to account for different tax rates and bases in the different taxing jurisdictions before the age of computers (in 1967) or internet-enabled network computing (in 1992).

Yet modern internet retail makes this all much easier than this Court could have imagined in 1992. Today, consumers purchasing online must input their address before they "check out" with a credit card, giving online retailers a perfect opportunity to calculate and collect the applicable sales tax. Readily available accounting software can now even track collections and prepare State-by-State remittances automatically, while "cloud-based" designs allow the underlying databases to be updated remotely whenever state laws change—automating everything on the seller's end. *See* Diane L. Yetter

& Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 575-76 (Aug. 7, 2017).[9] Today, this kind of algorithmic, data-driven task is rightly treated as marginal, particularly in the context of internet retailers like respondents, who specialize in using data and computing tools to identify and market products to individual consumers and then deliver those products rapidly throughout the country.

The record below vividly demonstrates just how easy the task has become. When Systemax chose to voluntarily comply, it began collecting South Dakota sales tax through its online portal *the very next day*. *Supra* p.7. That is no surprise: Because companies like respondents typically have physical presence in at least one State—and often several—they must already build sales-tax compliance functionality into their checkout processes. Adding collection in additional jurisdictions is more akin to flipping a switch than starting from scratch.

Many States—including South Dakota—have also worked together since *Quill* to simplify their tax laws and lower compliance costs through the Streamlined Sales Tax (SST) project. These States established common definitions and administrative procedures, and certified certain tax-compliance software providers that sellers could use *at no cost* in collecting and remitting sales taxes to the relevant States. Seven certified companies now offer software for compliance in the 24

---

[9] All of this post-dates *Quill*. Taxware released the first such program in 1996, with sophistication incomparable to modern options. *See id.*

States that have adopted the SST agreement, and using that software is both entirely free to merchants and a complete defense to any errors in collection and remittance. Yetter & Crosby, *supra*, at 576-77.[10]

This highlights how anomalous *Quill* has become. There could be *no* burden on interstate commerce—the marginal cost of compliance could be zero because SST covers all of it—and *Quill* would still prohibit a State from requiring an out-of-state retailer to collect sales tax. This indicates, in turn, that internet retailers' "reliance" on *Quill* is rooted not in the (perhaps) legitimate desire to avoid the (vanishing) costs of compliance, but in the largely illegitimate desire to preserve their apparent tax advantage at checkout. 814 F.3d at 1150 (Gorsuch, J., concurring).

This leads to the third difference between the present day and 1992—one that stems from *Quill* itself. As Justice Gorsuch has explained, by limiting its rule to state laws that directly require out-of-state retailers to collect sales tax, *Quill* invited States to respond by imposing other, no-less-burdensome requirements on out-of-state retailers. *Id.* at 1151. That might include a reporting regime like Colorado's, *see id.* at 1133, a "Corporate Activities Tax" pegged to gross receipts from in-state sales like Ohio's, *supra* p.26, expansive definitions of physical presence like New York's, *see Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y.), *cert. denied*, 134 S. Ct. 682 (2013), or any number of other possible measures. When an exception is so isolated, it often disappears as "reliance interests never form ... or erode over time." *DMA II*, 814 F.3d at

---

[10] *See generally* https://goo.gl/n2JWhd.

1151. Accordingly, "*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Id.*

Meanwhile, *Quill* itself warns any reasonably attentive seller against blind reliance on its lasting vitality. Beyond recognizing its tension with contemporary doctrine, *supra* pp.23-24, *Quill* repeatedly employs temporary formulations, indicating that the time to abandon *Bellas Hess* may yet come. *See, e.g.*, 504 U.S. at 318 (noting *stare decisis* factor recommends "'withholding our hand, *at least for now*'"); *id.* ("[W]e disagree ... that *the time has come* to renounce the bright-line test of *Bellas Hess*.") (emphases added). In fact, in jettisoning *Bellas Hess*'s Due Process holding, *Quill* expressly invited Congress to enact "legislation that would 'overrule' the *Bellas Hess* rule." *Id.* It would be foolish to rely heavily on a rule Congress might dissolve with this Court's blessing, or this Court might soon dissolve itself.

3. *Changed Circumstances.* For similar reasons, the other factors this Court frequently cites as "special justifications" for overturning precedent also support a grant here. *See DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring). For example, this Court is far more likely to entertain revision of its precedent when part of the justification is that "there has been an important change in circumstances in the outside world." *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (citing, *inter alia*, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality)). That factor is obviously present here. *See supra* pp.12-15.

4. *Constant Criticism & Inconsistency.* It also "weigh[s] in favor of reconsideration" when a precedent

"'has been questioned by Members of the Court in later decisions and has defied consistent application by the lower courts.'" *Pearson*, 555 U.S. at 235 (alteration omitted). Criticism of *Quill* has been severe and sustained—particularly recently—in this Court and in the lower courts. *See supra* pp.26-27. And to the extent *Quill* has been applied consistently in the lower courts, it is only by radically constraining that decision to its precise facts. *Id.*

This makes *Quill* "a positive detriment to coherence and consistency in the law," *Patterson*, 491 U.S. at 173: While its application has been consistently narrow, that comes at the cost of making dormant-commerce-clause doctrine consistently inconsistent. Indeed, ad hoc exceptions like *Quill* are an essential reason why Justices of this Court have concluded that the dormant commerce clause as a whole is incoherent and "unworkable." *See, e.g.*, *Wynne*, 135 S. Ct. at 1811 (Thomas, J., dissenting). *Quill* is an "island," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring)—"the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015); *see also Alleyne v. United States*, 133 S. Ct. 2151, 2165 (2013) (Sotomayor, J., concurring) (appropriate to overrule case, even after it has been reaffirmed once on *stare decisis* grounds, where it "has become even more of an outlier," and the Court finds it necessary to "'erase th[e] anomaly'").

5. *Experience & Workability*. Finally, *Quill* is a case where "experience has pointed up the precedent's shortcomings," *Pearson*, 555 U.S. at 233, and demonstrated that *Quill*'s supposedly bright-line rule is now increasingly "unworkable," *see, e.g.*, *Montejo v. Louisiana*, 556

U.S. 778, 792 (2009). *Quill*'s fundamental premise was that, at the very least, its bright-line, physical-presence rule would be an easily administered safe-harbor. But, as Justice White predicted, *see Quill*, 504 U.S. at 330-31 (White, J. concurring in part and dissenting in part), that has turned out to be incorrect—particularly because ubiquitous, interactive online commerce does not map easily onto traditional notions of "physical" presence. Does the "physical" presence of the Overstock.com "app" on consumers' smartphones make it "present"? How about offices of affiliated (but different) corporate entities, or of websites that route buyers to the out-of-state retailer's site? *See supra* pp.17-20. Questions like these have led to expensive, confusing, and high-stakes litigation as States increasingly expand their definitions of physical presence—a development that entirely post-dates *Quill*. *See* 504 U.S. at 320 (Scalia, J., concurring in the judgment) (relying on absence of litigation on this issue between *Bellas Hess* and *Quill*). And, worse, *Quill* makes it almost impossible to answer these questions because it acknowledges that its measure of "physical presence" can be logically arbitrary—there need be no connection between the actions that make a company "present" and the transactions on which it must collect tax. *Supra* pp.17-18. In this way, *Quill*'s purportedly simple approach has needlessly and harmfully complicated the tax code, the law books, and the retail business.

Unlike "physical presence," which maps so poorly onto modern online retail, a standard like South Dakota's fares far better in achieving *Quill*'s *own* goals. The "economic nexus" rule it employs—requiring $100,000 of sales in that State's relatively small market—guarantees that the retailer's relationship to the

State is "substantial," as *Complete Auto* requires, based on a legally and economically meaningful measure. This Court has been particularly willing to reconsider a rule it has adopted when, in contemporary context, it becomes "an increasingly unjustifiable anomaly" that "produce[s] litigation-spawning confusion in an area that should be easily susceptible of more workable solutions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404-05 (1970). South Dakota's law offers a far "more workable solution" to the problems *Quill* wanted to solve: Its line is bright and easily administered, its safe-harbor ensures that any burdens on out-of-state retailers are not undue, and it does not discourage businesses from participating in interstate commerce through physical investment or local job creation. This is vivid proof that *Quill* merits reconsideration.

III. The Question Presented Requires Immediate Review.

In addition to the foregoing, there are three reasons this Court should grant the Question Presented in this Petition, and without further delay.

First, and most important, is that States and local governments cannot afford delay. The harms Justice Kennedy identified in 2015 have continued mounting every day, as have their deleterious effects on local services and communities, as well as local, brick-and-mortar retailers. And because States must balance their books each year, they badly need to know whether to count on increased sales-tax collections, or not, for the coming year. Most state budgets start in July, and with the broad support of the other States, South Dakota has filed this Petition within weeks of the decision below, hoping to obtain an answer on the merits before the end of this Term.

Second, there is the widespread activity in the States in response to Justice Kennedy's concurrence, and the resulting burdens it creates for both regulated entities and the States embroiled in litigation. Many States have enacted nexus laws that challenge *Quill* by rejecting any need for physical presence. *Supra* pp.8-11. Because nearly all use "economic nexus" thresholds similar to or expressly modeled on South Dakota's, this case is an excellent vehicle for settling this issue generally.

But more importantly, most of the cases these statutes have generated are lagging well behind this one, and multiple States and businesses could find themselves engaged in years of costly and unnecessary litigation if this Court were to defer this issue for another day. Moreover, many of those cases include additional, ancillary issues that could confound this Court's inquiry, whereas South Dakota's candid acknowledgement of *Quill*'s binding force has isolated here the precise question whether *Quill*'s unyielding physical-presence requirement should be overruled. This is, accordingly, a uniquely clean and timely vehicle for an issue that demands broad and immediate resolution.

Relatedly, in this circumstance, allowing this issue to percolate is pointless, because other courts will no doubt acknowledge that they are bound by *Quill* and that this Court has the unilateral prerogative to abrogate that precedent. No split can develop here; the closest analog is the set of reasoned decisions recently rendered cabining *Quill* to its precise facts. *See supra* pp.25-26. Yet the widespread litigation on this issue sends much the same signal, suggesting that this Court should grant this Petition without regard at this stage

for which side may be right on the merits, so as to relieve the uncertainty now burdening the legal system.

Finally, there are strong institutional reasons to grant this Petition. Any decision striking down a State law on federal grounds is jurisprudentially significant, and federalism concerns frequently lead this Court to grant certiorari when a State seeks review in such a case. And yet this case goes well beyond even that situation: Here, in reliance on an express invitation from one of this Court's members, the entire machinery of South Dakota's government came together to bring this issue before this Court. The Legislature passed a statute, the State has prosecuted a suit, and the state courts adjudicated it expeditiously, all to answer Justice Kennedy's request that the system produce a vehicle without further delay. When a State commits itself to such measures in reliance on this Court's statements, this Court should give that State a chance to make its case.

That is particularly so because of the care the State took here to both respect this Court's precedent and protect the affected taxpayers. Recognizing the difficulty uncertain litigation regarding settled precedent could create, the State took extraordinary measures to insulate respondents and their peers against any threat of retroactive taxation. *Supra* p.6. And recognizing this Court's instruction not to anticipate the rejection of its binding precedents—even when intervening doctrine suggests they are outdated—neither the State nor its courts entertained the possibility of upholding this law, though that would have been a surefire path to certiorari. *See* Pet.App. 14a; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). If this Court is going to insist that the lower courts wait patiently for its intervention, 490 U.S. at 484, it should

be likely to actually intervene when courts and litigants respect that doctrine in questioning precedents this Court itself has marked as vulnerable.

In short, this Petition represents the most diligent efforts of "[t]he legal system" to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). It is "unwise to delay any longer." *Id.*

CONCLUSION

The petition should be granted.

Respectfully submitted,

MARTY J. JACKLEY
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General & Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3553

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Ronald A. Parsons, Jr.
JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP
101 S. Main Ave.
Sioux Falls, SD 57104
(605) 338-4304

October 2, 2017

APPENDIX

APPENDIX A

#28160-a-GAS

2017 S.D. 56

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,

v.

WAYFAIR INC., OVERSTOCK.COM, INC.,
and NEWEGG INC., Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARK W. BARNETT
Judge

* * *

ARGUED AUGUST 29, 2017

OPINION FILED 09/13/17

* * *

SEVERSON, Justice

[¶1.] South Dakota has no state income tax and relies on retail sales and use taxes for much of its revenue. Pursuant to state statute, sales tax is generally collected by sellers selling merchandise in this state at the point of sale and is remitted to the state by those sellers. SDCL 10-45-27.3.[1] Decisions from the United

---

[1] SDCL 10-45-27.3 provides in relevant part:

States Supreme Court interpreting the Commerce Clause of the United States Constitution prohibit the State of South Dakota from imposing this collection obligation on sellers with no physical presence in the state. As Internet sales by these sellers have risen, state revenues have decreased. Faced with declining revenues, the 2016 South Dakota Legislature passed legislation extending the obligation to collect and remit sales tax to sellers with no physical presence in the state. S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1 (S.D. 2016).[2] The Legislature specifically passed the legislation to challenge the Supreme Court's Commerce Clause decisions. *Id.* § 8. Pursuant to the legislation, the State of South Dakota commenced a declaratory judgment action in circuit court seeking a declaration that certain Internet sellers (Sellers)[3] with no physical presence in the state must comply with the requirements of the 2016 legislation. *Id.* § 2. Sellers moved for summary judgment. Adhering to Supreme Court precedent, the circuit court granted the motion, entered judgment for Sellers, and enjoined the State from enforcing the 2016 legislation. The State appeals. We affirm.

Any person who holds a license issued pursuant to this chapter or who is a person whose receipts are subject to the tax imposed by this chapter shall, except as otherwise provided in this section, file a return, and pay any tax due, to the Department of Revenue on or before the twentieth day of the month following each monthly period. The return shall be filed on forms prescribed and furnished by the department.

[2] A complete copy of the certified bill, S.B. 106, is attached to this decision as Appendix 1.

[3] Wayfair Inc., Overstock.com, Inc., and Newegg Inc.

Facts and Procedural History

[¶2.] Generally, sellers selling merchandise in South Dakota have an obligation to collect and remit sales tax on each transaction to the Department of Revenue. SDCL 10-45-27.3. However, the applicability of this requirement to sellers with no physical presence in a state has been limited by the Supreme Court's interpretations of the Commerce Clause since at least 1967. The Commerce Clause generally grants "exclusive authority [to] Congress to regulate trade between the States[.]" *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of the St. of Ill.*, 386 U. S. 753, 756, 87 S. Ct. 1389, 1391, 18 L. Ed. 2d 505 (1967).[4] In 1967, the Supreme Court held that the Commerce Clause prohibited Illinois from requiring a mail order seller in Missouri to collect and remit use tax[5] to Illinois for merchandise

---

[4] The Commerce Clause provides in full:

> The Congress shall have Power
>
> * * *
>
> 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. Const. art. I, § 8, cl. 3.

[5] Sales and use tax are often complementary. In the recent case *Direct Marketing Association v. Brohl*, __ U.S. __, 135 S. Ct. 1124, 1127, 191 L. Ed. 2d 97 (2015), Justice Thomas explained:

> Like many States, Colorado has a complementary sales-and-use tax regime. Colorado imposes both a 2.9 percent tax on the sale of tangible personal property within the State and an equivalent use tax for any property stored, used, or consumed in Colorado on which a sales tax was not paid to a retailer.

(Internal citations omitted.)

sold and shipped into that state. The seller had no physical presence in Illinois, and its only contacts with that state were by mail or common carrier.[6] The Court reasoned that exposing the seller's interstate business to local "variations in rates of tax . . . and recordkeeping requirements" would violate the purpose of the Commerce Clause "to ensure a national economy free from . . . unjustifiable local entanglements." *Id.* at 759-

---

South Dakota uses a similar system. SDCL 10-46-2 (imposing an excise tax equal to the sales tax on the use of tangible personal property in the State).

[6] The seller's lack of a "physical presence" in Illinois was explained with reference to the following factors:

> [Seller] does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.
>
> All of the contacts which [Seller] does have with the State are via the United States mail or common carrier. Twice a year catalogues are mailed to the company's active or recent customers throughout the Nation, including Illinois. This mailing is supplemented by advertising 'flyers' which are occasionally mailed to past and potential customers. Orders for merchandise are mailed by the customers to [Seller] and are accepted at its Missouri plant. The ordered goods are then sent to the customers either by mail or by common carrier.

Bellas Hess, 386 U.S. at 754, 87 S. Ct. at 1390 (quoting *Dep't of Rev. v. Nat'l Bellas Hess, Inc.*, 214 N.E.2d 755, 757 (Ill. 1966)).

60, 87 S. Ct. at 1393. The Court concluded that "[u]nder the Constitution, this [was] a domain where Congress alone [had] the power of regulation and control." *Id.*[7]

[¶3.] In 1992, the Supreme Court, while limiting application of its due process analysis, reaffirmed *Bellas Hess*'s Commerce Clause limitations in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). In that case, the Court held that a mail-order house with no physical presence in North Dakota could not be required to collect and remit use tax to that state for "property purchased for storage, use, or consumption within the State." *Id.* at 302, 112 S. Ct. at 1908. Despite later developments in its Commerce Clause jurisprudence, the Court adhered to the "bright-line rule" of *Bellas Hess* on the basis that it

---

[7] *Bellas Hess* was a product of what the Supreme Court refers to as "the 'negative' or 'dormant' Commerce Clause[.]" *Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 112 S. Ct. 1904, 1911, 119 L. Ed. 2d 91 (1992) (quoting P. Hartman, Federal Limitations on State and Local Taxation §§ 2:9-2:17 (1981)). Although the Commerce Clause provides a "positive grant of power to Congress," it carries a negative component "prohibiting States from . . . imposing excessive burdens on interstate commerce without congressional approval[.]" *Comptroller of the Treas. of Md. v. Wynne*, __ U.S. __, __, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015). This prohibition exists because "one of the chief evils that led to the adoption of the Constitution [was] . . . state tariffs and other laws that burdened interstate commerce." *Id.* Thus, the Supreme Court interprets the negative or dormant Commerce Clause as precluding states from imposing taxes "which discriminate[ ] against interstate commerce . . . by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Id.* (quoting *Nw. States Portland Cement Co. v. Minn.*, 358 U.S. 450, 458, 79 S. Ct. 357, 362, 3 L. Ed. 2d 421 (1959)).

"encourage[d] settled expectations and . . . foster[ed] investment by businesses and individuals." *Id.* at 316, 112 S. Ct. at 1915.

[¶4.] In 2015, the Supreme Court reviewed a Colorado law that instead of imposing the obligation to collect and remit use tax on sellers with no physical presence in that state, imposed the obligation "to notify . . . customers of their use-tax liability and to report" sales information back to the state. *Direct Marketing*, __ U.S. at __, 135 S. Ct. at 1127. The issue before the Supreme Court was whether the United States District Court had jurisdiction under the Tax Injunction Act (28 U.S.C. § 1341) over a suit challenging the new law on Commerce Clause grounds. Justice Kennedy, however, took the opportunity to write a concurrence questioning the advisability of continuing to follow *Bellas Hess* and *Quill* in light of later Commerce Clause jurisprudence and "in view of the dramatic technological and social changes that [have] taken place in our increasingly interconnected economy." *Id.* at __, 135 S. Ct. at 1135 (Kennedy, J., concurring). Despite noting the "startling revenue shortfall in many States" due to *Bellas Hess* and *Quill*, Justice Kennedy observed that Direct Marketing did not raise reconsideration of those decisions "in a manner appropriate for the Court to address it." *Id.* Nevertheless, he concluded that Direct Marketing provided "the means to note the importance of reconsidering doubtful authority." *Id.* He invited "[t]he legal system [to] find an appropriate case for [the Supreme] Court to reexamine *Quill* and *Bellas Hess*." *Id.*

[¶5.] With this legal backdrop, the South Dakota Legislature began its 2016 session concerned with its

ability to maintain state revenue in the face of increasing Internet sales and their effect on sales tax collections.[8] Senate Bill 106 was introduced during the session as: "An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016). The Act provided that any sellers of "tangible personal property" in South Dakota without a "physical presence in the state . . . shall remit" sales tax according to the same procedures as sellers with "a physical presence[.]" *Id.* § 1. However, the Act limited this obligation to sellers with "gross revenue" from sales in South Dakota of over $100,000 per calendar year or with 200 or more "separate transactions" in the state within the same time frame. *Id.* §§ 1-2. The Act authorized the State to bring a declaratory judgment action in circuit court against any person believed to meet the Act's criteria "to establish that the obligation to remit sales tax is applicable and valid under state and federal law." *Id.* § 2. The Act further authorized a motion to dismiss or a motion for summary judgment in the action. *Id.* It also provided that the filing of the action "operates as an injunction during the pendency of the" suit prohibiting the State from enforcing the Act's obligations. *Id.* § 3. Other sections of the Act prohibited retroactive application of the obligation to remit sales tax and made the obligation prospective only from the date of dissolution or lifting of an injunction provided for by the Act. *Id.* §§ 5-6.

---

[8] South Dakota must maintain a balanced budget. *See* S.D. Const. art. XII, § 7.

[¶6.] In addition to these provisions, the Act contained an emergency clause declaring it "necessary for the support of the state government" and making it effective "on the first day of the first month" falling at least fifteen days after signing by the Governor. *Id.* § 9.[9] The Act's emergency clause made a two-thirds majority vote in both houses of the Legislature necessary for it to pass. S.D. Const. art. III, § 22.

[¶7.] Senate Bill 106 was introduced in the South Dakota Senate and referred for a hearing by the Senate State Affairs Committee. S. Journal, 91st Sess., 150 (S.D. 2016). The hearing was held on February 17, 2016. Id. at 316. Several witnesses testified in open committee in support of the bill, including a representative of the Governor's Office.[10] There was no opposition. *Hearing I*, *supra* note 9. The bill passed out of committee with a do pass recommendation and was debated and considered on the floor of the Senate on February 19, 2016. S. Journal at 319, 370. The bill passed the Senate on a vote of thirty-three yeas and zero nays. S. Journal at 370.

[¶8.] The bill had its first reading in the South Dakota House of Representatives on February 22, 2016,

---

[9] Most legislation is effective "on the first day of July after its passage[.]" SDCL 2-14-16.

[10] *An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency: Hearing on S.B. 106 Before the S. Comm. on State Affairs*, 2016 Legis. Assemb., 91st Sess. 2:27 (S.D. 2016), http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016 [*Hearing I*].

and was referred for a hearing by the House State Affairs Committee. H. Journal, 91st Sess., 621 (S.D. 2016). The hearing was held on February 29, 2016. *Id.* at 710. Once again, several witnesses testified in open committee in support of the bill.[11] Again, there was no opposition. *Hearing II*, *supra* note 10. The bill passed out of the House committee with a do pass recommendation. H. Journal at 710. It was debated and considered on the House floor on March 1, 2016. *Id.* at 740. The bill passed by a vote of sixty-four yeas and two nays. *Id.* The Governor signed the bill on March 22, 2016. S. Journal at 619. It fulfilled the two-thirds vote requirement for the emergency clause and took effect on May 1, 2016. *Id.*; S.B. 106, § 9.

[¶9.] Shortly after the Governor signed Senate Bill 106 into law, the South Dakota Department of Revenue began issuing written notices to sellers it believed met the requirements of Senate Bill 106. The notices: informed the sellers of the passage of the law; explained its requirements; advised the sellers to register for South Dakota sales tax licenses by a date certain; and warned that the failure to register could result in a declaratory judgment action as authorized by the law. Although the three sellers in this appeal, as well as a fourth seller, Systemax Inc., received notices, they did not register for sales tax licenses. The State

---

[11] *An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency: Hearing on S.B. 106 Before the H. Comm. on State Affairs*, 2016 Legis. Assemb., 91st Sess. 1:00 (S.D. 2016), http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016 [*Hearing II*].

filed a declaratory judgment action against Sellers in circuit court on April 28, 2016. The State sought a judicial declaration that the requirements of Senate Bill 106 were valid and applicable to Sellers, an order enjoining enforcement of the law during the pendency of the action, and an injunction requiring Sellers to register for licenses to collect and remit sales tax.[12]

[¶10.] Following service of the State's complaint, Systemax Inc. voluntarily registered for a sales tax license and immediately began collecting taxes under the law. Therefore, the State dismissed Systemax from its lawsuit on May 19, 2016. The remaining sellers then sought to remove the State's action to the United States District Court for South Dakota on the basis of federal question jurisdiction. The District Court rejected removal and remanded the case to the South Dakota circuit court in January 2017.

[¶11.] After the District Court's remand, Sellers filed a joint answer, motion for summary judgment, and statement of material facts admitting: each lacked a physical presence in South Dakota; each met the sales and transaction requirements for application of Senate Bill 106;[13] and none were registered to collect South Dakota sales tax. As an affirmative defense, Sellers raised the unconstitutionality of Senate Bill

---

[12] Along with its complaint, the State filed a separate application for a preliminary injunction noting that the law provided for an injunction against its enforcement during the pendency of a suit under the law. *See* S.B. 106, § 3.

[13] Sales of personal property for delivery into South Dakota exceeding $100,000 and 200 or more separate transaction in the previous calendar year. *See* S.B. 106, § 1.

106 under the Commerce Clause. The State filed a response to the motion for summary judgement agreeing with Sellers' statement of material facts. The State further agreed that the court would have to grant Sellers' motion for summary judgment based upon *Bellas Hess* and *Quill* and indicated its intention to pursue review of the issue by the United States Supreme Court.

[¶12.] The circuit court did not hold a hearing. It entered its decision based on undisputed statements of material fact and the parties' briefs. As part of its decision, the court noted that the parties agreed that no hearing was necessary. The court found no material issue of fact in dispute over Sellers' lack of a physical presence in South Dakota. Observing its obligation to adhere to Supreme Court precedent prohibiting the imposition of an obligation to collect and remit sales tax on sellers with no physical presence in the State, the court granted Sellers' motion for summary judgment. It enjoined the State from enforcing the obligation to collect and remit sales tax against Sellers. The State filed a timely notice of appeal of the court's order granting summary judgment.

Issue

Whether the circuit court erred in granting summary judgment to Sellers.

Standard of Review

[¶13.] We review a summary judgment de novo. *Heitmann v. Am. Fam. Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 508 (citing *Ass Kickin Ranch, LLC v. N. Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 7, 822 N.W.2d 724, 726). We determine whether there are any "genuine issues of material fact" in the case and "whether

the law was correctly applied." *Id.* (quoting *Ass Kickin Ranch*, 2012 S.D. 73, ¶ 6, 822 N.W.2d at 726). If there are no genuine issues of material fact, "our 'review is limited to determining whether the [circuit] court correctly applied the law.'" *Id.*

Analysis and Decision

[¶14.] Sellers argue that there is an inadequate record for this Court's review in this matter. But Sellers moved for summary judgment and by doing so, limited the record available for review. *See* SDCL 15-6-56(c) (limiting the record on a motion for summary judgment to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any[.]"). In any event, the material facts are not in dispute. The parties agreed that each seller had a principal place of business outside of South Dakota and each lacked a physical presence in this state. The parties agreed that in the previous calendar year, each seller had gross revenue from the sale of tangible personal property in South Dakota in excess of $100,000 and/or sold tangible personal property in the state in 200 or more separate transactions. The parties agreed that none of the sellers were registered to collect South Dakota sales tax.

[¶15.] In view of these undisputed facts and the Supreme Court's holdings in *Bellas Hess* and *Quill*, Senate Bill 106 could not impose a valid obligation on Sellers to collect and remit sales tax to this State because none of them had a physical presence in the state. *See Bellas Hess*, 386 U.S. at 758-60, 87 S. Ct. at 1392-93 (rejecting imposition of "the duty of use tax collection and payment upon a seller" with no physical presence in the taxing state); *Quill*, 504 U.S. at 317-18,

112 S. Ct. at 1916 (reaffirming *Bellas Hess*'s Commerce Clause limitations in rejecting a state's attempt to require a seller with no physical presence in the state to collect and pay use tax for goods sold in the state). We see no distinction between the collection obligations invalidated in *Quill* and those imposed by Senate Bill 106, and hold that the circuit court correctly applied the law when it granted Sellers' motion for summary judgment.

[¶16.] Nonetheless, the State argues that the Supreme Court should reconsider *Bellas Hess* and *Quill*. It claims that in bringing this suit, the State has accepted Justice Kennedy's invitation in *Direct Marketing* for "[t]he legal system [to] find an appropriate case for [the Supreme] Court to reexamine" those decisions. __ U.S. at __, 135 S. Ct. at 1135 (Kennedy, J., concurring). According to the State, circumstances have changed since *Bellas Hess* and *Quill*, making *Bellas Hess* and *Quill* outdated. The State emphasizes that computer technology and software have advanced, South Dakota has streamlined its revenue laws, and the retail industry has evolved. The State also claims that the Supreme Court's application of the physical presence requirement to the collection of sales tax differs from its application of other Commerce Clause requirements to similar collection obligations. This has led to inconsistent results.

[¶17.] In his concurrence in *Direct Marketing*, Justice Kennedy recognized many of the State's arguments supporting reconsideration of *Bellas Hess* and *Quill*. *See* __ U.S. at __, 135 S. Ct. at 1134 (Kennedy, J., concurring). Some of them go as far back as Justice Fortas's original dissent in *Bellas Hess* and Justice White's concurrence and dissent in *Quill*. *See* 386 U.S.

at 760, 87 S. Ct. at 1393 (Fortas, J., dissenting); 504 U.S. at 321, 112 S. Ct. at 1916 (White, J., concurring in part and dissenting in part). Before joining the Supreme Court, Justice Gorsuch, while acknowledging Supreme Court precedent binding on lower courts, also raised similar concerns with *Bellas Hess* and *Quill*. *See Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147 (10th Cir. 2016) (Gorsuch, Circuit Judge, concurring).

[¶18.] However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled. *Quill* remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes. We are mindful of the Supreme Court's directive to follow its precedent when it "has direct application in a case" and to leave to that Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989). Therefore, we affirm.

[¶19.] GILBERTSON, Chief Justice, and ZINTER and KERN, Justices, and WILBUR, Retired Justice, concur.

APPENDIX B

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC.,
Defendants.

32CIV16-000092

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before me on the Defendants' Motion for Summary Judgment regarding the Complaint for declaratory relief filed by the Plaintiff pursuant to Senate Bill 106, "An Act to provide for the collection of sales taxes from certain remote sellers," 91st Sess., S.D. Legis. (2016) ("S.B. 106"), which has been codified as SDCL Chapter 10-64 "Collection of Sales Taxes From Out-of-State Sellers."

Upon a review of the record and the filings made by the parties, the Court rules in favor of the Defendants in granting them summary judgment. In reaching this decision, the Court finds as follows:

1. The Parties agree that no material issue of fact exists and this action may be decided as a matter of

law. Defendants' Brief in Support of Summary Judgment at 7-8 (noting that the parties agree that this case "presents no genuine dispute of fact" and "turns on pure questions of law"); Plaintiffs Response to Defendants' Motion for Summary Judgment at 2 ("the State agrees that there are no disputes of material fact"); *see also* Defendants' Statement of Material Facts, ¶¶ 1-9; Plaintiff's Response to Defendants' Statement of Material Facts ¶¶ 1-9.

2. The parties further agree that no hearing on the Defendants' Motion is necessary. In accordance with SDCL 10-64-3, this Court is directed to act on this matter "as expeditiously as possible" with the presumption that "the matter may be fully resolved through a motion to dismiss or a motion for summary judgment."

3. Because each of the Defendants lacks a physical presence in South Dakota, *see* Plaintiffs Response to Defendants' Statement of Material Facts, ¶¶ 1-3, the State acknowledges that under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the State of South Dakota is prohibited from imposing sales tax collection and remittance obligations on the Defendants. The State further admits that this Court is required to grant summary judgment in Defendants' favor, because of the *Quill* ruling. Parties' Joint Statement of Proceedings Following Remand at 4.

4. SDCL 10-64-2, by requiring remittance of sales tax by sellers who "do[] not have a physical presence in the state," fails as a matter of law to satisfy the physical presence requirement that remains applicable to state sales and use taxes under *Quill* and its application of the Commerce Clause (U.S. Const., Art. I, s. 8, cl. 3).

5. This Court is duty bound to follow applicable precedent of the United States Supreme Court. *James v. Boise*, -- U.S. --, 136 S. Ct. 685, 686 (2016) (state court is required to follow U.S. Supreme Court precedent interpreting federal law); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (where precedent of the Supreme Court has direct application in a case, lower courts must follow the decision which directly controls). This is true even when changing times and events clearly suggest a different outcome; it is simply not the role of a state circuit court to disregard a ruling from the United States Supreme Court.

6. The initiation of this action by the Plaintiff on April 27, 2016, resulted in the injunction of its enforcement as a matter of law under SDCL 10-64-4.

NOW, THEREFORE, after due consideration of the parties' submissions, the terms of SDCL Chapter 10-64, and controlling precedent, the Court hereby ORDERS that:

Defendants' Motion for Summary Judgment is GRANTED;

Judgment on the Plaintiff's Complaint shall enter for the Defendants;

The Plaintiff is enjoined from enforcing SDCL 10-64-2, in accordance with SDCL 10-64-4; and

Each party shall bear its own costs, disbursements, and fees.

Dated this 6th day of March, 2017.

BY THE COURT:

/s

Mark W. Barnett
Circuit Court Judge
Sixth Judicial Circuit

APPENDIX C

S.B. 106 provides:

AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis.

The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes, penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

(1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;

(2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;

(3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers actively market sales as tax free or no sales tax transactions;

(4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;

(5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

(8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Dakota

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE S. ISAACSON
Counsel of Record
MARTIN I. EISENSTEIN
MATTHEW P. SCHAEFER
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
(207) 786-3566
gisaacson@brannlaw.com
meisenstein@brannlaw.com
mschaefer@brannlaw.com

Counsel for Respondents

December 7, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Far from "find[ing] an appropriate case" for this Court to reconsider the continuing vitality of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), *see Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring), the State of South Dakota has manufactured an entirely inappropriate vehicle for doing so. Through its "fast track" appeal, the State seeks to enlist the United States Supreme Court to provide what amounts to an advisory opinion on a barren factual record, contrary to this Court's proper constitutional role and its carefully-circumscribed jurisdiction. In the process, the State runs roughshod over principles of *stare decisis*, disregards significant concerns of retroactive liability, and fails to establish facts sufficient for this Court to evaluate the complex and delicate balance between the burdens of imposing nationwide sales and use tax obligations on interstate businesses, on the one hand, and the States' interest in requiring companies located beyond their borders to serve as the States' use tax collectors, on the other. South Dakota thus invites the Court to assume a legislative role, supplanting Congress, the body to which the Constitution assigns responsibility for regulating commerce "among the several States," and which is actively addressing the issue. U.S. Const., art. I, § 8, cl. 3.

The question presented is:

> Whether the State's petition presents an appropriate case for this Court to reexamine *Quill*?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents Wayfair Inc., Overstock.com, Inc., and Newegg Inc. each states that:

1. It has no parent corporation.

2. No publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
JURISDICTION	5
STATEMENT OF THE CASE	6
REASONS FOR DENYING THE PETITION	9
I. Congress Is The Proper Institution To Address This Complex Issue	9
II. The State's Challenge To *Quill* Is Non-Justiciable	12
A. The Court Lacks The Power To Offer Opinions On Assumed Or Speculative Facts	12
B. There Is No Factual Record Concerning The *Quill* Issue	13
C. The Dormant Commerce Clause Necessitates A Fact-Intensive Review	15
D. This Court's Role As An Appellate Tribunal Requires Factfinding In The Lower Court	17
III. Principles Of *Stare Decisis* Strongly Weigh Against Granting The Petition	18
A. Retailers Have Continued To Rely On *Quill*	20

TABLE OF CONTENTS – Continued

Page

B. *Quill* Has Not Been Undermined By Later Decisions 21

C. *Quill* Was Not Badly Reasoned 22

D. The Physical Presence Standard Is Not "Unworkable" 23

E. Changed Circumstances Do Not Warrant Overturning *Quill* 25

1. Multistate Sales Tax Collection Remains Burdensome 25

2. Market Data Indicates That State Estimates Of Uncollected Use Tax Are Grossly Inflated And That Remote Sales Tax Collection Is Increasing 28

3. The State's Economic Policy Arguments Are Refuted By Other Sources 31

IV. The Petition Ignores The Issue Of Retroactive Liability 34

V. Developments In Other States Further Counsel Denial Of The Petition 36

A. The States Have Tools To Increase Consumer Use Tax Collection 36

B. *Quill* Challenges In Other States Are Focused On Developments Concerning Electronic Commerce 37

CONCLUSION 39

TABLE OF CONTENTS – Continued

Page

APPENDIX

ADDENDUM A: Defendants' Statement of Material Facts A-1

ADDENDUM B: Plaintiff's Response to Defendants' Statement of Material Facts B-1

TABLE OF AUTHORITIES

Page

CASES

Am. Catalog Mailers Ass'n, et al. v. Tenn. Dep't of Revenue, et al., Tenn. Chan. Ct., Davison Cnty. No. 17-307-IV 38

Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 35

Capital One Bank v. Comm'r of Revenue, 899 N.E.2d 76 (Mass.), *cert. denied*, 557 U.S. 919 (2009) 23

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 4

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 3, 11, 22

Comptroller of the Treasury v. Wynne, 135 S.Ct. 1787 (2015) 3, 22

Crutchfield Corp. v. Harding, et al., Vir. Cir. Ct., Albemarle Cnty. No. CL17001145-00 38

Direct Mktg. Ass'n v. Brohl, 135 S.Ct. 1124 (2015) 6, 22, 36

Direct Mktg. Ass'n v. Brohl, 813 F.3d 1129 (10th Cir.), *cert. denied*, 137 S.Ct. 591 (2016) 36, 37, 38

Flast v. Cohen, 392 U.S. 83 (1968) 13

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 13

Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66 (2013) 12

TABLE OF AUTHORITIES – Continued

Page

Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) 34, 35, 36

Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010) 21

In re Appeal of Intercard, 14 P.3d 1111 (Kan. 2000) 24

In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi, 82 P.3d 804 (Haw. 2004) 24

Ind. Dep't of Revenue v. Wayfair Inc., et al., Ind. Sup. Ct., Marion Cnty. No. 49D01-1706-PL-025946 38

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 34, 35

KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011) 23

Kimble v. Marvel Entm't, LLC, 135 S.Ct. 2401 (2015) 18, 19, 20, 22

King Bridge Co. v. Otoe Cnty., 120 U.S. 225 (1887) 13

Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) 34

Lewis v. Cont'l Bank Corp., 494 U.S. 472 (1990) 5

Massachusetts v. EPA, 549 U.S. 497 (2007) 5

Mead-Westvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16 (2008) 21

Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014) 18

TABLE OF AUTHORITIES – Continued

Page

Microsoft Corp. v. Baker, 137 S.Ct. 1702 (2017).....14

Miller Bros. v. Maryland, 347 U.S. 340 (1954).....3

Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967) .....*passim*

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).....3

Newegg Inc. v. Ala. Dep't of Revenue, Ala. Tax Tribunal No. S 16-613.....29

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971).....17, 18

Patterson v. McLean Credit Union, 491 U.S. 164 (1989).....19

Pearson v. Callahan, 555 U.S. 223 (2009) 18

Quill Corp. v. North Dakota, 504 U.S. 298 (1992)....*passim*

Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).....16, 17

Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016).....12

Standard Pressed Steel Co. v. Wash. Dep't of Revenue, 419 U.S. 560 (1975).....24

Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226 (W.Va. 2006), *cert. denied sub nom. FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007).....23

Travelers Ins. Co. v. Obusek, 72 F.3d 1148 (3d Cir. 1995).....13

TABLE OF AUTHORITIES – Continued

Page

Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue, 483 U.S. 232 (1987) 24

United States v. Asakevich, 810 F.3d 418 (6th Cir. 2016) 5

Washington v. Gen. Motors Corp., 406 U.S. 109 (1972) 18

Wash. State Apple Adver. Comm'n v. Holshouser, 408 F.Supp. 857 (E.D.N.C. 1976) 17

Wash. State Apple Adver. Comm'n v. Hunt, 432 U.S. 333 (1977) 16

Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992) 24

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I, § 8, cl. 3 ..... *passim*

U.S. Const., art. III, § 2 ..... 5, 6, 12

FEDERAL STATUTES

15 U.S.C. §§ 381-384 2

47 U.S.C. § 151 (note) 2

49 U.S.C. § 31705 2

H.R. 2193, 115th Cong. (2017-2018) 10

H.R. 2887, 115th Cong. (2017-2018) 10

P.L. 114-125, Sec. 922(a) (2016) 2

S. 976, 115th Cong. (2017-2018) 10

TABLE OF AUTHORITIES – Continued

Page

STATE CONSTITUTIONS AND STATUTES

S.D. Const., art. V, § 5 14

Cal. Rev. & Tax. Code § 6204 35

La. Rev. Stat. § 47:309.1 37

N.Y. Tax Law § 1133(a) 35

Pa. Gen. Assembly, H.B. 542, § 213.2 (2017-2018) 37

R.I. Gen. Laws § 44-18.2-3(E) 37

SDCL ch. 10-59 18

SDCL ch. 10-64 7

SDCL § 10-64-1(7) 7

SDCL § 10-64-1(10) 7

SDCL § 10-64-2 7

SDCL § 10-64-3 ..... 7, 14

SDCL § 10-64-4 13

SDCL § 10-64-6 ..... 13, 35

SDCL § 10-64-7 ..... 13, 35

Vt. Stat. Ann., tit. 32, § 9712 37

Wash. Rev. Code § 82.13.020 37

REGULATIONS

830 CMR 64H.1.7 38

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS

Avalara, *Getting started with Avalara*, https://offers.avalara.com/avalara-brand/ 16, 26

Avalara TaxRates, *South Dakota Sales Tax Rates*, http://www.taxrates.com/state-rates/south-dakota 27

Client's First Business Solutions, *Avoid the Perils of Zip Code-based Sales Tax Management*, http://www.clientsfirst-us.com/blog/sage/sage-mas-90-200-mas90-mas200/avoid-the-perils-of-zip-code-based-sales-tax-management/ 26

Connecticut DRS Media Release, *Connecticut Pursues Sales Taxes Not Paid by On-line Retailers* (Mar. 28, 2017), http://www.ct.gov/drs/cwp/view.asp?Q=591496&A=1436 36

T. Cooley, Constitutional Limitations 36

Jennifer DePaul, *Task Force Promises Legislation Designed to Overturn* Quill, 79 State Tax Notes 185-86 (Jan. 18, 2016) 6

Jeffrey A. Eisenach and Robert E. Litan, *Uncollected Sales Tax on Electronic Commerce: A Reality Check* (Feb. 2010), https://netchoice.org/wp-content/uploads/eisenach-litan-e-commerce-taxes.pdf 29

Tonya Garcia, *Amazon accounted for 60% of US online sales growth in 2015*, MarketWatch (May 3, 2016), http://www.marketwatch.com/story/amazon-accounted-for-60-of-online-sales-growth-in-2015-2016-05-03 31

TABLE OF AUTHORITIES – Continued

Page

Robert W. Goodlatte, *Statement of Chairman Robert W. Goodlatte* (Dec. 4, 2017), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_ Tax_Issue.pdf 10

Billy Hamilton, *Home Sweet Taxing Unit*, 56 State Tax Notes 217 (Apr. 19, 2010) 26, 27

Chris Isadore, *Amazon to start collecting state sales taxes everywhere*, CNN (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.....30

Larry Kavanagh and Al Bessin, *The Real World Challenges in Collecting Multi-State Sales Tax For Mid-Market Online and Catalog Retailers*, TruST (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_Embargoed-TruST-COI-Paper-.pdf 27

MEC Global, *Spotlight on Webrooming* (May 2016), http://www.mecglobal.com/assets/publications/2016-05/Spotlight-On-Webrooming.pdf.....33

OneSource, *Sales & Use Tax Solutions*, https://tax.thomsonreuters.com/products/brands/onesource/indirect-tax/sales-use-tax/ 26

PwC, *The race for relevance, Total Retail 2016: United States* (Feb. 2016).....31

Sara Spivey, *Consumers have spoken: 2016 is the year of "webrooming,"* Marketing Land (July 29, 2016), http://marketingland.com/consumers-spoken-2016-year-webrooming-180125.....33, 34

TABLE OF AUTHORITIES – Continued

Page

Janet Stilson, *Study Shows Prevalence 'Webrooming,'* Adweek (May 14, 2014), http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/ 31, 33

Streamlined Sales Tax Governing Board, Inc., *About Us,* http://www.streamlinedsalestax.org/index.php?page=About-Us.....28

Adam Thimmesch, David Gamage, and Darien Shanske, *Consumer-Based Use Tax Enforcement And Taxpayer Compliance*, 86 State Tax Notes 319 (Oct. 23, 2017).....37

Vertex, *Solutions*, https://www.vertexinc.com/solutions/indirect-tax-solutions/sales-tax 26

Arthur Zaczkiewicz, *Amazon, Wal-Mart, and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/.....31

INTRODUCTION

What the State asks the Court to do is extraordinary. It urges this Court to intervene in a complex policy matter, which Congress is actively addressing. *See generally* Brief of Amicus Curiae Robert W. Goodlatte, Chair of the House Committee on the Judiciary, et al., in Opposition to the Petition ("Goodlatte Brief"). It demands that the Court overrule long-standing precedent on which thousands of companies continue to rely. It proposes that the Court expose those businesses to potentially bankrupting back-tax liability. All of this, the State requests in the absence of any record evidence; instead, it asks the Court to assume as fact non-record information that is out-of-date, disputed, and incomplete.

While it is clear that the retail marketplace has changed considerably since the Court decided *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), actual, not speculative, facts regarding how those changes have affected remote sales tax collection are required to evaluate the issue. Petitioner argues that software developments make tax collection easier for remote sellers. The truth is that sales tax collection has become more complex as the number of tax jurisdictions has more than doubled since 1992. Moreover, the integration of tax collection software is extraordinarily expensive. The State asserts that states are suffering an ever-increasing loss of tax revenue. The "problem" of uncollected taxes, however, has proven to be largely self-correcting, as the largest online sellers collect sales tax in all states. Amazon.com, the poster-child of

online marketing, which accounts for half of all Internet sales and 60 percent of the growth, now collects sales tax in every state that has a sales tax.

If *Quill* is overruled, the burdens will fall primarily on small and medium-size companies whose access to a national market will be stifled. Congress can address this issue in a balanced and comprehensive manner through legislation. This Court should not accept the petitioner's invitation to abandon precedent on a barren factual record.

The Constitution assigns to Congress the responsibility of regulating interstate commerce. U.S. Const., art. I, § 8, cl. 3. In the area of state taxes, Congress has exercised its authority on a number of occasions, including with regard to transactional taxes and taxes targeting electronic commerce.[1] At present Congress is working "diligently and assiduously" on remote sales tax legislation in order to "resolve the myriad of issues that create the burden on interstate commerce through crafting compromises and drafting rules that simplify procedures and minimize complexities" of multi-state compliance. Goodlatte Brief at 2, 21.

---

[1] *See, e.g.*, Interstate Income Act of 1959, P.L. 86-272, 15 U.S.C. §§ 381-384. (limiting state taxes on net income); Intermodal Surface Transportation Efficiency Act, P.L. 102-404, 49 U.S.C. § 31705 (1991) (requiring conformity to International Fuel Tax Agreement for state fuel use taxes); Internet Tax Freedom Act, 47 U.S.C. § 151 note (originally enacted in 1998; made permanent in 2016, P.L. 114-125, Sec. 922(a)) (2016) (prohibiting discriminatory state taxes on electronic commerce).

It is well-understood that the negative implication of the Commerce Clause's affirmative grant of authority to Congress is a corresponding limitation on the power of the States. This limitation on state authority to impose tax and regulatory obligations on interstate businesses has been recognized in "dozens of [this Court's] opinions, joined by dozens of Justices." *Comptroller of the Treasury v. Wynne*, 135 S.Ct. 1787, 1806 (2015) (brackets added).

With regard to sales and use taxes, the constitutional restriction on a state's authority to require collection of such taxes by a company that lacks a physical presence in the state is long-standing. When, in 1967, the Court expressly recognized the "sharp distinction" between retailers with "outlets, solicitors, or property within a State" and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," the Court relied upon cases from earlier decades. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 758 (1967) (citing *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Miller Bros. v. Maryland*, 347 U.S. 340 (1954)).

In 1992, *after* the Court's seminal state tax decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and under the auspices of *Complete Auto*'s "substantial nexus" test, *Quill* reaffirmed the "physical presence" rule for sales and use taxes. *Quill*, 504 U.S. at 313-18. It was by then well-established that the substantial nexus requirement applies not only with respect to cross-border transactions potentially subject

to state tax reporting, but also to an interstate business itself. *E.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (an "interstate business must have a substantial nexus with the State before *any* tax may be levied on it") (italics in original).

The State's petition presents the question of whether the *Quill* physical presence standard should be overruled. This oddly-manufactured appeal by the State, however, could hardly be less suitable for an adequate review of *Quill*. The petition's shortcomings are numerous. In "fast tracking" its suit for potential review, the State presented no evidence, at all, in the lower courts. Any reference to "the record" in the petition (*see, e.g.*, Pet. at 3, 30) is necessarily to disputed, extra-record, secondary-source material, all of which is refuted by other, extra-record sources that demonstrate, in contradiction to the State's dire predictions, a strong trend toward *increased* use tax collection on Internet transactions. Moreover, the State's petition mischaracterizes the efforts of Congress to address use tax collection on remote sales and urges what amounts to legislative action by the Court. It grossly underestimates the continuing strength of *stare decisis* in this area. The State glosses over serious questions of potential retroactive tax liability for remote sellers that have relied upon the physical presence standard. It fails to explain that the States increasingly have regulatory tools at their disposal to improve use tax compliance by in-state consumers. It mischaracterizes litigation in other states and downplays pending challenges that focus on actual conditions in the electronic marketplace

and could serve, in contrast with the State's fact-free appeal, to bring the application of the *Quill* rule to the Internet economy into sharper relief.

Rather than presenting a narrow legal issue for the Court's review, the State's petition is freighted with complex questions unsuitable for review on this record. The proper course is to permit Congress to complete its work. Intervention by the Court into that process would only thwart the prospects for a lasting legislative solution. Goodlatte Brief at 24-25.

JURISDICTION

The judicial power of the United States is limited to the adjudication of "Cases" and "Controversies." U.S. Const., art. III, § 2. "[N]o justiciable 'controversy' exists" when a party seeks an advisory opinion. *United States v. Asakevich*, 810 F.3d 418, 420 (6th Cir. 2016) (citing *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007)). The case-or-controversy requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S 472, 477 (1990).

The State seeks the abrogation of the *Quill* physical presence rule, which is designed to prevent undue burdens on interstate commerce. *Quill*, 504 U.S. at 313-14 and n.6. In the state courts below, the State presented no evidence regarding any issue bearing on whether approval of South Dakota's sales tax collection requirements would burden interstate

commerce. Instead, the State conceded summary judgment and rushed an appeal to this Court. As a result, there is no factual record on which the Court may evaluate the constitutional issue the State seeks to present and no justiciable controversy under Article III.

STATEMENT OF THE CASE

The State attributes this appeal to the "machinery of South Dakota's government," Pet. at 37, but credit for its effort must be shared. In January 2016, the National Conference of State Legislatures ("NCSL") Task Force on State and Local Taxation received advice from a Supreme Court practitioner (now Counsel of Record for petitioner) detailing the elements of a bill designed to promote a *Quill* challenge. Jennifer DePaul, *Task Force Promises Legislation Designed to Overturn* Quill, 79 State Tax Notes 185-86 (Jan. 18, 2016). The normal features of an appropriate tax proceeding could be jettisoned, counsel suggested. "You can say, look, usually we have an audit, usually we have a state tax court, usually we have an appeal to a state supreme court. But if you are passing a bill, you don't have to have any of that." *Id.* at 186.

South Dakota responded to the call in March 2016. Treating Justice Kennedy's concurring comments in *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124 (2015) ("*Brohl I*") as an "invitation" to action, *not by the legal system* in its ordinary workings, but for the adoption of an unprecedented manipulation of the court system,

the State enacted "An act to provide for the collection of sales taxes from certain remote sellers" (the "Act"), now codified at SDCL chapter 10-64.

The Act requires any seller that "does not have a physical presence in the state" to collect and remit sales tax if, during the previous or current calendar year:

> (1) the seller's gross revenue from the sales of tangible personal property, any products transferred electronically, or services delivered into South Dakota exceeds $100,000; or
>
> (2) the seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in 200 or more separate transactions.

SDCL § 10-64-2. In devising these standards, however, the legislature expressly found that: (a) existing constitutional doctrine "prevents states from requiring remote sellers to collect sales tax;" and (b) "a decision from the Supreme Court of the United States abrogating its existing doctrine" would be necessary for the Act to be enforced. *Id.* § 10-64-1(7), (10).

Relying upon a right of action afforded under the Act only to the State itself, *id.* § 10-64-3, the State filed suit in April 2016 against the respondents, hand-picked retailers with no physical presence in South Dakota that the State conceded were acting lawfully in not collecting sales tax. *See id.* § 10-64-1(10); Complaint ¶ 24. The State sought a declaration that the Act is valid as applied to the respondents, although the

State acknowledged that the Act's collection requirements are unconstitutional. Complaint ¶¶ 1, 51.

In their Joint Answer, the respondents admitted that each of them: (a) lacks a physical presence in South Dakota; (b) had gross revenue in 2015 from the sale of tangible personal property delivered into South Dakota in excess of $100,000 and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (c) is not registered to collect South Dakota sales tax. No other facts are established by the proceedings below. *See* Addenda A & B (Statement of Undisputed Material Facts and the State's response). Since the undisputed facts established that the respondents had no physical presence in the state, they moved for summary judgment.

The State accepted that the statutory thresholds were satisfied and offered *no evidence regarding any other matter*. *See* Addendum B. Although it intended to challenge the continuing vitality of *Quill* – an established precedent designed to prevent undue burdens on interstate commerce – the State proffered no evidence regarding the respondents, no evidence regarding sales or marketing via the Internet, no evidence regarding the mechanics of state tax collection, no evidence about advances in technology, and no evidence regarding the nationwide sales and use tax system. The State conceded that because *Quill* is controlling, the lower court was required to grant the respondents summary judgment.

In March 2017, the circuit court awarded judgment (Pet. App. B) and the State appealed. In its brief to the South Dakota Supreme Court, the State urged the Court to affirm summary judgment against the State.

On September 13, 2017, the South Dakota Supreme Court affirmed the entry of judgment for the respondents. Pet. App. A.

REASONS FOR DENYING THE PETITION

I. Congress Is The Proper Institution To Address This Complex Issue.

Striking the proper balance between a free-flowing national marketplace, on the one hand, and the interest of the States in burdening such commerce in order to secure the collection of taxes due from their residents, on the other hand, is a responsibility assigned by the Constitution to Congress and not to the States, let alone an individual State. U.S. Const., art. I, § 8, cl. 3. "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Bellas Hess*, 386 U.S. at 760.

In light of Congress' role in regulating interstate commerce, "the better part of both wisdom and valor is to respect the judgment of the other branches of the

Government." *Quill*, 504 U.S. at 318-19. It is only Congress, and not the States or the Courts, that has the institutional expertise to weigh the national implications of expanded state taxing authority and craft legislation to ensure that state tax obligations do not unduly burden interstate commerce.

To that end, Congress is considering bills that would determine the conditions under which states would be authorized to require retailers with no physical presence in a state to collect and remit sales and use taxes. Pending before Congress are three bills: (1) Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017-2018), a version of which passed the Senate in 2013; (2) Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017-2018); and (3) No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018).

In addition, the House Judiciary Committee, the committee with jurisdiction over proposals for increased state taxing authority over interstate commerce, has worked tirelessly in pursuit of a compromise bill that will address the many competing concerns and balance the diverse interests with regard to this complex issue. *See* Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement") (describing the "thousands of hours" invested in developing the Committee's "compromise solution"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf. The Judiciary Committee has worked through multiple versions of legislation, each bringing

"the interested parties closer together." Goodlatte Brief at 17.

The State bemoans congressional inaction (Pet. at 28), but it mischaracterizes the efforts of Congress. Congress has considered numerous legislative proposals since *Quill* was decided, with particular intensity over the past five years. *See generally* Goodlatte Statement. Even the amicus brief filed by the Senators urging this Court's review demonstrates Congressional focus on the issue. *See* Addendum to Brief of Amicus Curiae of Four United States Senators and Two United States Representatives In Support of Petition ("Senators' Brief") (detailing bills and hearings concerning remote sales tax collection). Moreover, the inability of Congress, so far, to reach consensus is attributable, in no small part, to the refusal of sales tax states and localities to accept any simplification measures not devised by the states themselves.[2] The pursuit of this litigation by South Dakota has effectively halted compromise negotiations and created a further obstacle to Congress achieving a result that would promote the interests of all sides to the debate

---

[2] The State decries *Quill* because it claims the Court's ruling upholding the physical presence test requires the State to "beg" Congress for the authority to exercise its sovereign taxing powers. Pet. at 4, 28. *Quill*, however, no more "seizes a power from the States" (Pet. at 28) than *Complete Auto* does. Both cases properly recognize that state tax authority is subject to the *constitutional* limitations imposed by the Commerce Clause, specifically, the requirement that state tax laws not unduly burden interstate commerce. *See Quill*, 504 U.S. at 311, 314 (*Quill* is consistent with *Complete Auto* and "furthers the ends of the dormant Commerce Clause"). Congress has the authority to adjust such limitations.

and bring certainty to States and interstate businesses alike. Goodlatte Brief at 24-25.

A decision by the Court to grant the State's petition – particularly where the factual record is devoid of information concerning the many complexities that Congress is working to address – would damage prospects for a legislative solution. *Id.* Since Congress is fulfilling its institutional role, while the Court has neither the tools nor the information to take its place, "the better part of both wisdom and valor" is to respect the judgment of Congress and deny the petition. *Quill*, 504 U.S. at 318-19 (internal citation omitted).

II. The State's Challenge To *Quill* Is Non-Justiciable.

A. The Court Lacks The Power To Offer Opinions On Assumed Or Speculative Facts.

The judicial power of federal courts is limited by Article III to "Cases" and "Controversies." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016); art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation on federal-court jurisdiction to actual cases or controversies." *Spokeo*, 136 S.Ct. at 1547 (internal quotation omitted). An actual controversy must be "extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (internal quotation and citations omitted). The State, as the party invoking

federal jurisdiction, bears the burden of establishing it. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). The facts supporting jurisdiction must "appea[r] affirmatively from the record." *Id.* (citing *King Bridge Co. v. Otoe Cnty.*, 120 U.S. 225, 226 (1887) (brackets in original)).

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted). Where a plaintiff fails to develop a record to support a fact-intensive constitutional claim, its request for a declaratory judgment becomes non-justiciable. *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1155 (3d Cir. 1995) ("Without the necessary facts, the Court is left to render an advisory opinion.").

B. There Is No Factual Record Concerning The *Quill* Issue.

The State filed suit seeking a declaration that it could "require the Defendants to collect and remit state sales tax" and acknowledging that such a declaration would "require the abrogation of *Quill*." Complaint ¶¶ 1, 51. Whether or not the action reflected a potentially justiciable controversy at the time it was filed,[3] the manner in which the State prosecuted the

[3] The structure of the Act suggests that the State intended from the outset to secure an advisory opinion concerning *Quill*. The Act contains provisions suspending its enforcement and preventing the State from pursuing liability for a company's failure to register and collect the tax. *Id.* §§ 10-64-4, -6, -7. The Act creates

action, without record evidence, has rendered it non-justiciable by this Court.[4]

The State's fundamental premise for why *Quill* should be revisited is that circumstances in the retail marketplace have dramatically changed since *Quill* was decided. Pet. at 3 ("[A]fter 25 years of technological progress and economic changes, [the physical presence test] has proven entirely out of date.") (brackets added). The State, however, presented no facts in the proceedings below. Instead, accepting that *Quill* controlled the outcome, the State conceded summary judgment in order to press this appeal.[5] As a result, there is no record on which this Court can evaluate the continuing vitality of the *Quill* standard.

---

an exclusive right of action in the State, and instructs the state courts that dismissal or summary judgment is appropriate, given the Act's dubious legality. *Id.* § 10-64-3. Thus, the Act remains ineffective until this Court advises the parties that *Quill* is no longer controlling.

[4] The South Dakota Supreme Court's jurisdiction is not similarly limited to "Cases" and "Controversies," but is determined "as may be provided by the Legislature." S.D. Const., art. V, § 5.

[5] As Justice Thomas noted in *Microsoft Corp. v. Baker*, 137 S.Ct. 1702 (2017), where a plaintiff consents to the entry of judgment against it on the merits, the necessary adversity may be destroyed. *Id.* at 1717 (Thomas, J., concurring). "[I]t has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it." *Id.* (citations omitted).

C. The Dormant Commerce Clause Necessitates A Fact-Intensive Review.

The rule of *Bellas Hess* and *Quill* is based upon a fundamental premise that is factual, not legal: namely, that compliance with the use tax collection, remittance, and reporting obligations of thousands of state and local taxing jurisdictions where a company has no physical presence imposes undue burdens on interstate commerce. *Quill*, 504 U.S. at 313-19.

The State bears the obligation to demonstrate that this underlying premise is incorrect. The State, however, has offered no evidence to support overruling *Quill*. Instead, the petition simply assumes that the burdens of nationwide use tax reporting are negligible. The State then proclaims that interstate sellers are afforded an unfair advantage because they are not required to collect and remit use taxes in jurisdictions where they have no physical presence. Pet. at 4. But employing circular logic does not prove the underlying condition as a factual matter.

The record omissions are glaring. The State presented no record evidence before the state circuit court regarding the "technological progress" and "economic changes" it asserts have rendered *Quill* obsolete. Pet. at 3. It proffered no evidence regarding the advances in computing that the State claims have "made it easy" for retailers to comply with state sales and use tax laws. *Id.* Notably, the continued expansion of state sales taxing jurisdictions from over 6,000 in 1992 to more than 16,000 today belies any such "ease."

Compare Quill, 504 U.S. at 313 n.6 (6,000 taxing jurisdictions) *with* Avalara, *Getting started with Avalara* (addressing requirements of "16,000+ jurisdictions"), https://offers.avalara.com/avalara-brand/ (last visited Dec. 4, 2017). The State offered no evidence to show that the dramatic increase in the number of taxing jurisdictions has not similarly increased the burdens of multi-jurisdictional use tax compliance.

Oddly, the State treats the absence of record facts as a virtue of its petition. Pet. at 2, 36 (touting the State's appeal as a "uniquely clean and timely vehicle"). This Court, however, has emphasized the need for a factual record in dormant Commerce Clause cases. When "state legislation comes into conflict with the Commerce Clause's overriding requirement of a national 'common market,'" the Court is "confronted with the task of effecting an accommodation of the competing national and local interests." *Wash. State Apple Adver. Comm'n v. Hunt*, 432 U.S. 333, 350 (1977). This constitutional inquiry involves "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978).

In cases examining whether state laws place an undue burden on interstate commerce, a detailed factual record is essential, not exceptional. So, for example, the record underlying the Court's decision in *Hunt* included factual findings by the district court regarding the national marketplace, the regulated entities in question, and other states' business practices and

regulations. *See Wash. State Apple Adver. Comm'n v. Holshouser*, 408 F.Supp. 857, 858-59 (E.D.N.C. 1976) (factual findings). *Quill* itself, while resulting from a declaratory judgment action filed by the state, was presented to the Court on a detailed record. 504 U.S. at 302-04 and n.1. Similarly, in *Raymond Motor Transp.*, the Court reviewed a wealth of record evidence concerning the "substantial burden on the interstate movement of goods" resulting from the state's regulation and concluded, based on "the record in this case that the challenged regulations unconstitutionally burden interstate commerce." 434 U.S. at 444-45.

D. This Court's Role As An Appellate Tribunal Requires Factfinding In The Lower Court.

By foregoing all factual development and requesting that the state circuit court and supreme court rule against it, the State has effectively placed its appeal in the same posture as a suit brought by a state under the Court's original jurisdiction.

The Court has determined that suits brought to it directly by states against the citizens of other states are ill-suited for the Court's review. *See, e.g., Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497-99 (1971). A principal reason for the Court's decision to decline jurisdiction in such cases is that the Court is "structured to perform as an appellate tribunal, illequipped for the task of factfinding." *Id.* at 498. Even with regard to "important questions of vital national importance,"

Washington v. Gen. Motors Corp., 406 U.S. 109, 112 (1972), the Court carefully guards its jurisdiction against disputes in need of factual development for review in an appellate posture. *Wyandotte Chems.*, 401 U.S. at 498-99 (this Court is an "inappropriate forum" for addressing cases that have enjoyed no development in the lower courts). In bypassing any such development below, the State has rendered its claim non-justiciable in this Court.[6]

III. Principles Of *Stare Decisis* Strongly Weigh Against Granting The Petition.

The doctrine of *stare decisis* is "a foundation stone of the rule of law." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2036 (2014)). A party arguing that precedent should be overruled must show that there is "special justification" for abrogating the decision. *Kimble*, 135 S.Ct. at 2409 (citation omitted). Where precedent concerns a substantive rule of law that dictates how companies order their affairs, considerations of *stare decisis* are "at their acme." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

Furthermore, as Justice Scalia noted in *Quill*, *stare decisis* applies with enhanced force with respect

---

[6] The ordinary procedure for developing a record in a tax case is to pursue an assessment and appeal process. This is the standard means by which the State, and every other state that has sales and use taxes, pursues tax administration and enforcement. *See generally* SDCL ch. 10-59.

to the Court's dormant Commerce Clause decisions, because Congress "remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Just as when a decision of the Court interprets a federal statute, "critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble*, 135 S.Ct. at 2409 (citing *Patterson*, 491 U.S. at 172-73).

Congress has demonstrated both the willingness and ability to adopt standards governing state taxation of interstate commerce, including as recently as 2016 with respect to Internet sales. *Supra* n.1. The physical presence standard has governed the application of state sales and use taxes to remote sales transactions for more than fifty years, during which time Congress has had multiple opportunities to alter it. *See* Addendum to Senators' Brief. Such "long congressional acquiescence" to the standard further amplifies the effect of *stare decisis*. *Kimble*, 135 S.Ct. at 2409-10 (citation omitted). Indeed, it would be illogical to conclude that because Congress has repeatedly *declined* to adopt a change to the *Quill* physical presence rule, this Court should overrule it.

Congress is also better suited to address the remote sales tax issue. Far more than the Court, Congress has "the capacity to assess" whether the physical presence rule retains its vitality today and, if not, the "prerogative to determine the exact right response – choosing the policy fix, among many conceivable ones, that will optimally serve the public interest." *Id.* at

2414. The Court has noted that, in such a circumstance, a "superspecial justification" would be required for the Court to overturn established precedent. *Id.* at 2410.

None of the reasons the Court has identified as grounds for overruling its prior decisions is present here.

A. Retailers Have Continued To Rely On *Quill*.

There can be no doubt that remote sellers employing a wide range of direct marketing methods (catalog/mail order, television/infomercial, telemarketing, Internet) have continued to rely upon *Quill*. *See generally* Brief of *Amicus Curiae* American Catalog Mailers Association in Opposition to Petition; Brief of NetChoice as *Amicus Curiae* in Support of Respondent. Perhaps most importantly, the physical presence rule has permitted start-ups and small businesses access to the Internet as a means to grow their companies, without exposing them to the daunting complexity and expense of nationwide sales tax collection. *See id.*

The State and its amici do not dispute the continued reliance by remote sellers. To the contrary, they complain that such reliance is unfair to companies that have a physical presence and must collect the sales tax. Pet. at 15-16. They further argue that reliance on the physical presence rule is not "legitimate," Pet. at 24, but as Justice Scalia recognized, it would be fundamentally incompatible with *stare decisis* to "demand

that private parties anticipate" the overruling of precedent and to "visit economic hardship upon those who took us at our word." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) ("reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance") (italics in original).

B. *Quill* Has Not Been Undermined By Later Decisions.

Quill's doctrinal underpinnings have not eroded over time. No post-*Quill* decision of this Court has undermined its holding, and the State points to none. *See* Pet. at 33-35.

To the contrary, the Court has in recent years favorably referenced the physical presence standard for use taxes in rejecting a locality's effort to use a federal statute to circumvent the *Quill* rule. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 17 (2010) (city improperly sought to impose civil liability on remote seller under RICO for uncollected use taxes that the company "had no obligation to collect, remit, or pay"); *id.* at 18 (Ginsburg, J., concurring) (noting that the Commerce Clause prohibits the imposition of a use tax collection obligation on an out-of-state seller with no physical presence in the jurisdiction, citing *Quill* and *Bellas Hess*). In addition, the Court has on more than one occasion cited with approval *Quill*'s ruling that the Commerce Clause establishes limitations on state taxing power that differ from the basic requirements of due process. *Mead-Westvaco Corp. v. Ill. Dep't of Revenue*,

553 U.S. 16, 24 (2008); *Wynne*, 135 S.Ct. at 1798-99. Even Justice Kennedy's concurrence in *Brohl I* cites no subsequent decision, of any court, that undercuts *Quill*'s holding with regard to sales and use taxes. *Brohl I*, 135 S.Ct. at 1134-35.[7]

The State and its amici instead argue that *Quill* is inconsistent with the Court's *pre-Quill* jurisprudence, in particular the Court's decision in *Complete Auto*. Pet. at 22-25. All of those arguments were addressed, and rejected, by the Court in *Quill*. 504 U.S. at 313-18.

C. *Quill* Was Not Badly Reasoned.

The Court adopted the physical presence standard in *Bellas Hess* by a 6-3 majority, and reaffirmed it by an 8-1 majority in *Quill*. Although each decision drew a dissenting opinion, the logic of the decisions is sound. The *Quill* rule is not based on "shaky economic reasoning." *Kimble*, 135 S.Ct. at 2412. The *Quill* Court fully understood the argument that protecting remote sellers from state use tax obligations in states where they have no physical presence purportedly gives them a price advantage over in-state retailers. 504 U.S. at 304 n.2 (referencing the lower court's conclusion that *Quill* affords a competitive advantage to out-of-state businesses). The question was whether the burdens of nationwide use tax collection would, in counterpoise, unduly burden such sellers and hinder interstate commerce. The Court concluded that they would. Indeed, it

---

[7] No other Justice joined the concurrence, although the decision in *Brohl I* was unanimous. *Id.*

is *illogical* to argue that this Court would prescribe a constitutional standard serving no beneficial objective in order to tilt the competitive playing field.

Notably, lower courts have not questioned the validity of the *Quill* rule for sales and use taxes, but rather have declined to apply it to other types of tax, such as state income taxes. *See, e.g.*, *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011); *Capital One Bank v. Comm'r of Revenue*, 899 N.E.2d 76 (Mass.), *cert. denied*, 557 U.S. 919 (2009). These decisions are almost universally premised on the conclusion that sales and use taxes impose substantially greater burdens on out-of-state companies than do income taxes. *KFC Corp.*, 792 N.W.2d at 325 ("the burden of state income taxation, however, is substantially less" than the burden of collecting and remitting sales tax); *Capital One*, 899 N.E.2d at 85 ("the collection of franchise and income taxes did not appear to cause similar compliance burdens"); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 233-34 (W.Va. 2006) (the burden of sales tax collection is greater than franchise/income taxes and "demands knowledge of a multitude of administrative regulations"), *cert. denied sub nom. FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007).

D. The Physical Presence Standard Is Not "Unworkable."

The *Bellas Hess/Quill* rule is not difficult to apply. If a company is physically present in a state, directly

or through third-parties acting on its behalf to make a market for sales in the state, then the company may be required to collect and remit the state's sales and use taxes. *See, e.g., Standard Pressed Steel Co. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-63 (1975) (single employee in the state creates nexus); *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987) (third-party sales representative engaged in substantial activities in the state establishes nexus for out-of-state company). If neither the company nor a third party acting for it is physically present in the state, then the State may not compel an out-of-state entity to collect use tax. *Quill*, 504 U.S. at 314-18.

This is not to say that the rule forecloses all litigation regarding its reach. Lower courts have, for example, differed over the question of when a demonstrable, but minimal, physical presence is sufficient to create nexus. *E.g., In re Appeal of Intercard*, 14 P.3d 1111, 1122-23 (Kan. 2000) (sporadic employee visits over four years insufficient for nexus); *In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 813-14 (Haw. 2004) (annual three-day customer visits creates nexus). But the recognition of a *de minimis* standard has always been an acknowledged caveat to the "bright line," physical presence test and does not make it "unworkable" in any sense. *Quill*, 504 U.S. at 315 n.8; *see also Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (state authority to require payment of net income tax by remote sellers is subject to a *de minimis* standard).

E. Changed Circumstances Do Not Warrant Overturning *Quill*.

While it is evident that the development of the Internet has resulted in dramatic changes in the retail marketplace since 1992, it remains to be determined what those changes mean with regard to remote sales tax collection. Rapid evolution of the retail market has been accompanied by ever-increasing complexity in state sales and use tax systems.

Rather than presenting evidence to support its claim that the *Quill* rule is outdated, the State relies on non-record materials – most of which are themselves disputed, stale, and erroneous – concerning the changed circumstances it contends warrant a reconsideration of *Quill*. *See generally* Pet. at 12-19. These claims are readily debunked.

1. Multistate Sales Tax Collection Remains Burdensome.

The system of state and local sales taxes in the United States is highly complex. There are 45 states, plus the District of Columbia, that have a sales tax, and thousands of local taxing jurisdictions. This dizzying array of jurisdictions results in thousands of different tax rates, taxable and exempt products and services, exempt purchasers, shipping tax treatment, specialized tax rules (such as sales tax "holidays" and "thresholds" for different products), statutory definitions, registration and reporting regimes, record

keeping requirements, and filing systems.[8] In addition to compliance burdens, companies are exposed to potential audit by every state and locality with a self-administered sales or use tax. Remote sellers are only shielded from such inordinate burdens by *Quill*.

The number of taxing jurisdictions has continued to mushroom. *See* Billy Hamilton, *Home Sweet Taxing Unit*, 56 State Tax Notes 217, 220 (Apr. 19, 2010) ("on average, a new local government is created every day in the United States"). The Court noted in *Bellas Hess* that there were 2,300 such jurisdictions. 386 U.S. at 759 n.12. In 1992, there were over 6,000. *Quill*, 504 U.S. at 313 n.6. Today, the companies that provide tax compliance software variously estimate the number of total taxing jurisdictions at between 10,000 and 16,000. Vertex, *Solutions* (more than 10,000), https://www.vertexinc.com/solutions/indirect-tax-solutions/sales-tax; OneSource, *Sales & Use Tax Solutions* (over 14,000), https://tax.thomsonreuters.com/products/brands/onesource/indirect-tax/sales-use-tax/; Avalara, *Getting started with Avalara* ("16,000+ jurisdictions"), https://offers.avalara.com/avalara-brand/. The number and types of local tax jurisdictions is staggering, including not only

---

[8] The State blithely asserts that "these companies surely can calculate sales tax from a zip code," Pet. at 3, but the State fails to acknowledge that local sales tax jurisdictions are *not* co-extensive with postal codes. *See* Client's First Business Solutions, *Avoid the Perils of Zip Code-based Sales Tax Management* ("what ZIP codes *don't* do is accurately indicate sales tax rates") (italics in original), http://www.clientsfirst-us.com/blog/sage/sage-mas-90-200-mas90-mas200/avoid-the-perils-of-zip-code-based-sales-tax-management/.

cities and counties, but also parishes, stadium districts, transportation districts, water districts, scientific and cultural facilities districts, and police jurisdictions, among others. *See* Hamilton, 56 State Tax Notes at 220.[9]

The State asserts that retailers can "easily" implement nationwide sales tax collection due to improvements in software, but the State misrepresents the complexity. Integrating tax software with multiple systems, including a company's ecommerce, enterprise management, and financial reporting systems, and maintaining it over time, imposes considerable initial and ongoing expense. Larry Kavanagh and Al Bessin, *The Real World Challenges in Collecting Multi-State Sales Tax For Mid-Market Online and Catalog Retailers*, TruST (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_Embargoed-TruST-COI-Paper-.pdf. The States do not compensate retailers for the costs of implementation, testing, employee training, maintenance, and operation of the software, not to mention audits. The complexity of the U.S. sales tax system that led to the adoption of the physical presence standard

---

[9] South Dakota contributes to the complexity with over 100 city, county, and Native American reservation/special district taxes. "Since South Dakota sales tax has numerous local taxing levels that must be monitored and maintained on a regular basis, compliance is complex and time consuming." Avalara TaxRates, *South Dakota Sales Tax Rates*, http://www.taxrates.com/state-rates/south-dakota.

is about much more than the cost of a software license.[10]

The State also points to the purported simplification in state tax systems promoted through the Streamlined Sales and Use Tax Agreement ("SSUTA"). Pet. at 30-31. The SSUTA's alleged simplification measures, however, have attracted the membership of only 24 states, representing less than one-third of the nation's population. Streamlined Sales Tax Governing Board, Inc., *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us. The SSUTA has not added new members in several years and the group of non-members includes the six largest states, California, Texas, New York, Florida, Illinois, and Pennsylvania.

2. Market Data Indicates That State Estimates Of Uncollected Use Tax Are Grossly Inflated And That Remote Sales Tax Collection Is Increasing.

The State claims that South Dakota fails to collect $50 million annually on remote sales, and that the national total for uncollected tax is in excess of $20 billion. Pet. at 13-14. The exaggerated claims of the State

---

[10] The State points to the decision of Systemax, Inc., to register for sales tax collection as proof that tax compliance is simple. Pet. at 30. The State issued its demand that Systemax register (under threat of litigation) over a month before the State filed suit. In response to a similar demand by the State of Wyoming, Systemax required three months to implement tax collection. There is no evidence concerning what Systemax did to undertake compliance in response to South Dakota's demand.

and its amici ultimately derive from a single source: a study done in 2009 by professors at the University of Tennessee ("Tennessee Study"). *See* Pet. at 12. The Tennessee Study, however, has proven entirely unreliable.

To begin with, the Tennessee Study's inflated estimates were debunked almost immediately by competing analyses. *E.g.*, Jeffrey A. Eisenach and Robert E. Litan, *Uncollected Sales Tax on Electronic Commerce: A Reality Check* (Feb. 2010), https://netchoice.org/wp-content/uploads/eisenach-litan-e-commerce-taxes.pdf (demonstrating that the Tennessee Study overstated the uncollected use tax on Internet sales by approximately three-hundred percent). In addition, Professor Fox recently admitted, during a deposition in another proceeding, that the Tennessee Study was paid for by groups committed to overturning *Quill*. *See Newegg Inc. v. Ala. Dep't of Revenue*, Ala. Tax Tribunal No. S 16-613, Appellants' Motion to Exclude Expert Report and Testimony of William F. Fox (Nov. 8, 2017), at 12 (the 2009 Tennessee Study was funded by the Governing Board of the SSUTA and an unpublished, 2012 update was paid for by the Retail Industry Leaders Association).

The Tennessee Study is also based on taxability data gathered exclusively from state revenue officials. *Id.* at 12-13. This single, biased, data source on taxability was woefully incomplete. Officials from only 29 states participated. *Id.* at 13. The Tennessee Study

simply extrapolated from this group to the states that did not participate. *Id.*[11]

The Tennessee Study is also wildly out-of-date. There have been dramatic changes in the online marketplace with regard to sales tax collection since the Tennessee Study was conducted. Most notably, Amazon.com collected sales tax in only five states (Kansas, Kentucky, New York, North Dakota, and Washington) when the Tennessee Study was published in 2009, but now collects sales tax in every state that imposes a sales tax, including South Dakota. Chris Isadore, *Amazon to start collecting state sales taxes everywhere*, CNN (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

Online retail is now dominated by larger retailers that collect sales tax. Along with Amazon, the large "multi-channel" retailers that collect state and local sales taxes (*i.e.*, store-based retailers that also sell online) control the great majority of the Internet marketplace. *See* Brief of National Retail Federation as *Amicus Curiae* in Support of Petitioner ("NRF Brief")

---

[11] The Tennessee Study is lacking in other respects. While emphasizing the overall growth of ecommerce as a motivating concern, Professor Fox acknowledged under oath that the figures used for total ecommerce include the "vast number" of non-consumer, business-to-business ("B2B") transactions that make-up the majority of electronic commerce (91.9 percent of ecommerce in 2012 was B2B). *Id.* at 11. The Tennessee Study, however, "did not have any specific data on the B2B companies and their tax behavior." *Id.* B2B transactions are frequently non-taxable sales-for-resale, and most businesses file required use tax returns and are subject to audit.

at 23 (Amazon will soon comprise 50 percent of the online market); *see* Arthur Zaczkiewicz, *Amazon, Wal-Mart, and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/. Nineteen of the top twenty Internet retailers, including Amazon, already widely collect sales tax. *See id.* Moreover, Amazon alone accounts for sixty percent of all online sales growth. Tonya Garcia, *Amazon accounted for 60% of US online sales growth in 2015*, MarketWatch (May 3, 2016), http://www.marketwatch.com/story/amazon-accounted-for-60-of-online-sales-growth-in-2015-2016-05-03. The perceived problem of uncollected use tax is self-correcting, not worsening.

3. The State's Economic Policy Arguments Are Refuted By Other Sources.

The State insists that the *Quill* rule gives remote sellers an unfair price advantage, driving sales away from in-state sellers. A comprehensive study conducted in 2016, however, showed that convenience was a far greater reason why consumers chose to shop online. PwC, *The race for relevance, Total Retail 2016: United States* (Feb. 2016) at 10. Moreover, remote sellers have always operated at a fundamental cost *disadvantage* to local businesses, because remote sellers must charge (or absorb) shipping and handling fees in order to deliver their products to consumers. Such fees are almost invariably greater, as a percentage of the purchase price, than the sales tax. *See* Janet Stilson, *Study*

Shows Prevalence 'Webrooming,' Adweek (May 14, 2014) (47 percent of consumers say avoiding shipping costs is the primary reason they go to a store to buy a product after researching it online), http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/.

The State insists that the physical presence rule promotes economic inefficiency, but it fails to understand the most basic facts. The State paints a picture of concurrent "wasteful" transactions in which a California consumer purchases a product from Wayfair in Massachusetts, and a Massachusetts consumer purchases the same product from Newegg in California. Pet. at 19. According to the State, "[b]oth buyers get 'free shipping' and 'no tax' on the same items as they cross paths on pointless cross-country excursions." *Id.* This might be compelling, if it were not completely wrong. Wayfair has warehouse facilities in California, and collects sales tax in the state; Newegg has warehouse facilities in New Jersey (and collects sales tax there) from which it serves customers on the east coast. A California customer might order from Wayfair, and a Massachusetts customer might order from Newegg, but their purchases will not "wastefully" crisscross the United States and the *Quill* rule will have no bearing whatsoever on the economic efficiency of their purchases.

Several of the State's amici decry the practice of "showrooming," in which a customer goes to a local store to learn about a product, only to then purchase the product online free of sales tax. *See, e.g.*, NRF Brief

at 10. According to the State, such practices not only show the unfairness of the *Quill* rule, but also result in retailers refusing to invest in customer service, harming the U.S. economy as a whole. *See* Pet. at 19. The State's misunderstanding of the modern marketplace is profound. Recent studies prove that instances of "showrooming" are dwarfed by precisely the opposite phenomenon ("webrooming") in which consumers use a website to research a product (including detailed specifications and customer reviews) and then go to a local store to purchase it. MEC Global, *Spotlight on Webrooming* (May 2016) at 4 (consumers five times more likely to engage in webrooming than showrooming), http://www.mecglobal.com/assets/publications/2016-05/Spotlight-On-Webrooming.pdf.

The effect of this trend is dramatic. Forester research estimated that by 2017, the volume of in-store retail purchases attributable to "webrooming" would be nearly five times the volume of *all* consumer electronic commerce. *See* Stilson, *supra* (citing Forester study). Furthermore, consumers prefer retailers who offer the opportunity to see a product in person before they buy, increasing the pressure for retailers to offer a multi-channel shopping experience, *i.e.*, both a store location and website. Sara Spivey, *Consumers have spoken: 2016 is the year of "webrooming,"* Marketing Land (July 29, 2016), http://marketingland.com/consumers-spoken-2016-year-webrooming-180125. Contrary to the State's unfounded concerns about "free riding" and declining customer service in retail stores, consumers expect retailers to provide enhanced services during

their store visits following Internet research. *Id.* These market pressures not only enhance customer experience, they necessarily result in greater sales tax collection – whether in-store, or online – by multi-channel retailers that increasingly dominate the retail marketplace.

IV. The Petition Ignores The Issue Of Retroactive Liability.

The fundamental rule of "retrospective operation" has "governed 'judicial decisions . . . for near a thousand years.'" *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). "Unlike a legislature, we do not promulgate new rules to be applied prospectively only." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring) (internal quotation omitted).

It is well-established that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements of res judicata." *James B. Beam*, 501 U.S. at 544; *Harper*, 509 U.S. at 90. The State's complaint demands a declaration that the Act applies to respondents. *See* Complaint, Prayer for Relief, ¶ 1. A ruling concerning *Quill* that does *not* apply to the respondents would plainly be advisory.

It is a uniform principle of state and local sales tax law that a seller who is properly charged with the obligation to collect use tax from purchasers in a state

but fails to do so becomes liable for the uncollected tax. *E.g.*, Cal. Rev. & Tax. Code § 6204; N.Y. Tax Law § 1133(a). A ruling by the Court that the *Quill* rule is invalid will expose all remote sellers that have relied on the rule to retroactive liability in dozens, if not hundreds, or even thousands of jurisdictions.

South Dakota's choice to forego its remedy for back taxes in the event that the Court were to overrule *Quill* will not limit the retroactive application of such a ruling with respect to other state and local jurisdictions. The issue of remedy is determined with reference to state law. *James B. Beam*, 501 U.S. at 535; *see also Harper*, 509 U.S. at 102 (a state is "free to choose which form of relief it will provide"). While South Dakota has elected to forego its potential recovery of past due use taxes from remote sellers, SDCL §§ 10-64-6, -7, its election cannot bind other states (or localities), which are free to determine their own remedial approach if the physical presence rule is overturned. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (the Court's determination of constitutionality applies to similar statutes in other States "whether occurring before or after our decision"). It is significant that the amicus brief of the States does not disavow back tax liability if *Quill* is reversed. The Connecticut Department of Revenue Services ("DRS") has already begun notifying retailers without a physical presence in the state that it intends to pursue them for three years of back tax liability, on the theory that the physical presence rule no longer prevents the state from compelling use tax collection by out-of-state

sellers. *See* Connecticut DRS Media Release, *Connecticut Pursues Sales Taxes Not Paid by On-line Retailers* (Mar. 28, 2017), http://www.ct.gov/drs/cwp/view.asp?Q=591496&A=1436.

Of course, Congress, unlike the Court, can implement a legislative solution with prospective effect. *Harper*, 509 U.S. at 107 (Scalia, J., concurring) ("that which distinguishes a judicial from a legislative act is, that the one is a determination of what existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.") (quoting T. Cooley, Constitutional Limitations at 91).

V. Developments In Other States Further Counsel Denial Of The Petition.

A. The States Have Tools To Increase Consumer Use Tax Collection.

The central criticism of the *Quill* rule is that it prevents States from requiring collection by retailers of use taxes that the States cannot effectively collect from in-state consumers. *See Brohl I*, 135 S.Ct. at 1127 (noting that use tax compliance by purchasers is "relatively low"). States, however, now have at their disposal legislative options for effectively securing use tax compliance by in-state residents.

After remand in *Brohl I*, the Tenth Circuit Court of Appeals upheld Colorado's notice and reporting law. *Direct Mktg. Ass'n v. Brohl*, 813 F.3d 1129 (10th Cir.)

("*Brohl II*"), *cert. denied*, 137 S.Ct. 591 (2016). The Tenth Circuit held that requiring retailers with no physical presence in a state to notify in-state customers of their use tax obligations and to provide detailed information to the state revenue department regarding their customers' purchases did not violate the Commerce Clause. *Id.* at 1147. As a result, notice and reporting laws have given the states "new tools for improving consumer-based use tax compliance." Adam Thimmesch, David Gamage, and Darien Shanske, *Consumer-Based Use Tax Enforcement And Taxpayer Compliance*, 86 State Tax Notes 319 (Oct. 23, 2017).

In response to *Brohl II*, a number of states, including Louisiana, Pennsylvania, Rhode Island, Vermont, and Washington have already followed Colorado's lead in adopting such laws. La. Rev. Stat. § 47:309.1 (2017); Pa. Gen. Assembly, H.B. 542, § 213.2 (2017-2018); R.I. Gen. Laws § 44-18.2-3(E) (2017); Vt. Stat. Ann., tit. 32, § 9712 (2017); Wash. Rev. Code § 82.13.020 (2017). Colorado expects to secure 60 percent of unremitted use tax through its notice and reporting law alone. Brief for Colorado and 34 Other States and the District of Columbia as Amici Curiae Supporting Petitioner, at 8.

B. *Quill* Challenges In Other States Are Focused On Developments Concerning Electronic Commerce.

Contrary to the State's contention, litigation concerning "anti-*Quill*" laws is not rampant in other states, nor are remote sellers vulnerable to countless

assessments for failing to report use taxes in response to such laws. Pet. at 36. Retailers are able to rebut the presumption of nexus under "click through nexus laws" with simple administrative measures, no litigation has been initiated in response to state notice and reporting laws after *Brohl II*, and "economic nexus" statutes akin to the Act have been largely suspended in response to court challenges. *E.g.*, *Ind. Dep't of Revenue v. Wayfair Inc.*, Ind. Sup. Ct., Marion Cnty. No. 49D01-1706-PL-025946; *Am. Catalog Mailers Ass'n v. Tenn. Dep't of Revenue*, Tenn. Chan. Ct., Davison Cnty. No. 17-307-IV ("Tenn. Action"). There is not a crisis in the lower courts requiring precipitous action.

There are, however, a handful of pending suits in which the issue of use tax compliance in the Internet era is likely to be developed. In Tennessee, the Department of Revenue has pursued discovery in order to defend its new "economic nexus" regulation in response to a *Quill* challenge. *See* Tenn. Action, Memorandum in Support of Motion to Compel (June 30, 2017). In Massachusetts, the Department of Revenue supported with regulatory findings and a public comment process its regulation requiring sales tax reporting by Internet sellers. *See* 830 CMR 64H.1.7. A challenge to the Massachusetts rule is underway in Virginia circuit court. *See Crutchfield Corp. v. Harding*, Vir. Cir. Ct., Albemarle Cnty. No. CL17001145-00. In Alabama, the parties have served competing expert reports and conducted expert depositions in connection with the Department's effort to enforce its avowed "anti-*Quill*" rule against Newegg. *See* Ala. Tax Tribunal No.

S 16-613. These cases present opportunities for a properly developed record to address the continuing vitality of *Quill* in the Internet era, in sharp contrast to this appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE S. ISAACSON
Counsel of Record
MARTIN I. EISENSTEIN
MATTHEW P. SCHAEFER
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
(207) 786-3566
gisaacson@brannlaw.com
meisenstein@brannlaw.com
mschaefer@brannlaw.com
Counsel for Respondents

December 7, 2017

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

REPLY BRIEF

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
DEPARTMENT OF REVENUE
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

Ronald A. Parsons, Jr.
JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP
101 S. Main Ave.
Sioux Falls, SD 57104
(605) 338-4304

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

I. This Case Is Properly Presented 2

II. This Case Presents A Constitutional Question For This Court, Not Congress 7

III. Respondents' Background, "Factual" Arguments Are Overstated 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 3

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 3

Complete Auto Transit Inc. v. Brady,
430 U.S. 274 (1977) 5, 8

Comptroller v. Wynne,
135 S. Ct. 1787 (2015) 1, 6

D.H. Holmes Co. v. McNamara,
486 U.S. 24 (1988) 12

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) 1, 2

DMA v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 1, 2, 7, 12

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 2

Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017) 3

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Rodriguez de Quijas v. Shearson/Am. Express Inc.,
490 U.S. 477 (1989) 4

Other Authorities

Scott Drenkard & Nicole Kaeding, Tax Found., State and Local Tax Rates in 2016 (Mar. 9, 2016), https://taxfoundation.org/state-and-local-sales-tax-rates-2016/ 11

Jeffrey Eisenach & Robert Litan, *Uncollected Sales Tax on Electronic Commerce* (Feb. 2010) 9, 10

Larry Kavanagh & Al Bessin, *The Real World Challenges in Collecting Multi-State Sales Tax for Mid-Market Online and Catalog Retailers* (Sept. 2013), http://truesimplification.org/wpcontent/uploads/Final_Embargoed-TruST-COI-Paper-.pdf 12

Marketplace Fairness Act of 2013, S. 743, 113th Cong. 8

NetChoice, Our Mission, https://netchoice.org/ (last visited Dec. 20, 2017) 10

No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017) 8

Remote Transactions Parity Act, H.R. 2193, 115th Cong. (2017) 8

True Simplification of Taxation Coalition, About, http://truesimplification.org/about (last visited Dec. 20, 2017) 11

U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2012* (Feb. 15, 2013), https://www2.census.gov/retail/releases/historical/ecomm/12q4.pdf 10

REPLY

Several Justices of this Court have criticized *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), or its doctrinal underpinnings. *See, e.g.*, *Direct Mktg. Ass'n (DMA) v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring); *Comptroller v. Wynne*, 135 S. Ct. 1787, 1809, 1811 (2015) (Scalia, J., and Thomas, J., dissenting); *DMA v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Accordingly, when Justice Kennedy called for vehicles to reconsider *Quill*'s sales-tax-only, physical-presence rule, South Dakota answered. The vehicle it pursued is not a "manufactured" case that "manipulated" the courts or respondents (*contra* Opp. 4, 6); it is a clean vehicle that isolates the precise Question Presented without introducing extraneous issues or case-specific factual disputes. The State's declaratory judgment action will immediately resolve the parties' rights and obligations, and the unique features of South Dakota's legislation and litigation were provided for taxpayers' benefit—to spare them unnecessary costs and interim compliance burdens while the Question Presented made its way to this Court. That South Dakota took such care to protect respondents and avoid freighting this case with ancillary issues is a reason to grant certiorari, not deny it.

Meanwhile, the overwhelming *amicus* participation confirms that now is the time to reconsider *Quill*, and this is the vehicle to do it. Taxpayer groups (including one that has never supported an enforcement effort, *see* Tax Found. Br. 2), thirty-seven disinterested tax and economics professors, affected businesses, and Members of Congress have called for this Court's review. Even the six *amici* supporting respondent

confirm this case's importance. Yet while Justice Kennedy called it "unwise to delay [reconsidering *Quill*] any longer," 135 S. Ct. at 1135, respondents hope to delay indefinitely. So, for example, while they suggest there may be better vehicles in other States, Opp. 37-39, all those States (and many more) endorse certiorari here. *See* Colo. Br. 20.

Respondents' arguments are not really case- or record-specific—they follow from the nature of any litigation that challenges existing precedent. In reality, this case's summary-judgment posture is perfectly suited to the narrow question whether *Quill*'s physical-presence rule should be abrogated; respondents are just trying to delay the end of their "judicially sponsored ... 'tax shelter.'" *DMA*, 814 F.3d at 1150-51 (Gorsuch, J., concurring). Meanwhile, *Quill* causes daily harms to state treasuries, communities, and interstate commerce itself. It is time it washed away. *See id.*

I. This Case Is Properly Presented.

Respondents clothe objections about the record in vague justiciability concerns, Opp. 12-13, but neither the underlying record-related complaints nor their jurisdictional window-dressing have any substance.

1. First, this case in no way seeks an "advisory opinion." *Contra* Opp. 5, 13. Article III denies "federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). But the declaratory judgment sought here will immediately affect these litigants' rights: If the State's suit prevails, respondents must start collecting tax the next day. This is a prototypical "case or controversy."

That conclusion is unaffected by the State's candid acknowledgement of respondents' *Quill* defense below. This Court has recently granted petitions identical in posture, over similar objections about their factual records. *See, e.g.*, *Janus v. AFSCME*, No. 16-1466, Madigan Opp. 5, 7-8; *Friedrichs v. Cal. Teachers Ass'n.*, No. 14-915, Harris Opp. 6, 12. Unlike in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), petitioner did not seek voluntary dismissal; instead, *respondents* sought summary judgment—and won—precisely because of *Quill*. *Contra* Opp. 14 & n.5. Both the posture and record necessarily follow from respondents' summary-judgment motion and *Quill*'s bright-line rule.[1]

Respondents so recognize by admitting that their "advisory opinion" theory is, essentially, that this "Court lacks the power to offer opinions on assumed ... facts." Opp. 12. The rule is the opposite: Every case where this Court grants certiorari after dismissal or summary judgment requires it to "*assume* th[e] veracity" of a party's allegations. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added). In fact, the kind of isolated legal question appropriate for certiorari is often best presented on summary judgment, precisely because that posture makes contested facts immaterial. So too here.

2. Indeed, to the extent respondents' real complaint is simply that this case is a poor vehicle because

---

[1] *ASARCO Inc. v. Kadish* would answer any colorable justiciability concerns anyway. *See* 490 U.S. 605, 617-24 (1989) (holding normal Article III requirements inapplicable on certiorari to state court).

it lacks a factual record (Opp. 13-17, 38-39), that argument is unavailing or backwards.

First, it ignores the procedural consequences of respondents' own summary-judgment request. The South Dakota Legislature made clear findings regarding all the issues respondents now dispute, Pet.App. 22a-24a, and the State's complaint and briefing focused on them.[2] Respondents nonetheless sought summary judgment *without* contesting those facts because they themselves believed them immaterial to their *Quill* defense. *See* Opp. A1-A3. And they were right: So long as *Quill*'s bright-line, physical-presence rule remains, the only material fact is respondents' lack of physical presence. The State was thus compelled to acquiesce when respondents sought summary judgment, particularly given this Court's instruction to "leav[e] to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989).

But this only highlights the narrow Question Presented and the extreme nature of "*Quill*'s sales-tax-only, physical-presence requirement." Pet. i. Respondents' own motion proves that, *even assuming* all the facts the Legislature found are true, the State cannot prevail under *Quill*. No other case can or should have a different factual record precisely because, as respondents themselves (correctly) believed, *Quill* makes additional facts irrelevant.

Respondents also get it backwards in complaining that this case does not present retroactivity concerns

---

[2] *See* D.S.D. Dkt. #16-3019, Doc. 1, Exhibit A (complaint); Doc. 27 (summary judgment response).

that future cases might, Opp. 34-36, or fails to develop a record regarding compliance costs for (all other) businesses throughout the Nation. Opp. 13-17. Even if such issues could have been developed (somehow) in the record below, it *is* a virtue of this petition (*contra* Opp. 16) that it concerns only the bright-line, physical-presence rule, and reserves for lower courts the case-specific arguments of any "small [or] medium-sized companies" (Opp. 2) who claim to be unreasonably burdened by States that—*unlike* South Dakota—might impose sales-tax collection duties on smaller businesses, or do so retroactively. Even respondents may argue on remand that, per *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 278 (1977), "undue burdens exist in fact" for them under South Dakota's law, notwithstanding their huge size and present collection activities in much more complex States. *See* Opp. 32. Helpfully, however, such case-specific arguments do not affect the Question Presented here.

The "record facts" respondents now say they want developed are further irrelevant because this Court does not decide issues of nationwide import by relying on case-specific records. This Court cannot evaluate *Quill*'s vitality by relying on the fact-findings of one state tax judge on a "fact-intensive" national issue, resolved by weighing dueling experts' credibility or the like. *Contra* Opp. 15, 38. Indeed, this Court *avoids* cases that rest on a case-specific, factbound record, not the other way around.

In reality, any facts bearing on this case are not adjudicative facts of the kind elucidated in an adversary trial record, but *legislative* facts, on which the judgment of the State's legislature is presumptively correct. That dormant commerce clause doctrine

implicates such legislative facts may be a point against it. *See Wynne*, 135 S. Ct. at 1810 (Scalia, J., dissenting) (criticizing dormant commerce clause cases that "require[] us to balance the needs of commerce against the needs of state governments" because "[t]hat is a task for legislators, not judges."). But it cannot be a reason to deny the only venue for reconsidering a doubtful precedent to the State whose legislative judgment is set aside.

It should also be unacceptable *to respondents themselves* to force States to produce a detailed trial record to obtain review in a case like this. Respondents seem to want the State to have put them through the expense of an assessment, audit, full-blown discovery, dueling expert reports, and a tax-court trial, notwithstanding the immateriality of all this to any final judgment below. *See* Opp. 16, 18 n.6, 38-39. That the State's procedures were too easy on taxpayer-respondents would be an ironic ground for denying certiorari.

Indeed, the underlying theme of respondents' opposition is backwards. Respondents call South Dakota's statutory process "an unprecedented manipulation of the court system," resulting in an "oddly-manufactured" appeal, where South Dakota acknowledged from the outset that its case "require[d] the abrogation of *Quill*." Opp. 4, 6, 13. But these procedures and litigation positions were all undertaken *for taxpayers' benefit*—it spared them unnecessary expenses and difficult decisions about interim compliance, as the legislature carefully explained. Pet.App. 23a-24a. Meanwhile, South Dakota acknowledged *Quill*'s validity below because that's what this Court *told it to do*. *See supra* p.4. This Court certainly should not signal to States that this solicitousness towards defendants and

the doctrines that currently protect them is somehow a bad idea.

Given the above, it is perhaps unsurprising that, in the other cases respondents suggest might provide superior vehicles, Opp. 38, they or their (mutually represented) *amici* have resisted the discovery they now say they wanted here. *See, e.g.*, Addendum 1a-3a & n.5 (discovery opposition denying relevance of all facts to this constitutional issue and seeking to *delay that case* pending disposition of this petition). In any event, as various *amici* explain (Retail Litig. Ctr. Br. 19-22; Nat'l Gov. Ass'n Br. 1-2), the multiplying *Quill*-related cases in other States are not only lagging behind this one, but come with jurisdictional and other issues that could confound review. The States pressing these other challenges thus ask, unanimously, that this Court take *this* case. Colo. Br. 20. It should do so; no other vehicle—let alone better vehicle—is coming soon.

II. This Case Presents A Constitutional Question For This Court, Not Congress.

For 25 years, Congress has not responded to *Quill*'s explicit invitation for action. Respondents nonetheless try to avoid this Court's review by promising that Congress can still fix *Quill*'s problems, pointing to an *amicus* brief from the House Judiciary Chairman for support. Opp. 1, 2, 5, 10-12. Respondents' goal is not congressional *action*, however; they seek only to maintain the status quo, which is a constitutional default rule under which congressional *in*action preserves their "judicially sponsored ... 'tax shelter.'" *DMA*, 814 F.3d at 1150 (Gorsuch, J., concurring). It is therefore notable that the many bills respondents identify as being "tirelessly" pursued (at 10)

have never received a vote—or even a *hearing*—in the House Judiciary Committee.[3] That includes the Marketplace Fairness Act, which passed the Senate with bipartisan support. *See* Professors' Br. 4-5. As this experience shows, this case is not about *Congress's* power at all; it is about whether *Quill* has unduly empowered those on the side of doing nothing, including respondents and their political allies.

Notice, for example, that despite respondents' protestations, Opp. 5, this case cannot "thwart" anything in Congress. Whatever this Court says about *Quill*, Congress will retain its authority under the Commerce Clause to affirmatively enact any nationwide policy it chooses. Congress can also solve, at any time, any problems it perceives in the States' implementation of collection obligations. Even without *Quill*, the courts will retain the ability to police unduly burdensome obligations under *Complete Auto*, and Congress will retain *all* the options it has now. The only change is that this Court will return to the States the initial policy decision *it* took away in *Quill*.

That respondents' congressional *amici* have taken the time to urge denial here nonetheless demonstrates the *practical* importance of the constitutional question only this Court can decide. Respondents and their *amici* know that, in practice, the default rule this Court set in *Quill* makes all the difference. So long as *Quill* is in place, the States must beg Congress for the

---

[3] *See* H.R. 2193 (Remote Transactions Parity Act), https://goo.gl/ovuRGj; H.R. 2887 (No Regulation Without Representation Act), https://goo.gl/mjuEdv; S. 743 (Marketplace Fairness Act of 2013), https://goo.gl/fu9SFm. (For each, "last action" is referral to subcommittee).

taxing power that properly belongs to them under the Constitution, and that creates inordinate power at the many "veto points" in our constitutional design—among them, the House Judiciary Committee. *See* Professors' Br. 4 (explaining that, for similar reasons, Congress cannot be deemed to have "acquiesced" to *Quill* rule). Logic and twenty-five years of experience confirm that anyone genuinely seeking a congressional policy solution should welcome *Quill*'s reconsideration, not oppose it.

Relatedly, *even if* Congress suddenly reverses its quarter-century of inaction, *Quill*'s federalism harms will not be erased. Instead, whatever congressional compromise emerges will bear scars from where *Quill* affected negotiations by cutting into State authority. As in *other dormant commerce clause cases* where this Court has reversed its precedent, this is a problem only this Court can fix. *Id.* (collecting cases overruling dormant commerce clause precedents, and explaining limited force of *stare decisis* in this context).

III. Respondents' Background, "Factual" Arguments Are Overstated.

Respondents suggest that "small and medium-size" businesses will be overborne by the complexities of collecting tax in "16,000+ jurisdictions," and question the scale of the problem facing cash-strapped States. These "factual" concerns are insubstantial.

Begin with respondents' arguments attacking the evidence Justice Kennedy himself used to identify the increasing problem facing the States. Opp. 25-29. Respondents suggest this evidence was "debunked" by another study. Opp. 29 (citing Jeffrey Eisenach & Robert Litan, *Uncollected Sales Tax on Electronic*

Commerce (Feb. 2010), https://goo.gl/m9xN9U. That paper was avowedly paid for by respondents' *amicus* NetChoice, whose "mission" is "to protect e-commerce" from "taxes on ... goods through the Internet," https://netchoice.org/, and subsequent U.S. Census Bureau measurements have proven its "projections" quite understated.[4] But even that paper estimated uncollected sales tax revenues at *$3.9 billion* nationally in only 2008. Eisenach & Litan at ii. Respondents themselves calculated South Dakota's loss at $21 million annually, and do not dispute that this equates to $900 million in California. *See* Pet. 14. Any dispute here lies at the margins; the parties and their sources *agree* the problem is huge.

Meanwhile, the argument that this problem is shrinking because of Amazon's voluntary compliance is doubly unacceptable. First, a company's voluntary compliance is no reason to abandon concerns about its competitors; we would not abandon mandatory health inspections at fast-food restaurants just because McDonald's is voluntarily scheduling them. Second, it is untenable to set up a situation where States are dependent on Amazon's *voluntary* remittance for a large chunk of their annual budgets. What happens if, faced with some disfavored policy, Amazon changes views?

Respondents' "16,000+" jurisdictions number and related arguments are similarly meritless. Even

---

[4] In 2010, this paper predicted $164 billion in retail e-commerce by 2012; the Census found it was over $224 billion. Eisenach & Litan at 24; U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2012*, at 1 (Feb. 15, 2013), https://www2.census.gov/retail/releases/historical/ecomm/12q4.pdf.

accepting this figure, it shows that the number of taxing "jurisdictions" has only doubled in the last 25 years, while the change in computing power from *Quill*'s *pre-Internet* period is far more profound. As evidenced by Systemax's overnight compliance, Pet. 30, in the age of cloud computing, the marginal cost of adding additional tax jurisdictions beyond 6,000 (or even, say, 50) is functionally zero.

The 16,000-jurisdictions number is also substantially overstated; it counts separate "jurisdictions" wherever rate variations are theoretically possible, even in the many States (like South Dakota) where sales-tax collection and audit functions are centralized at the State level, and sales-tax bases have been harmonized across localities. *Compare* Opp. 27 & n.9, *with* https://taxfoundation.org/state-and-local-sales-tax-rates-2016/ ("Forty-five states and the District of Columbia collect statewide sales taxes."). It also ignores that out-of-State collectors can use the uniform, Streamlined system in South Dakota and many other States, *see* Streamlined Sales Tax Br. 7-8, and qualify for special, simplified treatment in others. Respondents' only source suggesting that compliance is costly comes from a lobbying organization whose sole purpose is "[a]dvocating that Congress oppose any federal legislation that would overturn the physical presence standard in *Quill*," http://truesimplification.org/about and even this study (over)estimates annual software costs at only $25,000-$50,000—or 0.1-0.2% of sales for the smallest national retailer likely to meet South Dakota's threshold. It also acknowledges that most States will (like South Dakota) "provide 'free' software

to retailers" if it allows them to obtain collection compliance.[5]

Respondents also take (widely varying) numbers about compliance difficulties from several different companies all *offering to help*. Opp. 26. Those companies have an obvious incentive to upsell the complexity involved. But, more importantly, their number and availability demonstrate that lots of competing companies can supply the necessary technology at reasonable cost. Respondents simply don't want to do their "fair share," *see D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)—not because collection is too costly, but because it costs them their sales-tax advantage.

Finally, respondents never explain why these expenses only matter for sales-tax collection. For example, the alternative "tools" respondents now embrace to encourage compliance, Opp. 36, could also be enacted in all alleged 16,000+ jurisdictions, even if they were equally costly. *See DMA*, 814 F.3d at 1149 (Gorsuch, J., concurring) ("*Quill* does nothing to forbid states from imposing ... duties of comparable severity."). Meanwhile, as the professors explain (at 17-19), relying on these tools to increase use-tax compliance is far less efficient than asking sellers to collect, and so imposes a greater burden on interstate commerce—the very thing this doctrine is meant to avoid. Respondents' various "factual" disputes thus do not concern burdens on interstate commerce as such; they are

---

[5] Larry Kavanagh & Al Bessin, *The Real World Challenges in Collecting Multi-State Sales Tax for Mid-Market Online and Catalog Retailers* 2, 3 (Sept. 2013), http://truesimplification.org/wpcontent/uploads/Final_Embargoed-TruST-COI-Paper-.pdf.

merely pleas to continue tax-sheltering *only* their business models as long as possible.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Ronald A. Parsons, Jr.
JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP
101 S. Main Ave.
Sioux Falls, SD 57104
(605) 338-4304

December 20, 2017

ADDENDUM

ADDENDUM

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE 20TH JUDICIAL DISTRICT, DAVIDSON COUNTY PART IV, AT NASHVILLE

AMERICAN CATALOG MAILERS ASSOCIATION and NETCHOICE, Plaintiffs, vs. TENNESSEE DEPARTMENT OF REVENUE and DAVID GERREGANO, In his Capacity as the Commissioner of the Tennessee Department of Revenue, Defendants.	No. 17-307-IV

PLAINTIFFS' RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

Plaintiffs American Catalog Mailers Association ("ACMA") and NetChoice (together, "the Plaintiffs"), hereby oppose the Motion to Compel ("Motion"), filed June 30, 2017, by the Defendants, the Tennessee Department of Revenue ("Department") and Commissioner David Gerregano (together, "the Defendants").

The reasons for denying the Defendants' Motion are manifold. The Defendants' Motion lacks merit because (1) it seeks from the Plaintiffs documents and information about non-parties to the case (the Plaintiffs' members) that the Plaintiffs simply do not possess; (2) the information requested is not relevant to

this facial constitutional challenge, in which the Plaintiffs request a declaration that the plain terms of Tenn. Comp. R. & Regs. 1320-05-01-.129(2) ("Rule 129(2)") are unconstitutional as a matter of law; and (3) the Defendants demand member-specific information to support a rule that the General Assembly has recently prohibited the Department . . . .

* * *

---

[5] The Defendants attach to their Memorandum a brief filed in the South Dakota Supreme Court by three individual retailers who have defended, successfully at the trial court, a suit brought against them by the state under a similar law enacted in South Dakota in 2016. *See* Memorandum, Ex. G. In that case, the individual retailers assert that the state had improperly failed to make a record with regard to the State of South Dakota's suit seeking a declaration that the statute *as-applied to the specific retailers* in question is constitutional. In this case, in sharp contrast, the Plaintiffs have brought a *facial challenge to the terms of Rule 129(2) as written.* The distinction demonstrates precisely why the Defendants' discovery requests are not relevant in this case.

The South Dakota suit is of significance to this case, however, in that the law at issue there reflects a similar standard for sales tax collection—nexus imposed on retailers without a physical presence in the state based upon a minimum level of sales to consumers in the state. The case is now fully-briefed and pending before the South Dakota Supreme Court. The state has, moreover, indicated its intention to petition the United States Supreme Court for review of the case. It would be appropriate for this Court to defer action pending resolution of the South Dakota appeal, particularly where the General Assembly has expressed an interest in reviewing the constitutionality of Rule 129(2) before allowing the Defendants to enforce it.

* * *

CONCLUSION

For the foregoing reasons, the Defendants' Motion to Compel should be denied. The Court should, instead, evaluate the best way to proceed in this action, in light of the unusual circumstances and posture in which this matter comes before the Court.

DATED this 24th day of July, 2017.

WALLER LANSDEN DORTCH & DAVIS, LLP

/s/

Charles A. Trost (#4079)
G. Michael Yopp (#02766)
Christopher A. Wilson (#24804)
Nashville City Center, Suite 2700
511 Union Street
Nashville, TN 37219-1750
Telephone: (615) 244-6380
Facsimile: (615) 244-6804
Email: charlie.trost@wallerlaw.com
mike.yopp@wallerlaw.com
chris.wilson@wallerlaw.com

and

BRANN & ISAACSON
George S. Isaacson (Maine Bar #1878*)
Matthew P. Schaefer (Maine Bar #7992*)
184 Main Street; P.O. Box 3070
Lewiston, ME 04243-3070
Telephone: (207) 786-3566
Facsimile: (207) 783-9325
Email: gisaacson@brannlaw.com
mschaefer@brannl.aw.com

* *Pro Hac Vice*

Attorneys for Plaintiffs, American Catalog Mailers Association and NetChoice

ADDENDUM

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE 20TH JUDICIAL DISTRICT, DAVIDSON COUNTY PART IV, AT NASHVILLE

AMERICAN CATALOG MAILERS ASSOCIATION and NETCHOICE, Plaintiffs, vs. TENNESSEE DEPARTMENT OF REVENUE and DAVID GERREGANO, In his Capacity as the Commissioner of the Tennessee Department of Revenue, Defendants.	No. 17-307-IV

PLAINTIFFS' RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

Plaintiffs American Catalog Mailers Association ("ACMA") and NetChoice (together, "the Plaintiffs"), hereby oppose the Motion to Compel ("Motion"), filed June 30, 2017, by the Defendants, the Tennessee Department of Revenue ("Department") and Commissioner David Gerregano (together, "the Defendants").

The reasons for denying the Defendants' Motion are manifold. The Defendants' Motion lacks merit because (1) it seeks from the Plaintiffs documents and information about non-parties to the case (the Plaintiffs' members) that the Plaintiffs simply do not possess; (2) the information requested is not relevant to

this facial constitutional challenge, in which the Plaintiffs request a declaration that the plain terms of Tenn. Comp. R. & Regs. 1320-05-01-.129(2) ("Rule 129(2)") are unconstitutional as a matter of law; and (3) the Defendants demand member-specific information to support a rule that the General Assembly has recently prohibited the Depar[illegible]ment . . . .

* * *

---

[5] The Defendants attach to their Memorandum a brief filed in the South Dakota Supreme Court by three individual retailers who have defended, successfully at the trial court, a suit brought against them by the state under a similar law enacted in South Dakota in 2016. *See* Memorandum, Ex. G. In that case, the individual retailers assert that the state had improperly failed to make a record with regard to the State of South Dakota's suit seeking a declaration that the statute *as-applied to the specific retailers* in question is constitutional. In this case, in sharp contrast, the Plaintiffs have brought a *facial challenge to the terms of Rule 129(2) as written.* The distinction demonstrates precisely why the Defendants' discovery requests are not relevant in this case.

The South Dakota suit is of significance to this case, however, in that the law at issue there reflects a similar standard for sales tax collection—nexus imposed on retailers without a physical presence in the state based upon a minimum level of sales to consumers in the state. The case is now fully-briefed and pending before the South Dakota Supreme Court. The state has, moreover, indicated its intention to petition the United States Supreme Court for review of the case. It would be appropriate for this Court to defer action pending resolution of the South Dakota appeal, particularly where the General Assembly has expressed an interest in reviewing the constitutionality of Rule 129(2) before allowing the Defendants to enforce it.

* * *

CONCLUSION

For the foregoing reasons, the Defendants' Motion to Compel should be denied. The Court should, instead, evaluate the best way to proceed in this action, in light of the unusual circumstances and posture in which this matter comes before the Court.

DATED this 24th day of July, 2017.

WALLER LANSDEN DORTCH & DAVIS, LLP

/s/

Charles A. Trost (#4079)
G. Michael Yopp (#02766)
Christopher A. Wilson (#24804)
Nashville City Center, Suite 2700
511 Union Street
Nashville, TN 37219-1750
Telephone: (615) 244-6380
Facsimile: (615) 244-6804
Email: charlie.trost@wallerlaw.com
mike.yopp@wallerlaw.com
chris.wilson@wallerlaw.com

and

BRANN & ISAACSON
George S. Isaacson (Maine Bar #1878*)
Matthew P. Schaefer (Maine Bar #7992*)
184 Main Street; P.O. Box 3070
Lewiston, ME 04243-3070
Telephone: (207) 786-3566
Facsimile: (207) 783-9325
Email: gisaacson@brannlaw.com
mschaefer@brannl.aw.com

* *Pro Hac Vice*

Attorneys for Plaintiffs, American Catalog Mailers Association and NetChoice

Supreme Court, U.S.
FILED
NOV 2 - 2017
OFFICE OF THE CLERK

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC.,
AND NEWEGG, INC.,
Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of South Dakota

BRIEF OF THE AMERICAN BOOKSELLERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

OREN TEICHER
AMERICAN BOOKSELLERS
ASSOCIATION
333 Westchester Ave,
Suite 202
White Plains, NY 10604

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTION PRESENTED

Should *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), be overruled?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *Quill* is an Existential Threat to Independent Bookstores. 4

II. The Particular Characteristics of Bookstores Make Them Uniquely Vulnerable to *Quill*'s Discriminatory Treatment. 9

III. Individual Booksellers' Experiences Confirm *Quill*'s Negative Effect On Independent Bookstores. 11

IV. This Court Should Act, Because Congress Has Not. 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 1

LEGISLATIVE MATERIALS

Main Street Fairness Act, H.R. 5660, 111th Cong. (2010) 16

Marketplace Fairness Act, S. 1832, 112th Cong. (2011) 16

Streamlined Sales and Use Tax Act, S. 1736, 108th Cong. (2003) 16

Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong. (2003) 16

OTHER AUTHORITIES

Xinxin Li et al., *Price Dispersion and Loss-Leader Pricing: Evidence from the Online Book Industry*, 59 Mgmt. Sci. 1290 (2013), https://www.researchgate.net/publication/256030627_Price_Dispersion_and_Loss_Leader_Pricing_Evidence_from_the_Online_Book_Industry 10

INTEREST OF *AMICUS CURIAE*[1]

The American Booksellers Association ("ABA") is a 117-year-old national, not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA's core members are key participants in their communities' local economy and culture, and to assist them ABA creates relevant programs; provides education, information, business products, and services; and engages in public policy and industry advocacy. ABA actively supports and defends free speech and the First Amendment rights of all Americans. ABA represents more than 1,700 locally owned independent bookstores operating in more than 2,300 locations nationwide. Approximately 400 ABA member bookstores participate in an association-sponsored e-commerce program, IndieCommerce, through which they sell physical books, e-books, tickets to author events and other items, www.indiecommerce.com.

ABA has an interest in this case because its members, independent bookstores, are adversely affected by the physical-presence rule set forth in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Under *Quill*,

---

[1] Pursuant to this Court's Rule 37.2(a), ABA states that both Petitioner and Respondents submitted blanket consents to *amicus* briefs. Those blanket consents were docketed more than 10 days before the due date of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

if a customer purchases a book from a bricks-and-mortar bookstore in a state with a sales tax, the bookstore is legally obligated to collect the tax. But if a customer purchases the same book from an online bookstore without a physical presence in that state, the online bookstore cannot be subjected to the same legal obligation—which means, in practical terms, that the customer will not pay sales tax. This artificial imbalance creates a powerful incentive for customers to buy books online rather than from their local bookstore, and as such, causes significant competitive harm to those bookstores. ABA therefore has a strong interest in this case, which holds the promise of restoring a level playing field and creating competitive balance between bricks-and-mortar and online bookstores.

SUMMARY OF ARGUMENT

The Court should overrule *Quill*. *Quill* is deeply harmful to bricks-and-mortar retail stores. *Quill* has yielded the notorious practice of "showrooming," where a customer browses in a bricks-and-mortar store, and then buys products online using a smartphone in order to avoid paying sales tax. That practice causes profound harm to independent bookstores, which have low profit margins in the best of times and cannot compete on price with online retailers that take advantage of *Quill*'s artificial competitive imbalance.

In light of the characteristics of the bookselling industry, *Quill* has a particularly deleterious effect on independent bookstores. Books are the exact sort of product that customers would buy using an app in order to save money on sales tax. First, books are extremely easy to find on the Internet. Second, books purchased

online are perfect substitutes for books purchased in stores. Third, consumers who purchase books online are charged nothing for shipping, or, at most, a minimal amount. Fourth, customers rarely mind the delay in receiving a book shipped to them by an online retailer. Fifth, online retailers often sell books below cost, making it even more difficult for independent bookstores to compete. As a result of these factors, *Quill* poses an existential threat to independent bookstores.

The Court should not wait for Congress to act—multiple bills have been introduced that would overrule *Quill*, but all the bills have stalled. Nor should the Court leave this issue to state governments—state statutes intended to mitigate *Quill*'s effects have yielded unintended consequences. Federal action is required, and that federal action should come from this Court.

ARGUMENT

ABA agrees fully with all of the legal and practical arguments in South Dakota's petition for certiorari. As South Dakota persuasively explains, *Quill*'s physical-presence rule is indefensible from both a doctrinal and practical perspective. Doctrinally, *Quill* is inconsistent with decades of this Court's dormant commerce clause jurisprudence: a "precedential island [] ... surrounded by a sea of contrary law." Pet. 3 (quoting *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring)). Practically, *Quill* harms both local governments and bricks-and-mortar businesses, and results in inefficient allocation of resources and economic waste. Pet. 12-20. ABA also agrees that *stare decisis* considerations do not warrant retaining *Quill*, in

view of the drastically changed circumstances since *Quill* was decided. Pet. 27-35.

ABA submits this brief to emphasize the harmful effects of *Quill* on independent bookstores. Given that virtually any product can be purchased online today, virtually all retailers are adversely affected by *Quill*. But *Quill* is particularly harmful to independent booksellers, in view of the unique characteristics of the bookselling industry that create an incentive for customers to buy books online as a way of avoiding sales tax. Put simply, the artificial competitive imbalance created by *Quill* is an existential threat to many independent booksellers. The Court should grant certiorari and overrule *Quill*.

I. *Quill* is an Existential Threat to Independent Bookstores.

ABA's bookstore members are independent businesses that are pillars of their communities' local economy and culture. For generations, independent bookstores have brought books to young and old. Independent bookstore owners carefully curate books, choosing titles of greatest interest and relevance to their local communities. Their staff provide invaluable assistance to their customers, listening to their interests and suggesting books they might find appealing. And independent bookstores provide more than just books. They also offer events, such as book signings and storytelling for young children, that support local authors and promote literacy in their communities.

To survive, independent bookstores must sell books. And for generations, independent bookstores have sold

books and thrived. Customers who came to independent bookstores to browse for books would buy them, thus supporting thousands of independent bookstores across the United States.

Even in the age of e-commerce, entrepreneurs continue to open and expand independent bookstores. There has been a 35 percent increase in the number of independent bookstore locations since 2009. Existing stores are opening in new locations, and established stores are being successfully sold to new owners, often younger owners as a new generation of booksellers enters the industry. Book sales have also increased for the past four years, including an eight percent increase in 2015.

But all is not rosy. As smartphones became increasingly ubiquitous, and as readers quickly became more accustomed to buying products online, this Court's decision in *Quill* has posed, and continues to pose, a threat to independent bookstores. With the advent of smartphones, many customers soon realized that, instead of buying a book from an independent bookstore and paying tax, they could buy the same book from an online retailer using their smartphones and avoid paying tax. As a result of this imbalance—which is entirely a product of this Court's decision in *Quill*—online retailers that do not collect and remit sales tax for in-state purchases have a significant competitive advantage, which customers have exploited to the detriment of independent bookstores.

Of course, the widespread belief that it is *legal* to purchase products online without paying sales tax is wrong. As South Dakota explains, the tax is still owed

as a use tax; *Quill* merely prevents the State from making the online service collect the tax. Pet. 28. Yet despite their best efforts, it is notoriously difficult for state revenue departments to collect use taxes from people who purchase products online. As such, online services obtain their competitive advantage by facilitating widespread tax evasion.

The practice of checking the price of a book or other retail item (as many independent bookstores offer a wide array of ancillary products) in a store and then buying it on a smartphone became so common it even spurred the creation of a new verb: "showrooming." In an environment where online retailers do not collect sales tax, a customer comes to a bookstore. He browses books that were carefully curated by the bookstore owner. He receives advice from store staff and enjoys a cup of coffee at the store's expense. His children enjoy a storytelling session. But after choosing the books he or his children want to read, he does not buy them from the bookstore. Instead, to save money, he pulls out his smartphone and buys his books from an online store, such as those operated by Respondents. Thus, the bookstore is transformed into a "showroom"—where customers can decide what books they want, so they can buy them more cheaply from an online seller.

When *Quill* was decided in 1992, this problem barely existed. Mail-order booksellers did exist in 1992, but purchasing books from such booksellers was cumbersome. A customer wishing to avoid sales tax would have had to write down the names of the books he wanted, using pencil and paper, and then go home and telephone mail-order booksellers until he found one or

more booksellers who had the books in stock. Moreover, the customer would potentially face shipping costs that exceeded the sales tax saved, especially if no single bookseller carried all the books that the customer wanted to buy. Few customers would jump through those hoops; most would simply buy the books from the bookstore.

Circumstances have changed. Today, it literally can be faster to purchase books from a smartphone app than to wait in line for the cash register. Many such apps store the user's address and credit card number; thus, searching for a book and ordering it can take 30 seconds or less. Further, "free shipping" from online stores is ubiquitous—and it is trivially easy to verify that the cost of purchasing a book online, tax-free, is lower than the cost of purchasing a book from a retail store and paying sales tax. From the customer's perspective, therefore, there are two, equally easy options for buying a book: buy it from the store, and pay tax, or buy it online, and not pay tax. It is hardly surprising that customers choose the latter option—and hardly surprising that independent bookstores have suffered as a result.

Of course, retail bookstores can lower prices, or offer to cover the cost of sales tax, so as to compete with online sellers. But that simply moves them from the frying pan into the fire. Margins for book sales are notoriously low—in the experience of ABA's members, bottom-line profitability is often no more than two percent. And sales taxes can be very high—in some jurisdictions, 10 percent or higher. Independent bookstores cannot lower their prices by this amount, and still stay in business.

To be clear, ABA is not opposed to online booksellers and does not support any legal obstacles that would inhibit their growth. To the contrary, ABA is a staunch literacy advocate and supports all efforts to bring books to readers. In this spirit, ABA recognizes the important contributions of online booksellers, which allow everyone with an Internet connection—including people in rural or underpopulated areas who do not have access to a local bookstore—to access an almost unlimited array of books. Indeed, most ABA member bookstores have an online presence, and hundreds of ABA member bookstores sell books online. Further, ABA believes that a diverse array of options for buying books is healthy, and welcomes competition in the bookselling market.

But that competition should be fair. Under *Quill*, it is not. *Quill* artificially tilts the playing field by giving online booksellers an arbitrary advantage that they emphatically do not need.

Most importantly, even if bookstores' online competitors were to suddenly collect and remit sales tax in the 45 states that have sales tax, that still would not be an appropriate solution. Given the realities of retailing in the 21st century, if *Quill* is not overturned, it is inevitable that some future retailer will use this 1992 decision to gain a significant and unfair advantage over their bricks-and-mortar competitors.

The Court should overrule this unfair rule and ensure that ordinary market forces—not government-imposed tax arbitrage—determines who wins and who loses in the bookselling market.

II. The Particular Characteristics of Bookstores Make Them Uniquely Vulnerable to *Quill*'s Discriminatory Treatment.

Today, virtually anything can be bought online. As such, *Quill* adversely affects virtually all bricks-and-mortar retailers. But several characteristics of the bookselling market make *Quill* uniquely harmful to independent bookstores.

First, unlike items such as antiques or artworks, books are trivially easy to find on the Internet. In most cases, a simple search for the title and author will pull up the book immediately. Indeed, with modern apps, buying a book using an app is just as easy as buying the book at a physical bookstore's cash register. Thus, even if buying a book online will save only a few dollars in sales tax relative to buying the book from the store, customers will buy the book online—just as if two products were on a store shelf next to each other, one discounted and one at full price, the customer would naturally choose the discounted option.

Second, a book from an online bookstore is a perfect substitute for a book from retail bookstores. The words on each page will be identical no matter who sells the book. As a result, the difference in sales tax may be the decisive factor in where the customer buys the book.

Third, books are small enough that shipping costs are typically less than the cost of sales tax—and often zero. Almost invariably, the shipping costs will be lower than the sales tax saved, thus creating the incentive to buy the book online.

Fourth, books are the type of product for which a customer may be willing to endure the modest delay associated with buying online. Books are unlike goods such as candy bars, which are typically purchased for immediate consumption. People often read books slowly and are willing to wait a few days to obtain them, if the short delay will allow them to save money on sales tax.

Fifth, large online retailers have historically used books as "loss leaders" to persuade book-buyers to come to their sites and purchase other, more expensive items or services. *See* Xinxin Li et al., *Price Dispersion and Loss-Leader Pricing: Evidence from the Online Book Industry*, 59 Mgmt. Sci. 1290 (2013), https://www.researchgate.net/publication/256030627_Price_Dispersion_and_Loss_Leader_Pricing_Evidence_from_the_Online_Book_Industry. As such, bricks-and-mortar retail bookstores already have difficulty competing on price with online retailers. They are thus uniquely vulnerable to the additional competitive harm that results from *Quill*.

As a result, bookstores—more than virtually every other type of retail store—have been negatively impacted by *Quill*. Moreover, as smartphones become more efficient and as buying books from Respondents and other online stores becomes easier, the problem will get even worse. Overruling *Quill* is necessary to ensure that booksellers can compete on a level playing field—and survive.

III. Individual Booksellers' Experiences Confirm *Quill*'s Negative Effect On Independent Bookstores.

Quill harms real booksellers in the real world. Below, ABA presents the testimonials of four booksellers who have been harmed by *Quill* and whose livelihoods may depend on this case.

Bradley Graham, the co-owner of Politics & Prose, in Washington, D.C., has been the victim of the notorious "showrooming" phenomenon:

> One of our biggest concerns at Politics & Prose is showrooming—that is, customers who come into the store, avail themselves of our staff's expertise and recommendations, then leave without buying but instead end up ordering their books online. We regularly see customers using their phone cameras to take pictures of books on our shelves without purchasing those books in the store; very likely, they turn to the web to buy.

Liza Bernard, the co-owner of The Norwich Bookstore, in Norwich, Vermont, similarly describes the harmful effects of *Quill*:

> The Norwich Bookstore has been struggling to level the playing field for years, both on the state and federal level, and we have discovered that the regulations must be nationwide to have any real affect.
>
> Running a retail store in a town that borders a state with no sales tax, we are acutely aware of the 6 percent we collect for Vermont. If we

> purchase from a New Hampshire store and they deliver to us in Vermont, they are required to collect and remit the Vermont sales tax. If we purchase online, for delivery via carrier to the store or the post office, oftentimes the tax is not collected. This favoritism of the giant online retailers directly hurts the business we have worked over 20 years to build. Customers visit the bookstore and then order online to "save" the 6 percent sales tax and pick up their purchase next door at the post office! Not only do we collect the sales tax, we employ our neighbors, support local schools and non-profits, and pay property taxes.
>
> Fair and equitable sales tax collection honors the contribution of local, bricks-and-mortar retail business.

Becky Anderson, the co-owner of Anderson's Bookshops in Naperville, Illinois; Anderson's Toyshop in Downers Grove, Illinois; and Anderson's Bookfair Company in Aurora, Illinois, describes the harm of *Quill* on booksellers and the local community:

> I am a fifth-generation independent small-business owner. Our family has been in business for 142 years in Naperville, Illinois, with a large pharmacy, three retail bookshops, a toyshop, and a large educational book company. We are in four suburbs of the Chicagoland area. We have been collecting sales tax for every taxable item since sales tax was first introduced in our state. That's a lot of support for local, county, and statewide services and general funds. But as soon as the

stores in the cloud starting selling direct to our neighbors and fellow community members we were at a huge disadvantage. Not only were bricks-and-mortar stores losing sales, we were losing sales tax revenue on every item sold from the store in the cloud that could have been sold at a bricks-and-mortar location that we run, but also for thousands of bricks-and-mortar physical locations on the ground. No sales tax was being collected for years; an enormous loss for the state and local communities.

On the ground are stores like mine, paying property taxes, employing locally, circulating dollars in our community, increasing the social capital of our communities by donations, civic involvement, and building a community -- a Main Street.

As more and more empty storefronts appear around the country, our communities are losing out on all of the above. Proving nexus is just not enough. Just because a Cloud retailer has a location in a particular state does not mean they are paying the total tax in a particular community as all of us bricks-and-mortars do. In Illinois, companies like Amazon are only collecting 6 percent, which is the state tax and nothing is coming to local communities, especially those with home-rule sales tax. We were at a 7.5 to 10 percent disadvantage in the communities where we are located. But even after Amazon built warehouses in Illinois we are still at a 1.5 to 4 percent disadvantage.

> A national solution is necessary to ensure that the Cloud stores that do business in every community in this country pay the local rate of sales tax. In Illinois they have just instituted a fee for every community that collects sales tax – a 2 percent fee. Again, local communities are losing out. It would help so much to have Cloud stores collect the full sales tax based on where the sale originated, from the resident who lives in communities like mine.

Robert Sindelar, the managing partner of Third Place Books, in Lake Forest Park, Washington—and ABA's President—explains that he welcomes fair competition with online providers, so long as competition is on a fair playing field:

> As e-commerce grew in popularity from 2000 on, more and more I heard from my fellow booksellers how the outdated *Quill* decision was negatively impacting their stores. For me, it is easy to correlate the struggles of independent bookstores in other states with this sales tax inequity because, ironically, we never had this issue in our state. Amazon is the largest competitor for independent bookstores nationwide, but being headquartered in Washington State, Amazon has always collected and remitted sales tax to the state. Struggles that ABA member bookstores in other states had with sales tax inequity, such as showrooming (tapping a booksellers' brain for that great book and then going online to buy it at Amazon to avoid paying sales tax), were never much of an issue with us in

> Washington State. Indeed, that Seattle itself, the home of Amazon, has close to 20 independent bookstores in the greater Seattle area (much higher per capita than most parts of the country) is one example of how in a fair tax world, e-retailers and bricks-and-mortar can co-exist. This clearly points out that this inequity has a significant and negative impact on stores where remote retailers that compete with bookstores do not collect and remit. This is an inequity that indie bookstores -- and indeed all Main Street retailers -- have done well to overcome, to be sure, but one that they should never have had to face. This is an issue that should be corrected before the next big online retailer hits the market and tries to take advantage of this loophole -- a loophole created by a 1992 decision that made sense prior to the age of e-commerce, but one that needs to be rewritten for retail in the 21st century.

The Court should heed these voices and reconsider the anachronistic and harmful *Quill* rule.

IV. This Court Should Act, Because Congress Has Not.

This Court should not await action from Congress or state governments. It should grant certiorari and overrule *Quill* without delay.

ABA has tried for years to persuade Congress to enact legislation overruling *Quill*, without success. As early as 2000, ABA and other booksellers began making the case to Congress that overruling *Quill* was necessary to ensure a level playing field in retail. Since

then, members of Congress have frequently introduced legislation to overrule *Quill*, but those bills have invariably failed without reaching a vote.

For instance, in 2003, Republican and Democratic members of Congress jointly introduced legislation in both the House and the Senate that would allow states to simplify sales tax, with equal tax treatment between local merchants and remote sellers. *See* H.R. 3184, 108th Cong. (2003); S. 1736, 108th Cong. (2003) (Streamlined Sales and Use Tax Act). But that bill failed to come to a vote.

In 2010, Congress once again took up the sales tax fairness mantle in an effort to pass federal legislation. The proposed bill, the Main Street Fairness Act (H.R. 5660, 111th Cong. (2010)), would have authorized states to require remote retailers to collect and remit sales tax on orders in their states. As Representative Delahunt, who introduced the bill, explained, the bill was "designed to help states retrieve billions in sales tax revenues that are owed but currently going uncollected while providing long overdue relief to Main Street businesses by restoring fairness and competition to the marketplace." Two years later, the Senate convened a committee hearing to address another proposed bill, S. 1832, 112th Cong. (2011) which would have overruled *Quill*. Yet neither bill was successful.

The ABA has also lobbied states to enact legislation to mitigate the effects of *Quill*. In response, New York and several other states have enacted "affiliate nexus" laws, which imposed sales tax collection obligations on out-of-state retailers with online affiliates in the States. But that legislation has yielded unintended

consequences: Remote retailers took the harsh tactic of firing their online sales affiliate in states that had passed affiliate nexus laws. This draconian tactic by remote retailers made it clear exactly how important the inequity afforded by the outdated *Quill* decision was to their business model. It also made clear that there is no adequate substitute for a *federal* decision overruling *Quill*.

This Court created the outdated and detrimental *Quill* rule, and it is time for the Court to step in and overrule it.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

OREN TEICHER
AMERICAN BOOKSELLERS ASSOCIATION
333 Westchester Ave,
Suite 202
White Plains, NY 10604

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

November 2, 2017

No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK CO., INC., AND NEWEGG, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Dakota

AMICUS CURIAE BRIEF OF AMERICAN CATALOG MAILERS ASSOCIATION IN OPPOSITION TO THE PETITION

EDWARD J. BERNERT
Counsel of Record
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, Ohio 43215-4138
ebernert@bakerlaw.com
614.462.2687

THOMAS D. WARREN
BAKER & HOSTETLER LLP
127 Public Square
Suite 2000
Cleveland, Ohio 44114-1214

December 7, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
A. Introduction	6
B. The Continuing Reliance Interest of the Mail Order Industry Properly Warrants Retention of the Physical Presence Standard Until a Meaningful Substitute Can Be Implemented	7
C. Congress Has Examined the Interstate Commerce Implications of Sales and Use Tax Collection, But the States Have Failed to Convince Congress That Enough Has Been Done by the States and Localities to Warrant Changing the Rules	10
D. Real Simplification of the Requirements for Sales and Use Tax Collection Imposed on Remote Sellers Is Possible and Must Precede the Abandonment of the Physical Presence Requirement Applicable to Sales Made in Interstate Commerce	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) ..... *passim*

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8 11

LEGISLATIVE MATERIALS

Internet Tax Freedom Act of 1998, 47 U.S.C. § 151 (Pub. L. No. 105-277) 4, 11

Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. No. 114-125) 11

OTHER AUTHORITIES

Office of Tax Policy Analysis, New York Department of Taxation and Finance, October 26, 2006, *Streamlining New York's Sales Tax: Examining Requirements for Compliance with the Streamlined Sales and Use Tax Agreement* https://www.tax.ny.gov/pdf/stats/policy_special/streamlining_new_yorks_sales_tax_october_2006.pdf 13

INTEREST OF *AMICUS CURIAE*[1]

The American Catalog Mailers Association (ACMA) was founded in 2007 to advocate for catalog marketers and their suppliers. The ACMA is a non-profit organization established under Section 501(c)(6) of the Internal Revenue Code. The ACMA is the leading trade association in the United States representing the interests of businesses, individuals, and organizations engaged in and supporting catalog marketing.

Catalog sales remain a vital part of the economy. More than one-half of Americans shop using catalogs. More than 9,000 companies use catalogs to make sales and many of these sellers are small and medium-sized entities. Catalogs have historically received the highest order response from consumers among any marketing medium.

The Supreme Court's decisions in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) have served as pillars of the catalog industry's protection from the imposition of unduly burdensome state and local sales and use tax collection and remittance obligations for the past 50 years. Reliance upon the physical presence requirement of *National Bellas Hess* and *Quill* has been significant in the continued growth

---

[1] Petitioners and Respondents filed Blanket Consents to the filing of *amicus* briefs with the Clerk's Office on October 16, 2017 and October 19, 2017 respectively. On November 27, 2017, *Amicus* notified the parties of the intention to file a brief in support of Respondent. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution to fund the brief's preparation or submission.

of the industry and remains important today, even as the mail order industry evolves.

Catalogs play a significant role in many sellers' multi-channel marketing efforts. They are closely associated with both internet sales and brick and mortar sales. Collecting sales and use tax on catalog sales, however, continues to present unique challenges just as they did in 1967 and 1992.

Catalog sales represent the most universal source of goods, especially in rural areas, which are often far removed from stores and not typically wired for high-speed internet. Catalog sales are available to customers concerned with online transactional safety in that the catalog sellers generally provide both mail and phone ordering capabilities in addition to online ordering. Catalogs meet the needs of shut-ins, handicapped persons or older consumers and the use of catalogs increases with the age of the consumer. The use of catalogs, however, is not limited to older Americans. Beyond merely the elderly, baby boomers buy more from catalogs per capita than any other generation, and studies show that millennials use catalogs when making purchases. Catalogs present new products not yet known to consumers and provide better knowledge of certain types of products whose marketing requires information that is more detailed. Some catalog sellers continue to receive orders by mail with payments by check accounting for as much as 30% of all sales, which presents special challenges in complying with the tax rules of multiple jurisdictions.

SUMMARY OF ARGUMENT

In *National Bellas Hess*, the Court weighed the interests of the states in collecting revenue with the burdens on interstate commerce that arise by requiring mail order sellers to collect use tax on behalf of taxing districts across the United States. The burden on interstate commerce applicable to mail order sellers is a function of the varying and changing tax rates, differing record keeping and compliance requirements across the more than 12,000 taxing districts that exist in the United States today. In *National Bellas Hess*, the Court limited collection responsibility to the situation in which the mail order seller had a physical presence within the state as a means of addressing the burdens on interstate commerce.

The Court in *Quill* reaffirmed the determination in *National Bellas Hess* under the Commerce Clause, despite the claims by the states and localities in *Quill* that the technology and the nature of the business of making sales had changed in the 25 years between *National Bellas Hess* and *Quill*. Ironically, 25 years after *Quill*, the states make the same arguments. The states argue that technology has solved the sales and use tax collection difficulties. To ACMA members and other businesses that rely on printed catalogs, however, this is anything but the case. As the Court recognized in *Quill*, catalog marketers had continued to rely upon the physical presence standard. Post-*Quill*, that reliance has continued even as catalog sellers have evolved with changes in the marketplace brought about by the internet.

In 2017, the inherent complexity of the process of complying with sales and use taxes in the United States remains burdensome. In many ways, the nationwide sales and use tax system has actually become dramatically *more* complex. In comparison to the 2,300 local taxing jurisdictions at the time of *National Bellas Hess*, and the 6,000 taxing jurisdictions at the time of *Quill*, now more than 12,000 state and local jurisdictions exist in the United States that impose a sales or use tax. Absent real simplification of the collection process, technology cannot overcome the nature of the fundamental burden on mail order sellers with customers in multiple states and local jurisdictions.

The states offer no meaningful alternative to the physical presence standard. The states seek outright reversal of *Quill* and carte blanche authority for whatever varying requirements that each state or municipality separately chooses to enforce upon mail order companies and other remote sellers engaged in interstate commerce. The absence of a meaningful alternative to the physical presence standard for regulating interstate sales supports rejection of the petition at this time.

The limitations on state taxing power in the era of electronic commerce have received the continued attention of Congress through adopted and proposed legislation. Congress acted to regulate state and local tax impositions on the internet in 1998. Internet Tax Freedom Act of 1998, 47 U.S.C. § 151 (Pub. L. No. 105-277). In the intervening years, Congress has revisited the terms of that Act, repeatedly extending it and

making it permanent in 2016. Congress has considered several different legislative proposals to address the complexity of compliance for sellers in the interstate markets.

While legislative proposals to address sales and use tax collection have passed a single chamber, no bill has passed Congress. These legislative proposals show that the *National Bellas Hess* and *Quill* decisions reveal sensitive policy concerns. The Court should not intervene in a case instituted by a state when that litigation is being substituted for continuing efforts to achieve real solutions to the continuing burdens on interstate commerce.

The states themselves recognize the inherent complexities for remote sellers in collecting sales and use taxes in multiple jurisdictions. Some of the states have been working to address the complexity of the sales and use tax collection system through their participation as members in the Streamlined Sales Tax Governing Board, Inc. (SSTGB) project by adopting common definitions and attempting to address inherent difficulties in the collection process. The SSTGB has adjusted its simplification standards in a bid to attract additional states. Many states rejected participation in the Streamlined Sales and Use Tax Agreement as full members, however, including states representing some of the largest markets in the United States. Thus, the burdens on mail order sellers have not been meaningfully addressed by SSTGB or otherwise. The lack of agreement among the states at this time counsels

caution from the Court in revisiting *National Bellas Hess* and *Quill* now.

ARGUMENT

A. Introduction

South Dakota's challenge to this Court's decisions in *National Bellas Hess* and *Quill* relies on identical arguments raised in 1967 and 1992. In those decisions, the Court acknowledged the importance of the revenue collection authority of the states but balanced that authority against the correlative burden placed on interstate commerce. Reflecting these competing valid interests, the Court approved the use of the in-state physical presence requirement as the trigger for the sales and use tax collection responsibility. The physical presence standard remains a means of upholding the authority of the states and localities to compel collection of tax from out-of-state sellers while limiting that authority to prevent undue burdens on interstate commerce. In *Quill*, the Court noted that Congress could develop viable alternatives to the physical presence standard. To date, no such alternative has met Congressional approval or commanded acceptance widely among the states. The Court's acknowledgement in *Quill* that Congress might intervene reflected the fundamental concern that the legislative branch institutionally is better suited to evaluate competing policy questions, such as how to weigh the revenue needs of the states versus the need for interstate commerce to

proceed unburdened. Recognizing that certain tax policy considerations are difficult to resolve does not warrant the conclusion that this Court should abandon the standard upon which mail order companies have relied for more than half a century.

Nowhere does South Dakota or its supporters offer any alternative to the physical presence standard other than a loose economic nexus requirement – selling to customers in the states – with each state free to establish a separate dollar threshold of sales volume triggering the sales and use tax collection responsibility. Under South Dakota law, a company may have as few as 200 separate transactions a year in South Dakota, and generate as little as a few thousand dollars yet be subject to tax collection, remittance and reporting. The states seek virtually unrestrained authority to require collection from remote sellers.

B. The Continuing Reliance Interest of the Mail Order Industry Properly Warrants Retention of the Physical Presence Standard Until a Meaningful Substitute Can Be Implemented.

Catalog sellers continue to operate in a manner that merits the protection of the physical presence standard. On average, 11% of catalog purchases are paid by check, and some catalog sellers receive checks for more than 30% of their sales. The receipt of checks means that if the customer incorrectly determines the taxable or exempt status of the purchase or the

applicable tax rate, the seller is confronted with a difficult task. The seller must either (a) return the check to the customer, (b) absorb the loss and pay the additional tax due directly, or (c) issue an additional bill for the balance due or a refund. The error could be small so that either the generation of an additional bill or refund is not economical. Unless refunds are made to the consumers, the overpayments would have to be paid to the states from whom consumers realistically could not seek refunds under these circumstances.

For underpayments, it may be necessary for the mail order companies to make up the deficiency. It is often not practical to go back to the customer seeking to collect the shortfall. Cumulatively, the small underpayments become an economic burden on the sellers, especially for those with small profit margins.

The proper evaluation of the taxable status of purchases remains difficult because of its complexity. The states and localities do not provide clear guidance. An exemption may depend on the status of the customer, e.g., whether engaged in manufacturing, or operating as one of certain statutorily defined types of charitable organizations. Other exemptions are dependent on the consumer's specific use of the item or service, such as using the item in certain types of manufacturing activities. These determinations remain challenging today notwithstanding available software. The coding of dynamic retail inventories that may easily number into the tens of thousands of distinct Stock Keeping Units (SKUs) is a very judgment-intensive exercise replete with opportunities for honest errors creating unknown

liabilities for future penalties and interest (in addition to uncollected tax). Moreover, some states offer sales tax holidays providing temporary exemptions for certain items, such as some, but not all, school supplies, clothing or computers for one weekend a year. The classes of items that qualify for these exemptions differ from state to state as do the calendar dates when these holidays occur.

Software does not solve the problem, or printing expense, of communicating the complexities of a nationwide sales tax collection process to mail order purchasers as a part of the text of the catalog. Moreover, the cost of implementing the software in the first instance is a significant expense even should software be provided by the states. Many catalog marketers rely on home grown and specially-developed software to run their operations, warehouse, inventory management, order processing, customer service and other enterprise activities. Each time the state-provided software is updated, each of the sellers' legacy systems must be modified to map to and interact with that software. Technology does not prevent the ongoing expense of implementing the software, coding inventories, updating the software, maintaining compliance, revising customer-facing communications, training personnel, answering customer questions, administering tax law changes, recordkeeping, and responding to audits by multiple jurisdictions.

The use of the internet by the catalog customer does not alleviate the burdens. Some customers do not have access to the internet. Customers using a web

connection after referencing the catalogs then must grapple with multiple state and local systems that remain both difficult and confusing for the taxability determinations and other elements of compliance.

Catalog sellers focusing on business-to-business (B-to-B) sales make few, if any, taxable retail sales when the merchant sells inventory or other items that are not typically taxable in the states and localities. Those merchants nevertheless must accumulate exemption certificates from all of their customers on a nationwide basis under the states' laws or face an assessment against the merchant for the failure to collect. The cost of compliance easily could exceed the total tax revenue the states would receive from these sales.

C. Congress Has Examined the Interstate Commerce Implications of Sales and Use Tax Collection, But the States Have Failed to Convince Congress That Enough Has Been Done by the States and Localities to Warrant Changing the Rules.

The Addendum to the Brief of *Amicus Curiae* of Four United States Senators and Two United States Representatives in Support of the Petition shows why the Court should not usurp regulation of interstate commerce from Congress. The Addendum recites a significant number of instances when Congress took up the issues arising from imposing sales and use tax collection responsibility on remote sellers from 2001 to

the present. The latest proposals for reform were put forward in April 2017.

Contrary to the states' position, the absence of successful federal legislation does not warrant a finding that the Congressional effort is a failure or that legislation is not needed. Congressional action can take time to reach fruition. Congress first addressed the taxation of the internet by the Internet Tax Freedom Act of 1998 (Pub. L. No. 105-277). That Act imposed restrictions on the states' imposition of tax on the internet because Congress recognized that the tax on the internet would harm interstate commerce. In the intervening years, Congress has revisited the terms of the Internet Tax Freedom Act several times, finally making its provisions permanent in the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114–125), on February 24, 2016, thus ending a process of more than 18 years.

Congress may yet change the rules for imposing collection responsibilities on interstate commerce. The U.S. Constitution expressly assigns to Congress the role of regulating interstate commerce in Article I, Section 8. The Court should defer to Congress when (a) this Court has set forth, and then re-affirmed, a specific bright line standard in its decisions in *National Bellas Hess* and *Quill*, (b) Congress has taken up the specific issue of whether the Court's standard should be abandoned, but (c) Congress has left the Court's standard in place. "The underlying issue here is one that Congress may be better qualified to resolve and

that it has the ultimate power to resolve." *Quill*, Syllabus 2(d).

D. Real Simplification of the Requirements for Sales and Use Tax Collection Imposed on Remote Sellers Is Possible and Must Precede the Abandonment of the Physical Presence Requirement Applicable to Sales Made in Interstate Commerce.

A major reason that Congress has not passed legislation in response to *Quill* is the failure of the states to agree to make changes necessary to reduce the burdens on interstate commerce. In 1999, a group of states responded to the *Quill* decision by forming what is now the Streamlined Sales Tax Governing Board, Inc. (SSTGB) to address the "practical and pragmatic concerns" in *National Bellas Hess* and *Quill* and to focus "its work on lessening burdens on participating sellers." Brief for *Amicus Curiae* Streamlined Sales Tax Governing Board, Inc. in Support of Petitioner at 3. The SSTGB, however, has failed to achieve the required lessening of the burdens on sellers and has failed to attract states representing large portions of the United States market.

A fundamental limitation on the effectiveness of the SSTGB is the failure to enlist more states including several of the larger states. Only 24 states are members of the Streamlined Governing Board. SSTGB *Amicus* Brief at 1-2. The advisor (non-member) states include Alabama, Arizona, California, Connecticut,

District of Columbia, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Mexico, New York, Puerto Rico, South Carolina, Texas, and Virginia. Id. at 2, footnote 4.

The Office of Tax Policy Analysis of the New York State Department of Taxation and Finance in an October 2006 Report, updated on the New York State website on June 29, 2017, discussed whether New York should become a Streamlined state.[2] The New York Report candidly explained that New York has not adopted the Streamlined Sales and Use Tax Agreement because it is unsure whether it would benefit New York residents.

> New York's existing sales tax has been structured to reflect the policy and revenue priorities of State and local policymakers. A significant number of changes to this structure would be necessary before New York could certify that it substantially complies with the [Streamlined Sales and Use Tax] Agreement. Some of these changes could promote a simpler tax structure; others would limit the flexibility of the State in crafting its annual financial plan and providing for the revenue needs of localities.
>
> Legislation to modernize and simplify the New York sales tax would be worthwhile, but it is unclear if the proposal developed by the

---

[2] https://www.tax.ny.gov/pdf/stats/policy_special/streamlining_new_yorks_sales_tax_october_2006.pdf. Last visited on November 25, 2017.

> Streamlined project would yield net benefits to New York's taxpayers and local businesses. There are, however, provisions of the Agreement which State policymakers may determine would provide benefits to New York. The likelihood of the State and its localities generating vast amounts of "new" sales tax revenue from taxing mail order and e-commerce sales is low. As the Streamlined project moves forward, New York's policymakers may wish to consider a number of options, including the option of adopting some, but not all, of the Agreement's provisions to realize some benefits of simplification short of full conformity.
>
> Bracketed material added.

SSTGB, whose very existence is a direct response to *Quill* in a quest for a system that would lessen the burdens on remote sellers, has been rejected by New York and other states representing major U.S. markets. New York explicitly recognizes the benefits of lessening the burdens uniquely imposed on remote sellers shipping products nationwide. New York nevertheless rejects joining with the Streamlined states in working toward real uniformity. *Quill* remains necessary so long as the states and localities decline to seek simplicity, some measure of uniformity, and a lessening of the burdens on remote sellers.

Sales and use taxes, like most systems, and all tax systems, have experienced increased complexity over time. Many elements could be cited that contribute to increased complexity and resulting increased difficulty

in compliance from 1992 to the present. In the case of direct mailers, (a) many more diverse local taxing jurisdictions now exist – at least 12,000; (b) many more new and previously unimagined products are being developed that must be classified as taxable, exempt or even partially exempt under state or local laws; and (c) the expansion of the use of tax holidays by states adopting differing calendar dates when the exemptions are expanded temporarily especially for school supplies, certain types of clothing and computer items. In some states, the lack of uniformity even extends to the local level when the laws of the localities are not applied uniformly across a single state. New compliance challenges, like the continuing challenges addressed in both *National Bellas Hess* and *Quill*, present policy issues best addressed by the states working together with taxpayer input to reduce complexity and by Congress setting the rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. BERNERT
Counsel of Record
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, Ohio 43215-4138
ebernert@bakerlaw.com
614.462.2687

THOMAS D. WARREN
BAKER & HOSTETLER LLP
127 Public Square
Suite 2000
Cleveland, Ohio 44114-1214

RECORD AND BRIEFS

FILED
NOV - 2 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION AND SOUTH DAKOTA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, SW
Suite 1000W
Washington, DC 22024
(202) 406-3600

DEEPAK GUPTA
Counsel of Record
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Amici Curiae

November 2, 2017

TABLE OF CONTENTS

Table of authorities ii

Interest of *amici curiae* and summary of argument ... 1

Argument 3

Quill's physical-presence requirement unfairly inflicts extreme harm on rural communities..... 3

Conclusion 10

TABLE OF AUTHORITIES

Cases

Direct Marketing Association v. Brohl,
135 S. Ct. 1124 (2015) 1

Direct Marketing Association v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 9

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 1, 3

Other Authorities

Rachel Abrams & Robert Gebeloff,
In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs,
N.Y. Times, June 25, 2017 ..... 4, 5

Janet Adamy & Paul Overberg,
Rural America Is the New Inner City,
Wall Street Journal, May 26, 2017 4

Eric T. Anderson, et al.,
How Sales Taxes Affect Consumer and Firm Behavior: The Role of Search and the Internet, 47 Journal of Marketing Research 299 (April 2010) 3, 4

Joe Cadotte,
Online sales to blame for businesses closing around town, NewsChannel ABC 20, Springfield, IL (Oct. 11, 2017) 6

Michael Dasilva,
Online sales present challenge to traditional brick and mortar businesses,
NC 13 WHTV, Osceola, IA
(March 14, 2017). 6

Austan Goolsbee,
In a World Without Borders: The Impact of Taxes and Interstate Commerce,
115 Q. J. Econ. 561 (2000) 3

Lina Khan, *Amazon's Antitrust Paradox*,
126 Yale L.J. 710 (2017).....4

Lois W. Morton & Troy C. Blanchard,
Starved for Access: Life in Rural America's Food Deserts, Rural Realities,
Vol. 1 No. 4 (2007) 7

Lois W. Morton, et al.,
Iowa Food Security, Insecurity, and Hunger (2004).....7

Meghan O'Brien,
Small Town Grocers in Iowa: What does the future hold?, Iowa State University,
Regional Capacity Analysis Program
(2008).....7

David E. Procter,
The Rural Grocery Store Crisis,
Daily Yonder, August 18, 2010. .....6, 7

David Peters,
Income Trends for Iowa Farms and Farm Families, 2003-2015, SOC 3076
(December 2016). 5

Testimony of Bruce Weber,
Senior Economist, Rural Policy Research Institute, Before the U.S. Senate,
Committee on Agriculture, May 25, 2017. 5

Ethan Wolff-Mann,
The New Way That Walmart Is Ruining America's Small Towns, Time,
Jan. 25, 2016. 6

Kansas State University, Rural Grocery
Initiative. 7

U.S. Department of Agriculture, Food Desert
Locator. 8

INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

Amicus American Farm Bureau Federation is a voluntary general farm organization established in 1919 to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in 50 States and Puerto Rico, representing nearly six million member families. Its mission is to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities.

Amicus South Dakota Farm Bureau Federation is a grassroots membership organization established in 1917 and dedicated to representing, upholding and improving South Dakota's agricultural industry. It represents more than 16,000 farm, ranch and rural member families across South Dakota. SDFBF is a member of AFBF.

Amici file this brief to explain why the question presented in this case is particularly crucial to the future of America's rural and agricultural communities.

This case offers a golden opportunity for this Court to jettison the long-outdated rule of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which prevents States from collecting sales tax from retailers who lack an in-state physical presence. To be sure, *Quill* "inflict[s] extreme harm and unfairness on the States" and results in "a startling revenue shortfall." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring). That (along with its many doctrinal flaws) is reason enough for *Quill* to go. But it is far from its only

---

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

evil. By unfairly hampering the ability of brick-and-mortar stores to compete on a level playing field with their online counterparts, *Quill* inflicts a variety of economic and social harms on the fabric of America's rural communities.

The stores that line the streets of our small and rural towns offer essential goods and services to the farmers and ranchers who work in the fields that surround them. Farmers depend on local stores not only for convenience but also to support their families, provide jobs, generate tax revenue, and give vibrancy to community life. But hometown businesses are at a distinct disadvantage when they compete with online-only retailers who don't have to collect sales tax.

When a family-owned grocery, drugstore, or gift shop is forced to shutter its doors after generations of serving a town's citizens, it does not merely represent the loss of one business. It also often means another empty storefront in an already struggling downtown, the loss of jobs (including off-farm jobs of family farmers and their spouses), and less foot traffic for the neighboring shops. It also inevitably means less revenue for critical public services, such as emergency responders, law enforcement, and educators.

Of course, a decision to retire *Quill* won't solve all of rural Main Street's problems. But it would at least foster a more level playing field between large internet retailers and local stores, thereby protecting not only sales-tax revenue but jobs and a sense of community. And it would encourage new jobs, by eliminating a rule that perversely discourages out-of-state companies from investing in rural communities for fear that warehouses or manufacturing facilities will trigger the physical-presence threshold. For all these reasons, this Court

should grant certiorari and put an end to *Quill*'s unfair and harmful regime.

ARGUMENT

QUILL'S PHYSICAL-PRESENCE REQUIREMENT UNFAIRLY HARMS RURAL COMMUNITIES.

This case presents the Court with an ideal opportunity to reconsider and overrule the outdated and doctrinally dubious physical-presence requirement of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The petition for certiorari persuasively explains why *Quill*'s continued vitality presents an exceptionally important question and why this Court's review is warranted now: The physical-presence requirement robs state and local governments of hundreds of billions of dollars in revenue, disadvantages brick-and-mortar businesses by subsidizing their internet-only competitors, and inexplicably discriminates against interstate commerce itself. Pet. 12–20. To the list of harms, this brief adds one more: the particular harm that *Quill* inflicts on rural communities.

Numerous empirical studies show that *Quill* has a pronounced anticompetitive impact, affecting both consumer and retailer behavior.[2] When a retailer collects sales tax, "a natural customer reaction is to look for similar products at competing retailers that do not charge sales taxes," and the studies show that consumers do precisely that, taking their business online.[3] Freedom from the obligation to pay sales taxes thus confers a significant competitive advantage on online retailers over

---

[2] *See, e.g.*, Eric T. Anderson, et al., *How Sales Taxes Affect Consumer and Firm Behavior: The Role of Search and the Internet*, 47 *Journal of Marketing Research* 299 (April 2010); Austan Goolsbee, *In a World Without Borders: The Impact of Taxes and Interstate Commerce*, 115 Q. J. Econ. 561 (2000).

[3] Anderson, et al. at 235.

brick-and-mortar stores, even after adjusting for all other variables.[4] In effect, *Quill* confers a subsidy on out-of-state retailers—including the nation's largest internet businesses, which already benefit from huge economies of scale, lower rent and labor costs, and increased consolidation and market dominance.[5] The result is that price-sensitive consumers take their business away from local brick-and-mortar stores, which often cannot lower their prices enough to be competitive. This diversion of business to online retailers forces local governments in some cases to try to make up for lost tax revenue by increasing property taxes—a burden that falls heavily on land-based business owners like farmers and ranchers. And studies show that internet retailers, aware of the need to maintain their competitive advantage, take pains to avoid locating warehouses where doing so could trigger the physical-presence requirement, thereby depriving communities of not only tax revenue but jobs as well.[6]

These harmful consequences are felt acutely in rural communities across America. As jobs in manufacturing and other non-farm industries have dried up, the retail industry has become an increasingly important source of off-farm jobs in rural areas.[7] When brick-and-mortar stores close or scale back, residents have even fewer

---

[4] *Id.* at 239.

[5] *See generally* Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017) (discussing Amazon's market dominance and its effects).

[6] *Anderson*, et al. at 239; *see also* Janet Adamy & Paul Overberg, *Rural America Is the New Inner City*, Wall Street Journal, May 26, 2017 (noting that, over the past decade, "Amazon shifted its warehousing strategy," moving warehouses away from rural areas).

[7] Rachel Abrams & Robert Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017.

employment options. And online retail is unlikely to fill the void. Rural and small metropolitan areas enjoy only 13 percent of jobs relating to online commerce, compared to 23 percent of brick-and-mortar retail positions.[8]

The economic health of farm communities and the availability of retail jobs can determine whether a family has enough off-farm income to keep the family farm. As one rural economist explains, "[f]arm household well-being is very dependent on rural community prosperity," particularly because "farm households have become more dependent on off-farm income."[9] Hence, the loss of rural retail jobs threatens the viability of many family farms. "A struggling farm economy only highlights the need for non-farm employment opportunities for all farm families."[10] In this way, the fortunes of both smaller and mid-size family farms are closely linked to the local rural economy.

Beyond jobs, local stores provide essential services, convenience, and a sense of community. These stores invest in their neighborhoods and play a major role in the overall quality of life. In rural America, the competitive imbalance in favor of internet commerce is not some abstract concern; it is felt every day by consumers who must choose between their need to manage household expenses and their loyalty to treasured local stores. For example, a customer at Farm and Home—a food and farm supply store in Osceola, Iowa—recently explained that she does most of her shopping on Amazon to save

---

[8] *Id.*

[9] Testimony of Bruce Weber, Senior Economist, Rural Policy Research Institute, Before the U.S. Senate, Committee on Agriculture, May 25, 2017, https://goo.gl/oyNGZE.

[10] David Peters, *Income Trends for Iowa Farms and Farm Families, 2003-2015*, SOC 3076 (2016), https://store.extension.iastate.edu/product/14898.

money, despite her desire to "support the local community here," and "shop local."[11] "Our town doesn't have a whole lot, but we need to keep what we have going," she explains. Another customer emphasized the values of both community and convenience: "I favor small town stores and want to keep the town vibrant, growing, and if I want something, I want to be able to just go get it instead of having to wait for it," he said. Yet Farm and Home's owner acknowledges that "younger customers are turning to internet sales more and more, and it's difficult for physical stores like his to compete."[12]

When stores like this end up closing in communities like Osceloa, Iowa, the harms go beyond a loss of convenience and community—they can also eliminate citizens' access to essential goods and services. The departure of a local general store can leave a rural town with no grocery or pharmacy within a *50-mile* radius.[13] This is not uncommon. Rural grocery stores are slowly disappearing across the nation—with a particularly pronounced decline in Midwestern and Great Plains states. In rural Iowa, for example, 43 percent of grocery stores in towns with populations less than 1,000 have closed,[14] and the number of grocery stores across the state

---

[11] Michael Dasilva, *Online sales present challenge to traditional brick and mortar businesses*, NC 13 WHTV, Osceola, IA (March 14, 2017), https://goo.gl/oBrQEr (quoting store owner explaining that "younger customers are turning to internet sales more and more, and it's difficult for physical stores like his to compete"); *see also* Joe Cadotte, *Online sales to blame for businesses closing around town*, NewsChannel ABC 20, Springfield, IL (Oct. 11, 2017), https://goo.gl/KiUBrH.

[12] Dasilva, *Online sales present challenge*.

[13] Ethan Wolff-Mann, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016.

[14] David E. Procter, *The Rural Grocery Store Crisis*, Daily Yonder, August 18, 2010, https://goo.gl/b9rpjU.

dropped by almost half from 1995 to 2005.[15] In Kansas, 82 grocery stores in communities of fewer than 2,500 people have closed since 2007, and nearly one in five rural grocery stores has gone out of business since 2006.[16] In total, 38 percent of the 213 groceries in Kansas towns of less than 2,500 closed between 2006 and 2009. As internet retailers expand into the grocery and fresh-market business, rural communities can expect further closures of rural grocery and general stores.

Rural residents are increasingly forced to travel greater and greater distances to purchase basic items for their farms and families. Customers may choose less costly online shopping when they can afford to wait, but they will suffer when they have to drive an hour for milk or a simple pain reliever for a sick child. Thus the loss of local stores accelerates the spiral of local economic decline, as rural life becomes equated with the absence of convenient access to basic goods.

Ironic as it may seem, residents in many rural agricultural areas, no matter their age or income, are increasingly affected by the growing phenomena of rural "food deserts"—areas in which there are no outlets to purchase food despite public and private resources to do so.[17] The Great Plains region has by far the largest concentration of counties in which all the residents of a county are ten or more miles away from a full-service

---

[15] Meghan O'Brien, *Small Town Grocers in Iowa: What does the future hold?*, Iowa State University, Regional Capacity Analysis Program (2008), https://goo.gl/8yiGpt.

[16] Procter, *supra* note 6; Kansas State University, Rural Grocery Initiative. http://www.ruralgrocery.org/.

[17] Lois W. Morton, et al., *Iowa Food Security, Insecurity, and Hunger* (2004); Lois W. Morton & Troy C. Blanchard, *Starved for Access: Life in Rural America's Food Deserts*, Rural Realities, Vol. 1 No. 4 (2007).

grocery store—and 98 percent of those counties are rural.[18]

New residents and young families are unlikely to want to live in a community without a place to purchase food. Indeed, in many rural communities, the spiral of economic decline is hard to stop—not just for those families who lose their business, but for the community in general. The loss of a local retailer can have a domino effect, reducing foot-traffic to other shops, movie theaters and restaurants that provide a central point of community for rural families. The younger generations of farm families are also less likely to stay and work on the farm if the local community lacks vitality and retail options.

Quill's impact on local brick-and-mortar stores thus tangibly impacts day-to-day life in rural areas—even more so than in other parts of the country. Local brick-and-mortar retail is the backbone of the many towns, drawing people to live, work, and shop—keeping communities alive. But, under *Quill*, faceless remote sellers, without a physical presence in rural communities or the desire to invest in them, are crippling traditional Main Street retailers and threatening local jobs by taking advantage of this tax loophole.

For a rule designed to vindicate the Constitution's bar on discrimination against interstate commerce, it is beyond strange that *Quill* perversely inflicts so much economic harm on the basis of state boundaries—harm felt most acutely in America's rural agricultural communities. As Justice Gorsuch observed last year, internet retailers don't receive merely "comparable treatment to their in-state brick-and-mortar rivals" under *Quill*, but

---

[18] U.S. Department of Agriculture, Food Desert Locator, https://www.fns.usda.gov/tags/food-desert-locator.

instead get "more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). It is long since past time to set *Quill* aside.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, SW
Suite 1000W
Washington, DC 22024
(202) 406-3600

November 2, 2017

Counsel for Amici Curiae

RECORD AND BRIEFS

FILED
NOV 2 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF AMERICAN LIGHTING ASSOCIATION, AMERICAN SUPPLY ASSOCIATION, AMERICAN VETERINARY MEDICAL ASSOCIATION AND SEVEN OTHER NATIONAL TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

QUESTION PRESENTED

Should this Court abrogate the sales-tax-only, physical-presence requirement of *Quill Corp. v. North Dakota*, 504 U.S. 289 (1992)?

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. One Aspect Of How *Quill* Unfairly Advantages Interstate Over In-State Commerce Is The Phenomenon Of "Showrooming." 7

II. There Is A Pressing Need For This Court's Intervention Because Showrooming Has Increasingly Negative Consequences For Local Retailers And Their Communities. 14

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Direct Marketing Association v. Brohl,
135 S. Ct. 1124 (2015) 5

McBurney v. Young,
569 U.S. 221 (2013) 8

National Bellas Hess, Inc. v. Department of Revenue of Illinois,
386 U.S. 753 (1967) 7

New Energy Co. of Indiana v. Limbach,
486 U.S. 269 (1988) 8

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

OTHER AUTHORITIES

Adam Rapp et al., *Perceived Customer Showrooming Behavior and the Effect on Retail Salesperson Self-Efficacy and Performance*,
91 J. OF RETAILING 358 (2015) 9, 10, 19

Ann Zimmerman, *Can Retailers Halt 'Showrooming'? Stores Test New Services, Selection; It's About Price*, WALL ST. J., Apr. 11, 2012 9

Big Poppi Bicycle Co., *It's Been a Long Ride for EFairness*, 21st Century Retail Blog (Jan. 22, 2015) 18

Bill Craig, *Letter to the Editor: Unfair Advantage*, RIDGEFIELD PRESS, Nov. 20, 2014 12

Brad Tuttle, *Best Buy Swears Shoppers Don't Have to Bother Showrooming Anymore*, TIME (Feb. 20, 2013) 15

Cecillia Barr, *Growing Impact of Showrooming on Retail Businesses*, BFS Capital Blog (June 19, 2017) 8, 9

Dave Miller, *Working to Get It Right: Efairness for Small Businesses*, 21st Century Retail Blog (Aug. 17, 2015) 17

Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, ATLANTIC, Apr. 10, 2017 ..... 19, 20

Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. OF MKTG. RES. 229 (2010) 13

Lance Muzslay, *It's More About Protecting a False Competitive Advantage Than Difficulty in Collecting Sales Tax*, 21st Century Retail Blog (June 24, 2015) 17, 18

Mark Williams, *Online Sales Tax Loophole Presents Unique Challenges for Longtime Family Businesses*, 21st Century Retail Blog (June 14, 2015) 18

Matthew Quint et al., Columbia Bus. Sch. Ctr. on Glob. Brand Leadership, Showrooming and the Rise of the Mobile-Assisted Shopper (2013) 10, 11

Reed White, *Vote Yes on E-Fairness Legislation*, CASPER STAR-TRIB. (May 29, 2015) 18

Terence A. Brown et al., *Showrooming and the Small Retailer*, 14 QUALITATIVE CONSUMER RES. 79 (2017) 9, 10

INTEREST OF *AMICI CURIAE*[1]

Amici are national trade associations whose members sell goods and services from coast to coast in every category imaginable, from textbooks and lighting fixtures to snowboards and earrings. They have joined together to urge certiorari because this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), has had a direct, and increasingly urgent, negative impact on their businesses. That impact is widespread, as reflected in the diverse industries represented by *amici*:

The American Lighting Association (ALA) is a trade association representing over 3,000 members in the residential lighting, ceiling fan and controls industries in the United States, Canada and the Caribbean. Its members are manufacturers, manufacturers' representatives, retail showrooms and lighting designers who have the expertise to educate and serve their customers. There are over 650 retail showrooms in the United States that are impacted by the *Quill* decision.

The American Supply Association (ASA) is the national organization that serves wholesaler-distributors and manufacturers in the Plumbing, Heating, Cooling, and Piping and industrial Pipe, Valve Fittings industry. ASA represents more than

---

[1] All parties received advance notice of the intent to file this brief by October 23, 2017, S. Ct. R. 37(2)(a), and the brief is filed with the written consent of all parties through blanket letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

330 independent wholesaler distributors, many of which are family businesses that have been passed down from one generation to the next.

The American Veterinary Medical Association (AVMA), established in 1863, is the largest veterinary medical association, with more than 89,000 members in the United States. As a tax-exempt association created to advance the science and art of veterinary medicine, the AVMA is the recognized national voice for the veterinary profession. As part of their commitment to patient care, AVMA members advise pet owners about their choices with respect to pet food, over-the-counter treatments, and related products, and often sell those products directly to consumers.

The Auto Care Association is a national trade organization with 3,000 members representing more than 150,000 independent businesses that manufacture, distribute and sell motor vehicle parts, accessories, tools, equipment, materials and supplies, and perform vehicle service and repair. The independent auto care industry adds some $381 billion annually to the American economy (2% of Gross Domestic Product) and provides employment to more than 4.6 million workers.

The Home Furnishings Association (HFA), with roots dating back to 1920, is North America's largest organization devoted specifically to the needs and interests of home furnishings retailers. The HFA has more than 1,800 members representing more than 7,000 storefronts across all 50 states and several countries. Its members range from top 100 retailers and national chains and multi-generational family-

owned businesses to smaller local merchants and emerging entrepreneurs.

Jewelers of America is the national trade association for businesses serving the fine jewelry marketplace. Its membership includes approximately 3,000 retailers and suppliers representing approximately 8,000 retail storefronts in all 50 states and the District of Columbia. It has represented the business interests of jewelers in the United States since 1906.

The National Association of Electrical Distributors (NAED) is the trade association for the $100+ billion electrical distribution industry. NAED's membership operates in more than 6,000 locations nationally and internationally.

The National Association of College Stores, headquartered in Oberlin, Ohio, is the professional trade association of the campus store industry. Serving nearly 4,000 campuses in the United States and approximately 1,000 industry-related companies, the association represents campus stores that supply course materials, merchandise and services to campuses across the country.

The National Ski and Snowboard Retailers Association (NSSRA) is a volunteer-led organization dedicated to growing snow sports participation and to supporting and educating specialty snow sports retailers. Since its founding in 1989, NSSRA has served as the voice of specialty retailers, representing their interests on issues that affect the specialty retail channel.

The National Sporting Goods Association (NSGA)

has served as the leading voice for sporting goods retailers and dealers since 1929. NSGA's mission is to support its members' efforts to grow their businesses and to advocate on their behalf. NSGA represents owners and operators of more than 21,000 storefronts in the United States.

This case is important to these varied associations representing multifaceted markets because all of *amici*'s members face the negative consequences of *Quill* each and every day in their stores, showrooms, and clinics. Every day, customers avail themselves of the products *amici*'s members' stores display in convenient locations in high-rent areas, absorb the knowledge and information their highly-trained salespeople provide, and benefit from the education and product demonstrations they spend hours patiently offering. Consumers use these services to make informed decisions about high-value purchases that can be made best in person only after seeing, touching, and experiencing the product. But after gathering all that information, and taking advantage of all the resources provided by *amici*'s members, internet-savvy customers often opt to make their ultimate purchase from an out-of-state online seller because they can "save" the sales tax (as many do not remit the sales or use taxes themselves, even if required by state law).[2]

---

[2] Most states impose a sales tax on items sold within the state and a corresponding "use" tax on property used or stored within the state for which sales tax was not collected by a retailer, requiring consumers to calculate and remit use taxes directly to

With the rise of mobile phones, the customers may even make that purchase—from someone else—while still touching *amici*'s members' merchandise, and before they've even left the store. This phenomenon is known as "showrooming," and its rise is the direct result of the sales-tax advantage conferred on out-of-state online retailers by *Quill*. Showrooming is having devastating effects on *amici*'s members.

INTRODUCTION AND SUMMARY OF ARGUMENT

"I am fine competing with online sellers, but I don't like to see them start with a 7% price advantage." So reports one of *amici*'s members, a jeweler in Pittsburgh, Pennsylvania. The sentiment is shared by *amici*'s members across the country, whether they sell dressers or faucets or pet medications. The pricing disadvantage for in-state brick-and-mortar retailers can be as high as 10% or more, depending on the state and local sales taxes the local seller is required to collect and that the out-of-state, typically online, seller is not. And this differential cannot be reduced by any effort to trim costs, reduce prices, or otherwise compete with out-of-state, online sellers.

Worse still, efforts to maintain market share by improving service or offering more product education for consumers within a local retailer's space often redound instead to the benefit of those same out-of-

---

the state. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1127 (2015). But voluntary compliance with use-tax obligations is very low. *See id.*

state price-advantaged sellers. Consumers can now easily "showroom": go to local stores and examine, in person, different products that they're interested in; work with a local salesperson, possibly for hours or multiple visits, to learn details about the products and make their choices; and then ultimately choose to make their purchase with an out-of-state online seller to avoid paying sales tax. Even if brick-and-mortar retailers offer to match online prices, and many do, the online seller can be "cheaper" (sometimes even with higher base prices), because cost-conscious consumers know that the online seller will not collect sales tax.

Amici's members are prepared to compete with out-of-state online sellers on price, service, selection, and any other business factor within their control. But being forced to compete on an unlevel playing field because of differential tax treatment has had a serious and ever-more-urgent destructive impact. Simply put: sales tax differentials combined with a rise in mobile technology and e-commerce are putting local sellers out of business, emptying out the retail centers of our nation's towns and cities, destroying local jobs, and hurting small towns and communities.

Those negative consequences can be directly traced to this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As the Petition relates (Pet. 21-27), that decision was questionable when issued, and its infirmities have become only more obvious in the past 25 years. At the same time, the competitive harm caused by *Quill* for in-state brick-and-mortar businesses has worsened, as consumers' access to technology and e-commerce has increased. Because *amici*'s members have an in-state physical

presence, they are bound to collect sales tax, while *Quill* frees their out-of-state online competitors from this burden. And that very same physical presence makes them ever more subject to showrooming and its negative consequences. This Court's attention is needed, now more than ever, to reconsider *Quill*.

ARGUMENT

I. One Aspect Of How *Quill* Unfairly Advantages Interstate Over In-State Commerce Is The Phenomenon Of "Showrooming."

A. In 1992, when the internet was predominantly a tool for government and scientists, not consumers; no one owned a smartphone; and e-commerce largely did not exist, the Court considered whether a State could "require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." *Quill*, 504 U.S. at 301. Adhering to a rule announced yet more decades earlier (in 1967), the Court declined to overrule *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and held—as a matter of *stare decisis*, although "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today"—that under the dormant Commerce Clause, sellers with no physical presence in a state "are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 311, 315.

As the Petition explains (Pet. 15-17), this rule no longer alleviates special burdens on interstate sellers,

if it ever did. Rather, it serves only to give out-of-state sellers an unfair and artificial advantage over in-state sellers. That is ironic at best, because dormant Commerce Clause doctrine "is driven by a concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). In attempting to halt protectionism, the Court's dormant Commerce Clause jurisprudence requires only a level playing field. Whatever its specific contours might be, the Clause is most certainly not a command requiring States to adopt regulatory measures designed to *benefit* out-of-state competitors by burdening in-state interests. But that is precisely what the *Quill* rule orders States to do. Far from leveling the playing field, *Quill* unfairly tips the field in favor of out-of-state commerce.

B. The unfair advantage accorded out-of-state sellers under the *Quill* rule is manifest in a practice *amici*'s members face every day: showrooming.

Showrooming is the "act of visiting a store or stores to examine and try a product before buying it online for a lower price." Cecillia Barr, *Growing Impact of Showrooming on Retail Businesses*, BFS Capital Blog (June 19, 2017).[3] It has been identified in recent years as a trend "hurt[ing] the bottom lines of traditional stores while benefiting online-only retailers,... which have the advantage of lower

---

[3] *Available at* https://www.bfscapital.com/blog/impact-of-showrooming-on-retail-businesses/.

overhead costs and mostly can skirt the collection of sales tax." Ann Zimmerman, *Can Retailers Halt 'Showrooming'? Stores Test New Services, Selection; It's About Price*, WALL ST. J., Apr. 11, 2012. And it has truly exploded with the increased use of mobile technology, including smartphones and mobile broadband internet. One study concluded that "the growth of smartphone ownership may be one method of forecasting the growth of [showrooming]." Terence A. Brown et al., *Showrooming and the Small Retailer*, 14 QUALITATIVE CONSUMER RES. 79, 81 (2017). Another study tracking Christmas shoppers' use of smartphones to price shop found such behavior increased from 15% in 2009 to 59% in 2011. *Id.* More recent data puts the prevalence of using mobile devices to comparison shop while in a store at 72% for some age groups (30 to 44). Barr, *supra*. The experience of *amici*'s members backs up the heavy prevalence of mobile smartphone usage in showrooming. Many report that when a customer shops, "his/her phone is out"—as a jeweler in Beaumont, Texas put it—plugging in specific make and model information and researching prices.

Surveys confirm that "in-store information search and online purchasing (i.e., showrooming)" has increased substantially, with 35% of consumers overall, and 50% of consumers in the 25-34 age group, reporting they had "showroomed." Adam Rapp et al., *Perceived Customer Showrooming Behavior and the Effect on Retail Salesperson Self-Efficacy and Performance*, 91 J. OF RETAILING 358, 360 (2015). Many consumers "have begun to view retail stores simply as places to handle products prior to purchase

via other channels." *Id.* at 359. And one study estimates that showrooming has a "$217 billion negative impact on retail sales." *Id.*

As the broad range of *amici* here can attest, showrooming's negative impact spans all kinds of markets. Electronics and appliances, books and music, sporting goods and toys, clothing and shoes, furniture and home furnishings, and home improvements are all sectors where more than a fifth of consumers stated they "almost always or frequently" engage in mobile-device-assisted comparison shopping. Matthew Quint et al., Columbia Bus. Sch. Ctr. on Glob. Brand Leadership, Showrooming and the Rise of the Mobile-Assisted Shopper 11 (2013).[4]

And there is little doubt that showrooming is driven by the *Quill* sales-tax advantage. The overwhelming majority (69% in one study) of consumers who make purchases online after viewing and interacting with goods at a retail store report that their choice is driven by lower prices. *Id.* at 12. Lower prices, in turn, are—at least in part and sometimes in full—made possible by the fact that many online sellers do not collect sales tax. Consumers connect the two in their minds, responding to surveys about why they showroom with responses like "Prices are better too – no sales tax." Brown, *supra*, at 88. And an additional group of them (16%) specifically cite the

---

[4] *Available at* https://www.aimia.com/content/dam/aimiawebsite/CaseStudiesWhitepapersResearch/english/Aimia_MobileAssistedShopper.pdf.

lack of sales tax as a reason for showrooming. Quint, *supra*, at 12.

Amici's members have suffered first-hand from this sales tax disadvantage. In the words of one of *amici*'s members—a furniture store that has been in business for more than 100 years in Baton Rouge—when customers "showroom," "[i]nvariably, the no sales tax issue of online purchases is mentioned." An example from one of American Supply Association's members is all too commonplace:

First Supply was first incorporated in 1897 as a family owned supplier of pumps and windmills, and has evolved into the single source provider that most Midwestern contractors rely on for plumbing supplies and related supplies. Now in the fifth generation of family ownership, First Supply operates 29 locations, including 14 showrooms, across the Midwest. At a promotional event at a showroom in Milwaukee, Wisconsin, a customer requested information about bathroom vanities, typically the centerpiece in a home's remodeled bathroom. The customer proceeded to measure various models in the showroom, and spent more than an hour taking detailed notes. When the customer was approached about placing an order, she informed First Supply's staff that Respondent Wayfair.com was cheaper due to no sales tax; so while she appreciated being able to see, feel and measure the product, she would be placing her order online. Although First Supply waives shipping and handling to remain competitive (at a cost to its profits), the apologetic customer nonetheless made her purchase online. First Supply is confident that if its showrooms had managed to close just a fraction of the sales like

this one that it believes were lost to "tax-free," out-of-state online competition in the past year, it would have been able to add 25 new jobs.

A family-owned San Diego furniture retailer that has been in business since 1937 has a similar story to share: Three weeks ago, a customer came into the store's showroom and worked with one of the designers on a dining room table and chairs for her home. After spending about two hours in the showroom, she settled on a wood dining table with matching chairs. After returning home to think about the purchase, the customer advised the designer that she had found the same table and chairs online for a lower price and with "no sales tax." The store offered to match the online price, but the customer then asked for the store to throw in the sales tax. The store could not cover that additional cost and advised the customer that she owed the tax even if she purchased the furniture online. The customer was not convinced and said she would purchase the set online, "saving" $426 in sales tax.

These stories of sales lost due to consumers' sales-tax-driven choices reflect a common experience for all of *amici*'s members. Some of their online-only competitors go so far as to actively encourage customers to visit local stores for expertise and knowledge before making an online purchase to save the tax. *See* Bill Craig, *Letter to the Editor: Unfair Advantage*, RIDGEFIELD PRESS, Nov. 20, 2014, at A4. And any attempt to "nicely explain 'use' tax laws" to consumers, per a Texas retailer, "simply puts an immediate icy chill on the conversation."

The *Quill* court recognized that there were market consequences of the sales tax advantage that *Bellas Hess*, and adherence to that precedent in *Quill* itself, provided to certain out-of-state businesses. The Court remarked that "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." 504 U.S. at 316. What the *Quill* court could not have foreseen, however, was the way that the decision would interact with the growth of the internet, and mobile technology especially. *Quill* has played a critical role in transforming local, in-state retailers into showrooms and display outlets for online retailers in particular, to a much greater degree than ever occurred with the traditional "mail-order" industry. *See* Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. OF MKTG. RES. 229 (2010) (study concluding that online sales are significantly affected by whether a merchant collects sales tax, but catalog sales are not, likely due to the greater ease of online price searching).

In the e-commerce era, local stores are effectively required to expend resources—on rent for prime locations, equipment to demonstrate products, experienced and knowledgeable sales personnel, and product displays—to the benefit of out-of-state online retailers. And they incur such costs all while facing up to a 10% artificial pricing disadvantage in competing for the business of internet-savvy consumers that expect high levels of service (and will post negative online reviews when they don't receive

it), but who will search prices, and ultimately purchase, online. That future is now here, and getting increasingly worse, for local in-state retailers.

II. There Is A Pressing Need For This Court's Intervention Because Showrooming Has Increasingly Negative Consequences For Local Retailers And Their Communities.

The steady stream of consumers coming in to look, touch, and learn—but not buy—imposes costs on stores. *Amici*'s members make significant investments in physical displays (imagine furniture or bathroom fixture showrooms, with their mock rooms designed and put together with care to evoke the feel of what an actual room might feel like), special equipment (like treadmills for evaluating a runner's gait before fitting her for shoes), and salespersons' knowledge and time. Retailers may spend "weeks sharing with [a] buyer different finish and fabric options" on furniture, for example—as one of *amici's* members reports happened regularly in his store—only to have the buyer purchase online to save 8% or 10%. Or, in the jewelry business, it is common for a sales person to spend an hour educating a customer about specific diamonds, with the customer taking extensive notes, only to have the customer then purchase online to save the sales tax—which is frequently a considerable sum (hundreds of dollars) for such a high-value purchase. These stories are legion from all industries.

Amici's members cannot defeat the advantage *Quill* bestows on out-of-state retailers through market competition alone. Price matching is not enough. Thus, Best Buy loudly proclaimed "the end of

'showrooming'" when it announced a price match guarantee, but commentators quickly noticed that the price match could not overcome the no-sales-tax differential. Brad Tuttle, *Best Buy Swears Shoppers Don't Have to Bother Showrooming Anymore*, TIME (Feb. 20, 2013).[5] *Amici*'s members report the same experience. A second-generation, family-owned furniture store in Phoenix, Arizona, for example, tried price matching, but found that it "can't survive discounting to match what online sites charge without sales tax." Even when people would prefer to buy from a local company, "they can't justify it" when the "price difference is 8% plus."

Or, as a jeweler in Mount Joy, Pennsylvania reports, when a local seller offers to price match, customers often either still make the purchase online or request that retailers "'cover' the tax for them." Even worse, retailers do not have the option of simply curtailing their level of service for showrooming consumers—if they did, in this online world, they'd simply "get a bad review on Yelp!"

Even in industries where local stores have invested time and money to compete aggressively in the online space, retailers are still harmed by showrooming. For example, Pueblo Community College Bookstore in Pueblo, Colorado has implemented price comparison tools in its own online site, providing transparency to students on textbook purchases and making it easy for them to buy from the

---

[5] *Available at* http://business.time.com/2013/02/20/best-buy-swears-shoppers-dont-have-to-bother-showrooming-anymore/.

lowest priced source, whether that is the Pueblo Community College Bookstore or elsewhere. More than 1,200 college stores do the same thing, and several thousand additional stores price match. Yet the bookstore (and others like it) still face a drain from showrooming, because an estimated 1 in 4 students use the sales personnel to research and gather all of the books that they need, with no intention of purchasing them at the store, harming customer service for those students who do plan to make their purchase in-store. Because the store price matches and offers an online engine permitting students to purchase from the lowest-priced source, the sales-tax differential is plainly driving this conduct. Effectively, the *Quill* advantage for out-of-state sellers means the Pueblo Community College Bookstore and its similarly-situated in-state peers must pay the overhead for tax-advantaged out-of-state sellers, despite offering identical prices.

No industry is immune. Take veterinary medicine, for example. The veterinarian-client-patient relationship, of course, cannot be supplanted by online sales. But veterinarians still face showrooming with respect to their sales of pet products such as pet food, prescriptions and over-the-counter medicines, and flea and tick products in a more than $66.75 billion annual market for veterinary care and pet-related supplies.[6] Consumers will avail

---

[6] Data provided by *amicus* American Veterinary Medical Association, drawn from American Pet Products Association, *2017-2018 National Pet Owner Survey Statistics: Pet*

themselves of the extensive training and education that make veterinarians and veterinary technicians extremely knowledgeable about these products, only to then make purchases through an online retailer that offers sales-tax savings.

Investments in knowledgeable and highly trained staff are common across many market sectors, and those investments only make local retailers even more subject to showrooming. For example, specialty running stores often put tremendous effort into understanding a customer's fitness level, goals, injuries, and foot and bone structure so that they can provide the perfect running shoe that will decrease the risk of injuries. *See* Dave Miller, *Working to Get It Right: Efairness for Small Businesses*, 21st Century Retail Blog (Aug. 17, 2015).[7] Yet—after half an hour or more spent finding the perfect shoe based on the narrowness of a person's heel, the flex of their arches, and any rotation when they run—the customer often leaves "with the intent of buying online to avoid paying sales tax." *Id.* Because manufacturers' prices are usually identical, the only difference in price between a local running store and its out-of-state, online competitor is the sales tax. Lance Muzslay, *It's More About Protecting a False Competitive Advantage Than Difficulty in Collecting Sales Tax*, 21st Century Retail

---

Ownership & Expenses, http://www.americanpetproducts.org/pubs_survey.asp.

[7] *Available at* http://www.efairness.org/blog/2015/08/working-to-get-it-right-efairness-for-small-businesses/.

Blog (June 24, 2015).[8] As a store owner in Tempe, Arizona—where local sales tax averages over 8%—put it, "If this were a 100 meter running race, it would be equivalent to allowing some runners to start eight meters ahead of their competitors." *Id.* Whether the product is running shoes, plumbing fixtures, skis, or bicycles—or anything else you can imagine—it is not a fair race.[9]

Payments for elaborate and informative displays, compensation of highly-trained sales personnel, and investments in special equipment all become futile and expensive overhead costs with no return when sales go to another store—even if you offer the exact same price. That is hardly a sustainable business model. As mentioned above, one estimate puts the

---

[8] *Available at* http://www.efairness.org/blog/2015/06/its-more-about-protecting-a-false-competitive-advantage-than-difficulty-in-collecting-sales-tax/.

[9] *See, e.g.*, Big Poppi Bicycle Co., *It's Been a Long Ride for EFairness*, 21st Century Retail Blog (Jan. 22, 2015), http://www.efairness.org/blog/2015/01/its-been-a-long-ride-for-efairness/ (bicycle retailer in Manhattan, Kansas); Mark Williams, *Online Sales Tax Loophole Presents Unique Challenges for Longtime Family Businesses*, 21st Century Retail Blog (June 14, 2015), http://www.efairness.org/blog/2015/06/online-sales-tax-loophole-presents-unique-challenges-for-longtime-family-businesses/ (patio furniture and ski shop in Chicago area); Reed White, *Vote Yes on E-Fairness Legislation*, CASPER STAR-TRIB. (May 29, 2015), http://trib.com/opinion/columns/white-vote-yes-on-e-fairness-legislation/article_ccf1f1ba-8f66-5634-af75-dfecac6feaef.html (plumbing and heating supply store in Wyoming).

losses from showrooming at $217 billion. Rapp, *supra*, at 359.

The end result of this no-win situation, where consumers expect service in person but purchase online, is closed stores and lost jobs. And, over time, online cost savings for individual consumers are more than offset when entire communities suffer from failed businesses and lost jobs. The former president of a family furniture business that was in operation for more than two decades in Austin, Texas reported that the store attempted price matching for a time, but the price match was "trumped by competing against no sales tax with either having to pay the sales tax ourselves or lose out on the sale in its entirety." In December 2016, after years of operation, the store had to close its doors.

The net effect is that "[i]n the middle of an economic recovery, hundreds of shops and malls are shuttering." Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, ATLANTIC, Apr. 10, 2017. And the store closures and bankruptcies are only accelerating in recent years. In just the last 18-24 months, the National Sporting Goods Association reports that four sporting goods retailers have closed permanently: The Sports Authority (a national chain), City Sports (predominantly in New England), MC Sports (Midwest), and Sports Chalet (West Coast). More than 600 stores were closed as part of those bankruptcies, resulting in more than 18,000 jobs lost. And such closures were only in the past two years, from just one of the *amici*'s membership.

Although closures have accelerated in recent years, the historical data since *Quill* suggest that the trend has been a steady one, indicating long-term negative effects of that decision on local retail stores. Looking just at sporting goods retailers, census data indicate there were 5,356 single-location sporting goods stores when *Quill* was decided in 1992. The most recent census data, from 2012, identifies 3,232 single-location sporting goods retailers. That means about 2,124, or almost 40% of "mom and pop" sporting goods stores have closed since *Quill*. The decline in multi-location firms is even starker in percentage terms, as that number declined from 507 to 207 over the same period.[10] Because each multi-unit firm could have a few locations or hundreds (as with the four recent multi-location closures described above), the decline of 300 multi-location firms represents an exponentially higher decrease in the number of brick-and-mortar local retail stores.

Online commerce generally, and the *Quill* sales-tax advantage specifically, are not the only reasons that retail stores are closing and jobs are being lost, but they are surely a big part of the story. *See* Thompson, *supra* (citing the increase in internet commerce, and mobile-device commerce, as the primary factor in the "demise of America's storefronts"). As the National Sporting Goods Association reports, all four of the sporting goods

---

[10] Data provided by *amicus* National Sporting Goods Association, drawn from U.S. Census Bureau, 2012 Retail Trade, https://www.census.gov/data/tables/2012/econ/census/retail-trade.html.

retailers that recently closed cited changing shopping habits with respect to the internet, reinforced by the unfair tax advantage, as a significant factor in the store closures.

Although loss of jobs is bad enough, more than jobs are lost when local stores shut down. Such closures also cause the loss of other contributions to the community such as little league sponsorships, local events like bicycle races and fun runs hosted by retailers, and participation in other civic activities like the Rotary Club or local Chambers of Commerce. These negative consequences will only worsen when in-state, local retail stores increasingly function largely as showrooms for out-of-state online rivals that have an impossible-to-defeat pricing advantage. As long as *Quill* is the governing national rule, local retailers have little hope of changing this trend.

Amici and their members understand that competition from online retailers is here to stay. They are more than happy to compete in the modern marketplace and to have consumers evaluate the service and products they offer against those of any other seller. But there is no reason that the Commerce Clause, or its dormant cousin, should force them to compete using a deck stacked in favor of out-of-state sellers. This Court's ruling in *Quill* effectively turns the stores and sales personnel in which *amici* and their members have invested their lives and their livelihoods into mere showrooms and adjuncts for online out-of-state sellers who start with an artificial, unfair, and immutable advantage. This Court's intervention is needed now, before even more jobs are lost and local businesses bankrupted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
Deutsch Hunt PLLC

November 2, 2017

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR INC., OVERSTOCK.COM, INC. AND NEWEGG, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF OF *AMICUS CURIAE* AMERICANS FOR TAX REFORM IN SUPPORT OF RESPONDENTS

JONATHAN MYLES LAURIER CANNON
AMERICANS FOR TAX REFORM
722 12th Street, NW
Suite 400
Washington, DC 20005
(202) 785-0266

CLARK R. CALHOUN
Counsel of Record
ALSTON & BIRD LLP
333 South Hope Street
16th Floor
Los Angeles, CA 90071
(213) 576-1137
clark.calhoun@alston.com

Attorneys for Amicus Curiae

277523

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT IN SUPPORT OF RESPONDENTS 3

I. The Court has maintained the same approach to taxing entities without a physical presence in the taxing state since 1967, and that precedent should not change. 3

II. The policy considerations addressed in *Quill* should be addressed by Congress rather than the Court. 7

III. Accepting this case would encourage unconstitutional state action and threaten the rule of law. 10

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

CASES:

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 5

Direct Marketing Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 5, 6, 7

Lee v. Weisman,
505 U.S. 577 (1992) 3

National Bellas Hess v. Department of Revenue,
386 U.S. 753 (1967) 2, 3, 4, 6

*Quill Corp v. North Dako*ta,
504 U.S. 298 (1992) ..... *passim*

State v. Wayfair Inc.,
2017 S.D. 56 3-4

STATUTES & OTHER AUTHORITIES:

James Gattuso, "Taxing Online Sales: Should the Taxman's Grasp Exceed His Reach," *The Heritage Foundation* (2013) 8, 9

Joseph Bishop-Henchman, "Why the *Quill* Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction," *State Tax Notes* (Nov. 5, 2007) 8

Cited Authorities

Page

Katie McAuliffe, "Taxation without Representation; The Collateral Damage of Crony Capitalism," *Americans for Tax Reform* (Nov. 16, 2015) 8

S.D. Codified Laws § 10-64 5

INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief in support of Respondents' position is filed by the Americans for Tax Reform ("ATR"). ATR is a non-profit 501(c)(4) organization that represents the interests of the American taxpayers at the federal, state, and local levels. ATR has no parent companies, subsidiaries, or affiliates, other than the American Tax Reform Foundation, with which it shares its board and staff. No publicly held corporation has an ownership stake of 10% or more in ATR.

ATR is based in Washington, D.C. and represents the interests of taxpayers across the country. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates citizens and government officials about sound tax policies to further these goals. This case involves an important tax policy issue on which ATR has testified and otherwise written extensively about the taxpayer burdens of expanded tax nexus. As such, ATR has an institutional interest in ensuring that the physical-presence standard is upheld and that the U.S. Supreme Court continues to defer to Congress in the regulation of interstate commerce. Such deference is essential in order to protect taxpayers from taxation without representation.

---

1. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certify that no counsel for any party to this matter authored this brief in whole or in part. Counsel also certifies that no person other than amicus curiae, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by *amici curiae*.

SUMMARY OF THE ARGUMENT

The Supreme Court has followed the precedent of *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967) ("*Bellas Hess*") for over 50 years. In that time, the Court has clarified and emphasized its reluctance to allow states to tax entities that operate outside their borders. In 1992, the Court revisited the *Bellas Hess* rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) ("*Quill*"); in the absence of congressional action, the Court chose to uphold and reinforce its decision in *Bellas Hess*. Despite the change in technology over the last 25 years, the reasons behind the Court's affirmance of the *Bellas Hess* rule remain sound, and the law should not change simply because a new medium exists for ordering products.

The second half of the argument focuses on the policy and practical considerations if the Court were to reverse *Quill*. There are severe policy concerns for the impact it would have on small retailers doing business online. These businesses lack the necessary resources to manage the burdensome requirements that would result from the repeal of *Quill*. Finally, a reversal of *Quill*—and the establishment of the new standard that would replace its physical-presence rule—is best left up to Congress, and to grant this petition would encourage other states to pass unconstitutional laws as a means of attempting to force reversals of decisions with which they disagree. For these reasons, the Court should deny the petition for certiorari.

ARGUMENT IN SUPPORT OF RESPONDENTS

I. The Court has maintained the same approach to taxing entities without a physical presence in the taxing state since 1967, and that precedent should not change.

Dating back over 50 years, the Court has unwaveringly held that a state may not tax a remote entity that has ties to the state only via common carrier. *See National Bellas Hess* v. *Dep't of Revenue*, 386 U.S. 753 (1967). The Court affirmed the precedent set in *Bellas Hess* in *Quill*, which has become the leading precedent with respect to the taxation of remote entities and should remain the leading precedent going forward.

The legal doctrine of *stare decisis*, of course, is highly relevant to this matter. *See, e.g., Lee* v. *Weisman*, 505 U.S. 577, 632 (1992) ("Our Constitution cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court," but "must have deep foundations in the historic practices of our people."). In 1992, the Court affirmed the particular importance of *stare decisis* in the context of questions governed by the dormant commerce clause, upholding the physical-presence standard set forth in *Bellas Hess* and highlighting Congress's ability to change that standard. *See Quill*, 504 U.S. at 317 (writing that "the interest in stability and orderly development of the law" pointed toward maintaining the physical-presence standard on *stare decisis* grounds). Therefore, in the instant matter, the South Dakota Supreme Court correctly concluded that the 1992 *Quill* decision remains the controlling precedent and has "direct application" to this matter. *State of South Dakota v. Wayfair, Inc.*,

2017 S.D. 56, ¶ 18, 901 N.W.2d 754, 761 (citation omitted) ("*Wayfair*").

While South Dakota urges the Court that the time has come to overturn *Quill*, ATR urges the court to affirm its longstanding precedent, both because of the benefits of that standard and because the virtues of *stare decisis* that drove the Court to uphold *Bellas Hess* in 1992 are even more valid in 2017, with businesses having relied on that standard for another 25 years since *Quill*. As in the present case before the Court, in *Quill* the petitioner was a mail order company that did not have any physical presence in North Dakota. *Quill*, 504 U.S. at 301. The only difference between the facts in the present case and *Quill* is the technology used to view and purchase the products. In *Quill*, the business solicited with catalogs and flyers; today, the consumers visit a website to make purchases. The Court has continuously held that a vendor whose only connection to the state is a common carrier lacks a "substantial nexus" with the state required by the commerce clause; therefore, a tax collection obligation on remote sellers has been rejected since *Bellas Hess* whenever the seller lacks physical presence with the state. *Id.* at 304.

The Supreme Court of South Dakota therefore correctly held that without an entity having physical presence in the state, South Dakota is prohibited under the dormant commerce clause from imposing a tax collection obligation on such entity. The Supreme Court rejected any distinction between *Quill* and the present case, thus holding the instant law unconstitutional. *See Wayfair*, 2017 S.D. at ¶ 18.

The *Complete Auto Transit* decision created a four-part test that was applied in *Quill*. It provides that a tax is constitutional only when it:

1. "[I]s applied to an activity with a substantial nexus with the state";

2. "[I]s fairly apportioned";

3. "[D]oes not discriminate against interstate commerce"; and

4. "[I]s fairly related to the services provided by the state."

Complete Auto Transit v. *Brady*, 430 U.S. 274, 311 (1976).

In *Quill*, this Court primarily looked to the first step of the *Complete Auto* analysis to determine that under the dormant commerce clause, when a vendor's only connection with customers in a taxing state is the use of a common carrier to deliver goods, such vendors "are free from state imposed duties to collect sales and use taxes." *See Quill*, 504 U.S. at 315; *see also Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1145 (10th Cir. 2016). The South Dakota law in question states that "any seller selling tangible personal property, products transferred electronically . . . who does not have physical presence in the state . . . shall remit the sales tax and shall follow all applicable procedures and requirements . . . as if the seller had a physical presence in the state." S.D. Codified Laws § 10-64. This provision plainly violates the first prong of the *Complete Auto* test as interpreted in *Quill*.

The holding of *Quill* created a "safe harbor" for those whose only connection to the state is via common carrier. *Quill*, 504 U.S. at 315. There is a startling side effect to a law which asserts that anyone who accesses the website of a business without physical presence in a particular state is drawn into that state's taxing power. This would in essence blur the lines of the state border and make any entity engaging in any business outside of its borders—and with citizens of any state—susceptible to the taxation power of a state with a law similar to South Dakota's SB No. 106. South Dakota's law not only creates bad policy, but it also upsets more than 50 years of reliance on *Bellas Hess* and *Quill* by businesses—the very reliance that the Court cited in *Quill* as justification for its holding. The fact that the medium of ordering the products has changed does not mean that the laws revolving around taxing remote transactions should change with it. By accepting South Dakota's petition and reversing the decision of the South Dakota Supreme Court, the Supreme Court may indicate that *any* Internet activity in the state would enable a state to stretch its borders as far as it can reach over the internet to *any* entity that a citizen of the state may access online. *See Quill*, 504 U.S. at 315 (writing that the bright line test serves to "firmly establishes the boundaries of legitimate state authority to impose a duty to collect taxes").

Furthermore, under the dormant commerce clause, Congress has the authority to resolve these issues. Absence of congressional legislation does not empower the Court to legislate a judicial solution to a legislative problem. *Direct Mktg. Ass'n*, 814 F.3d at 1148. Given the long-standing precedent—and the reasons given in reaching that precedent—this Court would be undermining the power of

its own precedents (in the state tax arena and elsewhere) if it were to reverse its consistent and reliable physical-presence standard on which businesses have relied since 1967. Accordingly, it is incumbent on this Court to reject South Dakota's efforts to reshape established precedent on which businesses have relied. *See, e.g., Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d at 1147 ("Judges distinguish themselves from politicians by the oath they take to apply the law as it is, not to reshape the law as they wish it to be.").

II. The policy considerations addressed in *Quill* should be addressed by Congress rather than the Court.

It is imperative that the digital tax borders are limited to retailers that carry a physical presence in the jurisdiction. If *Quill* is overturned, the lines between who can be taxed will blur, forcing retailers—including many small businesses—to engage in costly practices to ensure they can keep up with the tax laws of numerous states, which can vary, *inter alia*, as to what is taxable; what is exempt; the tax rate; the degree to which taxes are centrally administered; and the deadlines by which taxes must be remitted and when reports must be filed. Brick and mortar retailers are only responsible for collecting tax in the jurisdictions in which they have physical presence, where an e-commerce retailer could be subject to a tax collection obligation in thousands of taxing jurisdictions. This burden is likely to be pushed onto consumers, and it is detrimental to smaller e-commerce retailers, potentially preventing them from expanding into new markets. Some small businesses will even be forced to choose *not* to sell into particular markets because the costs of compliance

will not justify the potential sales.[2] Even if a state's tax collection law includes the provision of "free software and installation," the maintenance and upkeep would cost thousands of dollars, providing large barriers to smaller businesses (not to mention the fact that software made available by a government for free is likely to lack the bells and whistles of software that larger businesses utilize, furthering the divide between such large and small entities).[3]

South Dakota's law would draft e-commerce retailers to serve as a tax collector, "forcing online retailers in other states to do their dirty work for them."[4] This would force small businesses to have to identify and comply with thousands of taxing jurisdictions, without recourse to any elected official. A change to South Dakota's tax collection regime would impose a heavy burden on retailers with issues ranging from determining how a product should be taxed (*e.g.* determining whether a food should be taxed as candy, or be tax exempt)[5] to how to collect, remit, and

---

2. *See* Joseph Bishop-Henchman, "Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction," STATE TAX NOTES (Nov. 5, 2007), available at https://taxfoundation.org/why-quill-physical-presence-rule-shouldnt-go-way-personal-jurisdiction/.

3. *See, e.g.*, Katie McAuliffe, *Taxation without Representation; The Collateral Damage of Crony Capitalism*, Americans for Tax Reform (Nov. 16, 2015), available at https://www.atr.org/taxation-without-representation-collateral-damage-crony-capitalism.

4. *Id.*

5. James Gattuso, *Taxing Online Sales: Should the Taxman's Grasp Exceed His Reach*, The Heritage Foundation (2013), available at http://www.heritage.org/taxes/report/taxing-online-sales-should-the-taxmans-grasp-exceed-his-reach; *see also* Katie McAuliffe, *supra* note 3.

report taxable and exempt sales in every jurisdiction that imposes a collection obligation on sales to customers located in that jurisdiction. The costs are not limited to technology: complying with South Dakota's law will also require man-hours to handle a variety of tax-compliance-related tasks, including accounting issues, audits and other inquiries from taxing authorities, and dealing with tax-exempt customer claims.[6]

When an entity has no physical presence or other contacts in a state, it has no say into the laws governing its conduct; along the same lines, of course, such entities receive little to no benefits from the taxes that they are required to collect and remit to such state(s).[7] Yet if the Court were to reverse *Quill*, "retailers would be subject to edicts and mandates from States with which they have no connection," without the practical ability to respond, given that they have no voting power over the legislators implementing the new, overreaching tax collection regulations.[8]

As this Court has already stated, it is not this Court's role to legislate a solution to this issue; in *Quill*, the Court recognized that any corrective action must come from Congress. *See Quill*, 504 U.S. at 317 (noting that reaffirming the physical presence standard was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.").

---

6. *See* James Gattuso, *supra* note 5.

7. *Id.*

8. *Id.*

Indeed, Congress has been in the midst of robust debate on this topic for years, with proposed legislation introduced in previous terms and in the current Congress. *See, e.g.*, H.R. 2887 (the "No Regulation Without Representation Act of 2017," which would codify the physical presence requirement for e-commerce). Because the legislative process is in motion (as this Court intended), the Supreme Court should defer to Congress in this matter; the fact that Congress is *perhaps* taking longer than the Court envisioned in 1992 has no effect on the particular force of *stare decisis* in this context (though it is far from a given that the Court in *Quill* expected that Congress would change the physical-presence standard set forth in *Quill* before 2017, if it had any expectations at all regarding the timing of such a change).

III. Accepting this case would encourage unconstitutional state action and threaten the rule of law.

State official or legislative actions in contravention of binding court precedent are challenges to the rule of law, and such acts could yield dangerous consequences in areas of public policy that are more politically charged than tax collection. States should not purposefully enact laws they know to be unconstitutional to antagonize courts in an attempt to push for a policy change. While asking courts to clarify areas of unsettled law is important to the evolution of law, the matter presented here—the passage of an unconstitutional law with the explicit intent of getting the Court to revisit and reverse settled precedent—chips away at the rule of law by challenging the vitality of, and respect for, this Court's holdings.

The state's intent in passing this unconstitutional law was not a secret. With full knowledge of the *Quill* holding, the South Dakota State Senator Deb Peters worked with both the governor and state attorney general to draft and pass legislation for online sales tax collection in order to draw a challenge to pursue to the United States Supreme Court. As intended, the day after passage of SB 106, taxpayers and taxpayer organizations filed suits to challenge the law's constitutionality.

Further, the state's behavior before the South Dakota Supreme Court was incredibly unusual. South Dakota had already conceded to the Sixth Judicial Circuit that the enacted statute is in conflict with *Quill*. Then South Dakota asked that the Sixth Circuit decision be upheld—that is, the state asked the Court to rule *against* the constitutionality of its law—in order to allow for the state to "fast track" this petition for certiorari to the U.S. Supreme Court. The state's conduct demonstrates a clear strategy to drive a matter of policy before the Court. While a state may of course seek clarification from courts on certain legal matters, it is an entirely different story when a state disregards constitutional precedent to force a desired review of a law or ruling. It offends the separation of powers between the federal government and the states if a state responds to a binding decision of this Court (or any state or federal court) by throwing its proverbial toys out of the pram.

The Supreme Court in *Quill* told the states exactly whom they should ask for a change to that decision's holding: Congress. And Congress is deliberating with respect to whether, and to what extent, to permit states to impose a tax collection obligation on remote sellers.

Congress's role in regulating interstate taxation and reviewing the taxation of remote sellers was not a footnote to *Quill*; rather, it is part of the Court's core holding. Thus, *Quill* was not an act of legislating from the bench, but instead a careful act of judicial restraint in which the Court refused to upset an area of settled law. Technology may have changed since *Quill*, but *stare decisis* remains the same, and its force in this matter is as strong in 2017 as it was in 1992.

Should the Court choose to accept South Dakota's petition and provide a favorable ruling to South Dakota, the Court would set a model that encourages states to pass laws directly in conflict with precedent, federal law, and the U.S. Constitution, rather than stay within their constitutional bounds and respect the rule of law. This is a tax case, which does not exactly set hearts racing. But it is not difficult to imagine a much more dangerous atmosphere if a state were to attempt the same stunt in a matter involving the scope of other constitutional amendments that involve life and liberty rather than dollars and cents. Accordingly, the Court should deny this petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

JONATHAN MYLES LAURIER CANNON
AMERICANS FOR TAX REFORM
722 12th Street, NW
Suite 400
Washington, DC 20005
(202) 785-0266

CLARK R. CALHOUN
Counsel of Record
ALSTON & BIRD LLP
333 South Hope Street
16th Floor
Los Angeles, CA 90071
(213) 576-1137
clark.calhoun@alston.com

Attorneys for Amicus Curiae

RECORD
AND
BRIEFS

FILED
NOV - 2 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC.; OVERSTOCK.COM, INC.; and NEWEGG, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR COLORADO AND 34 OTHER STATES AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING PETITIONER

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General

MELANIE J. SNYDER
Chief Deputy Attorney General

GRANT T. SULLIVAN
Assistant Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203
(720) 508-6000
Grant.Sullivan@coag.gov

Counsel for Amici Curiae

[Additional counsel listed on signature page]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Should this Court abrogate the physical-presence rule of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE PETITION 5

I. The States' collective experience in abiding by *Quill* demonstrates that no substitute is adequate to replace direct collection by the retailer 5

II. *Quill* disrupts the States' right to respond to economic realities and impose lawful taxes in the absence of contrary federal law 15

A. The physical-presence rule is a doctrinal outlier, creating splintered court decisions that hinder the States' ability to pass effective tax enforcement legislation 15

B. The States are sovereign entities that are constitutionally empowered to require remote retailers to collect use taxes 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 4, 22

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 21

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) ..... *passim*

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016),
cert. denied, 137 S. Ct. 591 (2016) ..... *passim*

Dows v. City of Chicago,
11 Wall. 108 (1871) 22

Geoffrey, Inc. v. Comm'r of Revenue,
899 N.E.2d 87 (Mass. 2009) 18

Halliburton Oil Well Cementing Co. v. Reily,
373 U.S. 64 (1963) 20, 21

Henneford v. Silas Mason Co.,
300 U.S. 577 (1937) 21

H.P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949) 2

Int'l Harvester Co. v. Wisconsin Dep't of Taxation,
322 U.S. 435 (1944) 22

J.C. Penny Nat'l Bank v. Johnson,
19 S.W.3d 831 (Tenn. Ct. App. 1999) 19

Lanco, Inc. v. Director, Div. of Taxation,
908 A.2d 176 (N.J. 2006) 18

M'Culloch v. State of Maryland,
17 U.S. 316 (1819) 21

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois, 386 U.S. 753 (1967) ..... *passim*

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 21

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization,
430 U.S. 551 (1977) 20, 21

Overstock.com, Inc. v. State Dep't of Taxation & Fin.,
987 N.E.2d 621 (N.Y. 2013) 9

Performance Mktg. Ass'n v. Hamer,
998 N.E.2d 54 (Ill. 2013) 9

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Rylander v. Bandag Licensing Corp.,
18 S.W.3d 296 (Tex. Ct. App. 2000) 19

Scholastic Book Clubs, Inc. v. Comm'r of Revenue Servs., 38 A.3d 1183 (Conn. 2012) 18

Scholastic Book Clubs, Inc. v. Farr,
373 S.W.3d 558 (Tenn. Ct. App. 2012) 18

Scioto Ins. Co. v. Okla. Tax Comm'n,
279 P.3d 782 (Okla. 2012) 19

Tax Comm'r v. MBNA Am. Bank, N.A.,
640 S.E.2d 226 (W. Va. 2006) 18

In re Various Applicants for Exemption from Prop. Taxation, 313 P.3d 789 (Kan. 2013) 18

W. Live Stock v. Bureau of Revenue,
303 U.S. 250 (1938) 2

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 2

CONSTITUTIONS AND STATUTES

ALA. ADMIN. CODE R. 810-6-2-.90-.03
(Supp. 2016) 8

CAL. REV. & TAX. CODE § 6203(c)(5)(A)
(Deering 2017) 9

COLO. CONST. ART. XX, § 6 10

COLO. REV. STAT. § 39-21-112(3.5) (2017) 7

COLO. REV. STAT. § 39-21-118 13

COLO. REV. STAT. § 39-26-105(1)(c)(II)(A) 13

COLO. REV. STAT. § 39-26-202 (2017) 20

CONN. GEN. STAT. § 12-407(a)(15)(A)(x) (2017) 9

GA. CODE ANN. § 48-8-2(8)(M)(i) (2017) 9

IDAHO CONST. ART VII, § 6 10

KAN. STAT. ANN. § 79-3702(h)(2)(C) (2017) 9

KY. REV. STAT. ANN. § 139.450 (2017) 7

LA. CONST. ART. VI, § 29 10

ME. REV. STAT. tit. 36, § 1754-B(1-A)(C) (2017) 9

830 Code Mass. Regs. 64H.1.7 (2017) 12

MINN. STAT. § 297A.66.Subd.4a.(b) (2017) 9

MO. REV. STAT. § 144.605(2)(e) (2017) 9

N.Y. TAX LAW §§ 1101(b)(8)(vi) (2017) 9

N.C. GEN. STAT. § 105-164.8(b)(3) (2017) 9

OHIO REV. CODE § 5741.01(I)(2)(h) & (i) (2017) . . . 12

OKLA. STAT. ANN. tit. 68, § 1406.1 (2017) 7

R.I. GEN. LAWS § 44-18-15(a)(2) (2017) 9

R.I. GEN. LAWS § 44-18.2 (2017) 12

S.C. CODE ANN. § 12-36-2691(E) (2017) 7

S.C. CODE ANN. § 12-36-2692 (2017) 7

S.D. CODIFIED LAWS § 10-63-1, *et seq.* (2017) 7

S.D. CODIFIED LAWS § 10-64-2 (2017) 8

TENN. CODE ANN. § 67-6-515(f) (repealed Jan. 1, 2014) 7

TENN. COMP. R. & REGS. 1320-05-01-.129 (2017) . . . 8

VT. STAT. ANN. tit. 32, § 9701(9)(F) (2017) 8

VT. STAT. ANN. tit. 32, § 9783 (2017) 7

WYO. STAT. ANN. § 39-15-501 (2017) 8

OTHER AUTHORITIES

About Us: The Streamlined Sales Tax Governing Board, Streamlined Sales Tax Governing Board, Inc., http://tinyurl.com/gtqcdoj 10

Brief for Respondent, Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (No. 13-1032) 6, 8

Donald Bruce, et al., *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537 (2009) 6, 10

California State Board of Equalization, *Revenue Estimate: Electronic Commerce and Mail Order Sales*, (Rev. Aug. 2013), https://tinyurl.com/yaelyo72 11

Crutchfield v. Harding, No. CL17001145-00 (Va. Cir. Ct., filed Oct. 24, 2017) 12

Lila Disque & Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163 (June 2016) 11

THE FEDERALIST NO. 32 (A. Hamilton) 21

Global Hookah Distribs. v. Dep't of Revenue, No. TC 5272 (Or. T.C.) 5

Iain MacNeil, *Uncertainty in Commercial Law*, 13 EDINBURGH L. REV. 68 (2009) 19

Laura Mahoney, et al., *States See Little Revenue From Online Sales Tax Laws, Keep Pressure on Congress*, Bloomberg BNA (Jan. 8, 2014), http://tinyurl.com/zvaarcv 9, 10

Nina Manzi, Minn. House of Representatives Research Dep't, *Policy Brief: Use Tax Collection on Income Tax Returns in Other States* (Apr. 2012), http://tinyurl.com/z5fb9sl 11

PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate* (Apr. 7, 2006), https://tinyurl.com/j32k2xt 13

S.D. Bureau of Finance & Mgmt., *Revenue Forecasts* (March 2015), https://tinyurl.com/yasyeot5 6

John A. Swain & Walter Hellerstein, *The Questionable Constitutionality of Amazon's Distribution Center Deals*, 62 ST. TAX NOTES 667 (Dec. 5, 2011) 7

U.S. General Accounting Office, *Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain* (June 2000), https://tinyurl.com/y6uk7fzf 6

Wash. Economic & Revenue Forecast Council, *Washington State Economic and Revenue Forecast* (Sept. 2017), https://tinyurl.com/ya95n6m4 6

Washington State Dep't of Revenue, *2016 Compliance Study* (June 1, 2016), https://tinyurl.com/ycmovp9k 12

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 35 States and the District of Columbia—all jurisdictions that, like Petitioner, rely on some form of consumption taxes to fund their essential government operations. The *amici* States have a significant interest in seeing that the unprincipled physical-presence rule receives the "complete burial it justly deserves." *Quill*, 504 U.S. at 321 (White, J., concurring in part and dissenting in part). As the volume of Internet-based retail transactions continues to compound daily, the physical-presence rule exacts an ever-increasing toll on the States' fiscal health. One estimate puts the States' lost tax revenue due to the physical-presence rule at $211 billion over the next five years. Pet. 13. The "States' education systems, healthcare services, and infrastructure are weakened as a result." *Direct Mktg. Ass'n v. Brohl ("DMA")*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Equally important, the physical-presence rule intrudes on the sovereign authority of the States. If, as many Justices of this Court have pointed out, the rule is contrary to the Constitution, it amounts to an illegal imposition on the legitimate power of the States, and it provides no justification to strip them of the most effective and sensible methods of sales and use tax collection. Removing those collection methods not only harms the States' budgets but also the Founders' constitutional design.

---

[1] No counsel for any party authored this brief in whole or in part, nor did such counsel or any party make any monetary contribution intended to fund the preparation or submission of this brief. Consistent with Rule 37.2(a), the *amici* States provided timely notice to the parties' attorneys more than ten days in advance of filing.

The *amici* States thus strongly support Petitioner's request for the Court to grant certiorari to expeditiously revisit *Quill*'s physical-presence rule.

SUMMARY OF THE ARGUMENT

The Commerce Clause encourages "the free flow of commerce across state lines." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 206 (1994). But this Court has recognized that the Clause does not render interstate or remote retailers immune from reasonable State regulation. "Even interstate business must pay its way." *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) (internal quotations omitted). The aim is to promote "free competition from *every* producing area in the Nation," *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (emphasis added), not preferential treatment for either local economic interests *or* those operating from distant computer screens.

The problem with the physical-presence rule is that it was first conceived of in 1967, two years before the moon landing and decades before the first retail transaction occurred over the Internet. *See Nat'l Bellas Hess*, 386 U.S. 753 (1967). The rule is therefore not responsive to the "far-reaching systemic and structural changes in the economy" caused by the Internet. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). If anything, the rule impairs rather than advances the Commerce Clause's underlying objective of promoting a free market undisturbed by discriminatory advantages. Today, remote retailers, invoking *Quill*, effectively receive a subsidy because of how unlikely it is that their customers will ever pay the state sales and use taxes that they undeniably owe. *See Direct Mktg. Ass'n v. Brohl ("DMA II")*, 814 F.3d 1129, 1150 (10th Cir. 2016)

(Gorsuch, J., concurring) (recognizing that *Quill* grants remote retailers "favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage").

The *amici* States are uniquely harmed by the market-distorting effects of the physical-presence rule. Because nearly all of the *amici* States must balance their budgets each year, the loss of tax revenue caused by *Quill*'s rule has forced them to forgo the traditional collection method of requiring the retailer to collect the tax directly from the customer at the point of sale—the procedure that applies to the millions of in-person sales made daily at local stores—and cast about for some kind of workable alternative. But the alternatives tested to date have proved ineffective. The States continue to lose billions of dollars in tax revenue owed on remote retail transactions, despite their attempts to collect the taxes that are undeniably owed. The combined experiences of the States thus demonstrate that direct collection of the tax at the point of sale is necessary to efficiently enforce the States' lawful sales and use taxes.

The negative consequences of *Quill* do not stop with the devastating loss of tax revenue. Because *Quill* is a doctrinal outlier that does not comport with the principles underpinning the Commerce Clause, it has created widespread confusion in lower courts. The result is a fragmented and inconsistent line of authority that has constrained the States' ability to meaningfully respond to the on-the-ground economic realities within the *amici* States' borders. When they have made the attempt, the States have been met with resistance and lengthy *Quill*-related litigation that both stalls the enforcement of legislative measures and costs the States millions in litigation expenses.

Apart from these pragmatic issues, however, there is a more basic problem. *Quill*'s physical-presence rule infringes State sovereignty. This Court has held that the States are sovereign entities entitled to exercise the full extent of their taxing power. It has also affirmed the constitutionality of their complementary sales and use tax schemes. Yet despite these uncontroversial holdings, the physical-presence rule persists, blocking the States from exercising that power fully. It prevents the States from fairly "distributing the burden of the cost of government," including "police and fire protection, the benefit of a trained work force, and the advantages of a civilized society"—all benefits that remote retailers reap when they market their products to the *amici* States' citizens and deliver them packages millions of times per day using the States' infrastructure. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623–24 (1981) (internal quotations omitted).

Suggesting that the States await a national solution from Congress is no answer to this infringement on their sovereignty. This Court invited congressional action nearly 25 years ago to address this issue, yet Congress has repeatedly declined. Moreover, if States have the sovereign authority to require collection by remote retailers, waiting for Congress is an affront to their sovereignty. Federal legislation cannot resolve whether the States have the sovereign authority to collect lawfully imposed sales and use taxes directly from remote retailers. Only this Court can.

REASONS FOR GRANTING THE PETITION

I. The States' collective experience in abiding by *Quill* demonstrates that no substitute is adequate to replace direct collection by the retailer.

The unfairness caused by *Quill*'s physical-presence rule has left the States in an increasingly untenable position. Justice Kennedy highlighted the States' predicament in *DMA*, explaining that "*Quill* now harms States to a degree far greater than could have been anticipated earlier" by causing a "startling revenue shortfall in many States." 135 S. Ct. at 1135 (Kennedy, J., concurring). *Quill*'s rule, Justice Kennedy noted, has not only created "concomitant unfairness" for physically-present retailers, it has also imposed a "serious, continuing injustice" on the States by weakening their education systems, healthcare services, and infrastructure. *Id.* at 1134–35.

Justice Kennedy was of course right. The collective experiences of the *amici* States prove that. In almost each instance, sales and use tax revenue makes up a sizeable portion of the States' budgets.[2] In South Dakota, it accounted for 61 percent of its 2016 general fund; in Colorado, the figure is one third; in

---

[2] Of the *amici* States, only Oregon does not impose a general sales-and-use tax. Oregon nonetheless currently has active litigation involving other taxes in which out-of-state vendors responsible for collecting taxes imposed on Oregon consumers allege the protection of *Quill*'s physical-presence rule, such as taxes on the distribution of tobacco products. *See Global Hookah Distribs. v. Dep't of Revenue*, No. TC 5272 (Or. T.C.). This further demonstrates the harm *Quill*'s rule can impose on the States.

Washington, nearly one half.[3] And while taxable E-commerce transactions are steadily increasing, sales and use tax collection actually *decreased* in Colorado from 2008 to 2010. Brief for Respondent at 5–6, *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (No. 13-1032) (citing record). This decrease occurred during the Great Recession when the States' annual budget shortfalls were mounting. *Id.* at 6. The shortfall came at the worst possible time. When the economy falters, the demand for public services goes *up*, increasing both the need for critical government services and the strain on the States' budgets. *Id.* Eliminating the confusion and uncertainty over collecting the owed but almost-never-paid use tax due on remote retail transactions could help fill this void.[4] Colorado alone lost an estimated $170 million of tax revenue owed in 2012 on remote E-commerce transactions. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Texas lost $870 million that year; in California, the estimated number was $1.9 *billion*. Donald Bruce, et al., *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537, 545 (2009) (Table 5). The reason is *Quill*.

---

[3] S.D. Bureau of Finance & Mgmt., *Revenue Forecasts*, p. 1 (March 2015), https://tinyurl.com/yasyeot5 (last visited Oct. 11, 2017); Brief for Respondent at 5, *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (No. 13-1032); Wash. Economic & Revenue Forecast Council, *Washington State Economic and Revenue Forecast*, p. 50 (Sept. 2017), https://tinyurl.com/ya95n6m4 (last visited Oct. 11, 2017).

[4] The United State General Accounting Office estimates that individual taxpayer compliance with the use tax is between zero and five percent, excluding motor vehicle sales. U.S. General Accounting Office, *Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain*, p. 35 (June 2000), https://tinyurl.com/y6uk7fzf (last visited Oct. 3, 2017).

Against this backdrop, *Quill*'s artificial rule has forced the States to craft special regulations to attempt to slow the loss to their treasuries. The result is that, despite the Commerce Clause's purpose of avoiding discriminatory treatment between intrastate and interstate markets, the States are forced to treat differently retailers that maintain a traditional physical presence within their boundaries and national remote retailers that do not. *See* John A. Swain & Walter Hellerstein, *The Questionable Constitutionality of Amazon's Distribution Center Deals*, 62 ST. TAX NOTES 667, 667 (Dec. 5, 2011) (stating States are "effectively force[d] to discriminate against local commerce" under *Quill*).

Colorado, for instance, enacted a notice and reporting law in 2010 that is akin to the IRS W-2 information return for employee income. COLO. REV. STAT. § 39-21-112(3.5) (2017). It requires remote retailers that "do[ ] not collect Colorado sales tax" to (1) provide notice to customers of their obligation to pay the owed sales or use tax directly to the State, and (2) supply the taxing authority with an annual statement specifying the amount of tax owed by each customer.[5] *See id.* In other words, it applies special rules to only those retailers that lack a traditional physical presence in Colorado. Retailers with such presence in the State, while not subject to the notice and reporting law, remain subject to the traditional obligations associated

---

[5] Other States have also enacted laws similar to Colorado's. *See* KY. REV. STAT. ANN. § 139.450 (2017); OKLA. STAT. ANN. tit. 68, § 1406.1 (2017); S.C. CODE ANN. §§ 12-36-2692 & 2691(E) (2017); S.D. CODIFIED LAWS § 10-63-1, *et seq.* (2017); TENN. CODE ANN. § 67-6-515(f) (repealed Jan. 1, 2014); VT. STAT. ANN. tit. 32, § 9783 (2017).

with collecting and remitting the sales tax. *Quill*'s physical-presence rule is the sole reason for this unnecessary, differential treatment of retailers that sell identical products to similarly-situated customers.

Although Colorado's innovative notice and reporting law is estimated to chip away at the State's growing "tax gap" caused by *Quill*, it remains only a partial solution. Colorado's law is expected to close its use tax gap by 60 percent at most.[6] It thus does not solve the growing problem caused by the increasing prevalence of remote purchases.

Colorado's approach is only one of a myriad of half-solutions that the States have been forced to devise to attempt to address the harm caused by *Quill*. Other State approaches abound:

- **Bright Line Economic Presence Standard**: Like South Dakota, some States have enacted laws establishing a bright line economic presence standard for determining whether a retailer lacking traditional physical presence must nonetheless collect the State's sales tax.[7] These laws generally provide that a remote retailer is required to collect and remit sales tax if it makes sales in the State exceeding a certain dollar threshold or enters into a certain number of retail transactions for delivery into the State. As

---

[6] Brief for Respondent at 9, *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (No. 13-1032) (citing record).

[7] S.D. CODIFIED LAWS § 10-64-2 (2017); *see also* ALA. ADMIN. CODE R. 810-6-2-.90-.03 (Supp. 2016); TENN. COMP. R. & REGS. 1320-05-01-.129 (2017); VT. STAT. ANN. tit. 32, § 9701(9)(F) (2017); WYO. STAT. ANN. § 39-15-501 (2017).

demonstrated by the South Dakota Supreme Court's decision here, the enforceability of these laws remains constitutionally uncertain so long as *Quill* remains on the books. This approach thus does not fix the States' collective dilemma absent action by this Court to abrogate *Quill*.

- **"Click-through nexus" statutes**: Several States have enacted laws that impose collection and reporting duties on remote retailers who market their products using in-state affiliates, including through websites that link to the seller's website.[8] State supreme courts, however, are split over the legality of these statutes. *Compare Performance Mktg. Ass'n v. Hamer*, 998 N.E.2d 54 (Ill. 2013) (striking down Illinois' click-through nexus law under the Internet Tax Freedom Act), *with Overstock.com, Inc. v. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013) (upholding New York's click-through nexus law against Due Process and Commerce Clause challenges). And online retailers have undercut the effectiveness of these statutes by severing ties with their affiliates in States with click-through laws and then claiming *Quill*'s protection.[9]

---

[8] CAL. REV. & TAX. CODE § 6203(c)(5)(A) (Deering 2017); CONN. GEN. STAT. § 12-407(a)(15)(A)(x) (2017); GA. CODE ANN. § 48-8-2(8)(M)(i) (2017); KAN. STAT. ANN. § 79-3702(h)(2)(C) (2017); ME. REV. STAT. tit. 36, § 1754-B(1-A)(C) (2017); MINN. STAT. § 297A.66.Subd.4a.(b) (2017); MO. REV. STAT. § 144.605(2)(e) (2017); N.Y. TAX LAW § 1101(b)(8)(vi) (2017); N.C. GEN. STAT. § 105-164.8(b)(3) (2017); R.I. GEN. LAWS § 44-18-15(a)(2) (2017).

[9] *See* Laura Mahoney, et al., *States See Little Revenue From Online Sales Tax Laws, Keep Pressure on Congress*, Bloomberg BNA (Jan.

- **Streamlined Sales and Use Tax Agreement** ("SSUTA"): Twenty-four States participate as members in SSUTA. That effort attempts "to find solutions for the complexity in state sales tax systems that resulted in the U.S. Supreme Court holding[s]" in *Bellas Hess* and *Quill*.[10] Its main features are the availability of a state-level administrator for sales and use tax collection and a uniform tax rate statewide. While SSUTA has eased the burden of collection—for example, by making tax software available to vendors free of charge, Pet. 30—difficulties remain. Joining SSUTA is prohibited in some States because of provisions in their constitutions that grant localities the right to administer their own sales and use taxes. *See, e.g.*, COLO. CONST. art. XX, § 6; IDAHO CONST. art VII, § 6; LA. CONST. art. VI, § 29. More fundamentally, SSUTA's effectiveness is limited by the fact that *Quill* makes vendor participation voluntary. In over seven years, a mere $1.3 billion was collected by retailers registered with SSUTA—a disappointingly low amount compared to the overall $66 billion-plus owed on remote E-commerce sales in the participating States.[11]

8, 2014), http://tinyurl.com/zvaarcv (last visited Sept. 27, 2017) (stating North Carolina "most likely lost revenue because many retailers cut ties with affiliate marketers in the state").

[10] *About Us: The Streamlined Sales Tax Governing Board*, Streamlined Sales Tax Governing Board, Inc., http://tinyurl.com/gtqcdoj (last visited Sept. 27, 2017).

[11] Mahoney, *supra* note 9; Bruce, 50 ST. TAX NOTES at 543 (Table 3, estimating sales and use taxes due on E-commerce in SSUTA participating States at $66.7 billion between 2007 and 2012).

- **"Look up" Table:** Nine States permit taxpayers to estimate their use tax liability by using a percentage of their income found in a "look up" table.[12] But compliance rates in States employing this approach are uneven at best. *See* Lila Disque & Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1179–80 (June 2016). In California, for example, this approach yielded compliance on just $249 million out of $6.3 billion in remote sales in one period, a mere four percent of the amount owed.[13]

- **Use Tax Line on the Income Tax Return:** Approximately 25 States encourage taxpayers to voluntarily report their use tax liability by including a use tax line on their state income tax return form.[14] Taxpayers' voluntary participation in this approach, however, is paltry, averaging just 1.6 percent.[15]

These varied approaches are just a sampling of how the States have been forced to respond to *Quill* in today's digital era in which "buyers have almost instant

---

[12] Nina Manzi, Minn. House of Representatives Research Dep't, *Policy Brief: Use Tax Collection on Income Tax Returns in Other States*, p. 8 (Apr. 2012), http://tinyurl.com/z5fb9sl (last visited Sept. 28, 2017).

[13] California State Board of Equalization, *Revenue Estimate: Electronic Commerce and Mail Order Sales*, p. 7 (Rev. Aug. 2013), https://tinyurl.com/yaelyo72 (last visited Oct. 2, 2017).

[14] Manzi, *supra* note 12, at 2.

[15] Manzi, *supra* note 12, at 9.

access to most retailers via cell phones, tablets, and laptops."[16] *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Predictably, many States have also increased the tax rates on their eroding sales tax bases, Pet. 14–15, or been forced to increase other taxes like property or income taxes. Yet despite the States' efforts, no method to date has proven to be an adequate substitute for requiring remote retailers to collect the owed tax at the point of sale.

Nor should this come as a surprise. When a retailer is required to add the owed sales or use tax to the price of the product and collect it at "check out," compliance skyrockets, nearing 100 percent.[17] The Tenth Circuit noted this in Colorado's litigation over its reporting law, explaining that direct collection of the tax yields a 98.3

---

[16] This proliferation of varied approaches continues today. Prompted by Justice Kennedy's observation in *DMA* of the "meaningful" and "structural" changes to the economy caused by the Internet, 135 S. Ct. at 1135, several States have recently undertaken a closer examination of today's E-commerce technology and concluded that it *does* include software components that are physically present in the State of the purchaser. *See, e.g.*, OHIO REV. CODE § 5741.01(I)(2)(h) & (i) (2017); R.I. GEN. LAWS § 44-18.2 (2017); 830 Code Mass. Regs. 64H.1.7 (2017). While States adopting this model believe that Internet retailers have physical presence in the State where the purchaser is located, this approach has been challenged under *Quill* and the outcome is uncertain. *See, e.g., Crutchfield v. Harding*, No. CL17001145-00 (Va. Cir. Ct., filed Oct. 24, 2017). These States join this brief because the physical-presence rule creates debilitating uncertainty, without conceding that it immunizes Internet retailers from collection obligations.

[17] Washington State Dep't of Revenue, *2016 Compliance Study*, p. 3 (June 1, 2016) (estimating sales tax noncompliance rate among registered taxpayers at 1.8%), https://tinyurl.com/ycmovp9k (last visited Oct. 2, 2017).

percent compliance rate. *DMA II*, 814 F.3d at 1132 n.1. This is common sense. Direct collection at the point of sale eliminates the need for consumers to keep records of their day-to-day transactions so that they can later report their use tax liability on their individual yearly tax return.

Moreover, in many States, retailers subject to collection and remittance laws are incentivized to properly collect and remit the owed tax. Retailers that comply receive compensation because they are often entitled to retain both a small portion of the tax collected, *e.g.*, COLO. REV. STAT. § 39-26-105(1)(c)(II)(A), and the "net float" interest income earned from investing the tax funds prior to periodic remittance to the State.[18]

Compliant retailers also avoid corrective action by the State—an incentive in and of itself. *Id.* § 39-21-118. But remote retailers that hide behind *Quill* can largely avoid State efforts to penalize them for not collecting the owed tax. Some even go so far as to falsely advertise that the sale is "tax free." Pet.App. 22a. Members of this Court have recognized the problem posed by this unfair, differential treatment. The physical-presence rule enables remote retailers to obtain a "tax shelter" of sorts, contrary to the Commerce Clause's core anti-discrimination principle. *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring) (internal quotation marks omitted).

---

[18] PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate*, p. 9 (Apr. 7, 2006), https://tinyurl.com/j32k2xt (last visited Oct. 20, 2017).

Quill's effect of forcing the States to revert to different, sub-optimal approaches to solve their resulting tax gaps poses still another problem. The States' disparate answers to *Quill* are, in many cases, incompatible with one another, frustrating the development of more evenhanded and complementary state-specific solutions that can function efficiently across the entire retail market. While click-through nexus statutes and SSUTA jurisdictions are premised on the States collecting the owed tax from the *retailer*, other State approaches use a very different model: voluntary *consumer* remittance. Colorado's information reporting law, "look up" table jurisdictions, and the States that include a use tax line on their income tax return all fall into the latter category. Under that type of patchwork, fastidious consumers who wish to satisfy their tax obligation may unwittingly end up paying the tax twice, while consumers and retailers who are all too happy to avoid compliance pay nothing. The result is a mishmash of different and largely ineffective half-measures that have proven incapable of curing the growing tax gap caused by remote sales. Abrogating the physical-presence rule will allow States to apply their existing collection laws and other enforcement measures in ways that create both a level playing field for in-state and out-of-state retailers and clarity for consumers.

Absent action by this Court, the States will continue to suffer increasing revenue shortfalls at great expense to their essential government functions. Meanwhile, the States' divergent approaches to solving this problem will continue to impose unnecessary complexity on both the retail industry and consumers alike. Accordingly, this Court should grant the Petition to reconsider its decision in *Quill*.

II. *Quill* disrupts the States' right to respond to economic realities and impose lawful taxes in the absence of contrary federal law.

The challenges faced by the States from the physical-presence rule and the uncertainty it creates are not limited to the billions of dollars they lose in tax revenue. The rule also hinders other critical interests of the States, namely their sovereign authority to collect sales and use taxes and their ability to enact meaningful regulatory measures that will pass constitutional muster in the lower courts. Those courts, bound as they are by *Quill*, have struggled to define the proper reach of the physical-presence rule, adversely affecting the States' ability to respond to the economic realities that exist within their boundaries. That problem is all the more confounding because this Court has repeatedly recognized that the States are sovereign entities that may exercise the full extent of the taxing power. *Quill*'s rule interferes with that core aspect of the States' sovereign power, but without doctrinal support under the Commerce Clause.

A. The physical-presence rule is a doctrinal outlier, creating splintered court decisions that hinder the States' ability to pass effective tax enforcement legislation.

The physical-presence rule created by *Bellas Hess* and perpetuated by *Quill* was heavily criticized in 1967, was recognized as a doctrinal mistake in 1992, and causes more harm and confusion in today's Internet age than anyone could have foreseen at the time of either decision.

When *Bellas Hess* first announced the physical-presence rule in 1967, Justice Fortas and two of his colleagues in dissent accurately predicted both the weakness of its doctrinal underpinnings and the resulting injury to state and local economies. He observed that, under any formulation of the dormant Commerce Clause, a commercial enterprise "engaged in the business of regularly, systematically, and on a large scale offering merchandise for sale in a State in competition with local retailers" should not be "excused" from compliance with that State's sales and use tax obligations. 386 U.S. at 765 (Fortas, J., dissenting). Even in 1967—decades before freely available software automated the process—Justice Fortas understood that the alleged mechanical "burdens" of compliance were not enough to justify the doctrinal oddity. In Justice Fortas' view, such objections "vastly underestimate[ ] the skill of contemporary man and his machines." *Id.* at 766. At the very least, he believed that the majority's "haven of immunity" should not be unnecessarily extended to the $2.4 billion national mail-order industry as a whole, but rather only to those few remote retailers that engage in "sporadic or minor" business in a given State. *Id.* at 763. The *Bellas Hess* majority's broad exemption, he forecast, would "be substantial, and ... may well increase in size and importance." *Id.* at 764.

Twenty-five years later, in *Quill*, the Court reaffirmed *Bellas Hess* but on narrower grounds, jettisoning the due process rationale for the physical-presence rule. 504 U.S. 298 (1992). Justice White dissented, criticizing as "without precedent or explanation" the majority's decision to craft a Commerce Clause test in conflict with the standard due process analysis that governs all other jurisdictional boundaries

for state regulation. *Id.* at 327 (White, J., concurring in part and dissenting in part). He also emphasized the compounded inequity visited upon the States and in-state retailers by the majority's "protectionist" rule. *Id.* at 329. What had been a $2.4 billion mail-order industry at the time of *Bellas Hess* had ballooned into a $180 billion industry at the time of *Quill*. *Id.*

The doctrinal confusion created by *Bellas Hess* and continued by *Quill* has left the States in a "harm[ful] and unfair[ ]" position. *DMA*, 135 S. Ct. at 1134 (Kennedy, J., concurring). As a practical matter, state lawmakers are left with no principled method for predicting whether their attempted legislative strategies for mitigating the *Quill* problem will pass constitutional muster. State Attorneys General are hampered in their ability to counsel their government clients, not knowing the contours of *Quill*'s reach in today's modern Internet age. In turn, state tax agencies and rulemaking bodies must fashion rules and provide guidance knowing that their efforts will be challenged in court as violating a rule meant to address the economy as it existed a half-century ago.

The *DMA* case demonstrates this unsustainable trend. Through seven years of costly litigation, the remote retail industry argued that Colorado's information reporting law was an end-run around *Quill*. The lower courts were understandably puzzled, unsure whether and to what extent *Quill* might bar Colorado's attempt to impose obligations that are similar to, but distinct from, those that *Quill* rendered off limits. After three appellate reversals involving two different preliminary injunctions in both state and federal court, the Tenth Circuit finally provided the last word: the

"exceptional narrowness" of *Quill*'s "ratio decidendi" is rooted in stare decisis only, and thus does not bar the States from enacting "other comparable regulatory and tax duties[.]" *DMA II*, 814 F.3d at 1149, 1151 (Gorsuch, J., concurring), *cert. denied*, 137 S. Ct. 591 (2016).

But this narrow reading of *Quill* still has at least two shortcomings. *First*, it is based on a doctrinal anomaly that does nothing to advance the Commerce Clause's overarching objective of promoting a market undisturbed by preferential advantages. Even under the Tenth Circuit's narrow reading of *Quill*, the decision continues to mandate at least some differential treatment of in-state brick-and-mortar retailers versus retailers that lack a traditional physical presence, thus conferring at least some advantage on one over the other.

Second, the Tenth Circuit's narrow interpretation of *Quill* has not been uniformly shared by other courts. To the contrary, the lower courts are divided over the proper scope of the physical-presence rule. *See Lanco, Inc. v. Director, Div. of Taxation*, 908 A.2d 176, 177 (N.J. 2006) (noting split). While some courts like the Tenth Circuit decline to extend *Quill* beyond the narrow sales and use tax context presented by that decision, *see, e.g.*, *In re Various Applicants for Exemption from Prop. Taxation*, 313 P.3d 789, 797 (Kan. 2013); *Scholastic Book Clubs, Inc. v. Farr*, 373 S.W.3d 558, 562–65 (Tenn. Ct. App. 2012); *Scholastic Book Clubs, Inc. v. Comm'r of Revenue Servs.*, 38 A.3d 1183, 1199–1200 (Conn. 2012); *Geoffrey, Inc. v. Comm'r of Revenue*, 899 N.E.2d 87, 94–95 (Mass. 2009); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 232 (W. Va. 2006), others courts have expanded *Quill* to

reach not only sales and use taxes but other types of taxes as well. *See, e.g., Scioto Ins. Co. v. Okla. Tax Comm'n*, 279 P.3d 782, 784 (Okla. 2012) (citing *Quill* to invalidate income tax imposed on an out-of-state corporation that received payments for its intellectual property used at in-state restaurants); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 299–300 (Tex. Ct. App. 2000) (using *Quill* to invalidate franchise tax imposed on a company holding a certificate of authority to transact business in the State); *J.C. Penny Nat'l Bank v. Johnson*, 19 S.W.3d 831, 841–42 (Tenn. Ct. App. 1999) (using *Quill* to invalidate tax imposed on a bank's income generated by its credit card activities in the State).

These splintered court decisions highlight the confusion and unfairness of *Quill*'s unworkable rule. Retailers, individual taxpayers, and the States all suffer as a result. Their ability to predictably anticipate their tax-related responsibilities and revenues depends entirely on the jurisdiction they happen to occupy rather than the consistent application of a clear legal standard. Maintaining the physical-presence rule will only further perpetuate legal uncertainty, depressing both business activity and resulting tax revenue for the States. *See* Iain MacNeil, *Uncertainty in Commercial Law*, 13 EDINBURGH L. REV. 68, 69 (2009) ("[B]usiness activity is facilitated by legal certainty").

This inconsistency in the lower courts also demonstrates that the purported virtues of maintaining *Bellas Hess*'s supposed bright line—predictability and the reduction of litigation—have never been realized. *See Quill*, 504 U.S. at 329–30 (White, J., concurring in part and dissenting in part) (predicting that it is "very

doubtful" that the majority's goal of reducing litigation will be accomplished). Far from reducing court battles by establishing a clear rule, *Bellas Hess* and *Quill engender* litigation in the E-commerce era, costing the States billions of dollars in litigation expense and lost tax revenue. Part of the reason is that the advent of the Internet has fundamentally altered what it means to be physically present—"a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). But changes in technology should not force States to spend seven years in litigation, as Colorado did, before they are permitted to chip away at the tax gap problem that *Bellas Hess* and *Quill* created. Indeed, because *Bellas Hess* was likely "wrong when the case was decided," *id.* at 1134, the States should not be forced to cast about for half-solutions in the first place.

Accordingly, this Court should grant certiorari to abrogate *Quill*'s unworkable exemption.

B. The States are sovereign entities that are constitutionally empowered to require remote retailers to collect use taxes.

No one disputes that the States may lawfully impose a use tax on goods that are stored, used, or consumed in a State when sales tax has not already been collected. *See, e.g.*, COLO. REV . STAT. § 39-26-202 (2017). This Court has repeatedly recognized the constitutionality of the States' complementary sales and use tax schemes. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). The use tax "put[s] retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *Nat'l Geographic Soc'y v.*

Cal. Bd. of Equalization, 430 U.S. 551, 555 (1977). The complementary framework is "intended to effect equality." *Henneford*, 300 U.S. at 585. It renders all tangible property used or consumed in a State subject to a uniform tax, regardless of whether it was acquired within or without the State. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963).

But *Quill* thwarts the States' legitimate authority to fully implement and enforce their otherwise lawful sales and use taxes. It frustrates the very principle of State sovereignty that underlies the federal system. *M'Culloch v. State of Maryland*, 17 U.S. 316, 429 (1819) ("All subjects over which the sovereign power of a state extends, are objects of taxation."). "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012). With taxation in particular, Alexander Hamilton emphasized the importance of the States' sovereignty as early as 1788, stressing the "justness" of the States "possess[ing] an independent and uncontrollable authority to raise their own revenues for the supply of their own wants." THE FEDERALIST NO. 32 (A. Hamilton). "An attempt on the part of the national government to abridge them in the exercise of [their taxing power] would be a violent assumption of power, unwarranted by any article or clause of its Constitution." *Id.* Thus, so long as other constitutional requirements are satisfied, *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), it makes no sense, doctrinally or practically, to maintain a special carve-out from the States' sovereign authority. *Cf. DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring) (noting *Quill* is "surrounded by a sea of contrary law").

While proponents of *Quill*'s artificial physical-presence rule will undoubtedly urge this Court to await a solution from Congress, that familiar argument ignores our system of dual sovereignty. Under that system, "the determination [regarding the appropriateness of a tax] is to be made by the state legislatures in the *first instance*[.]" *Commonwealth Edison*, 453 U.S. at 628 (emphasis added). And here, 35 legislatures in the *amici* States and the District of Columbia have spoken, choosing to enact a lawful sales tax on all retail transactions, including E-commerce transactions. Enforcement of those legislative decisions, however, is significantly obstructed by *Quill*, contrary to our federal scheme. *Cf. Int'l Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435, 444 (1944) (stating that a "practically effective device [is] necessary in order to enable the state to collect its tax"); *see also Dows v. City of Chicago*, 11 Wall. 108, 110 (1871) (stating "the modes adopted to enforce the taxes levied should be interfered with as little as possible").

Forcing the States to negotiate a legislative solution from Congress in lieu of fully exercising the sovereign authority that the Constitution already grants them fundamentally alters our democratic design. Pet. 28. It transforms the States from sovereign entities that are able to respond to the economic realities within their borders into 50 separate Congressional lobbying firms. It wrongly requires them to pursue policy objectives in conference rooms in Washington, D.C., rather than in their respective state legislative chambers where they are answerable to their voters.

This Court should grant review to abrogate the unprincipled physical-presence rule of *Quill*, making

clear that the Commerce Clause is no bar to the States' sovereign authority to collect lawfully imposed sales and use taxes directly from remote retailers. Congress cannot settle that constitutional dispute and, so far, it has been unable or unwilling to address the problem through legislation, despite this Court taking the unusual step of affirmatively inviting Congressional action 25 years ago. *See Quill*, 504 U.S. at 318. In light of Congress' continued inaction, certiorari should be granted by this Court. It is "unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should grant South Dakota's Petition for Writ of Certiorari.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General

MELANIE J. SNYDER
Chief Deputy
Attorney General

GRANT T. SULLIVAN
Assistant Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203
(720) 508-6000
Grant.Sullivan@coag.gov

November 2, 2017

Counsel for Amici Curiae

Counsel for Additional *Amici*

STEVE MARSHALL
Attorney General
of Alabama
501 Washington Avenue
Montgomery, AL 36104

LORI SWANSON
Attorney General
of Minnesota
102 State Capitol
75 Rev. Dr. Martin
Luther King Jr. Blvd.
St. Paul, MN 55155

LESLIE RUTLEDGE
Attorney General
of Arkansas
323 Center Street
Suite 200
Little Rock, AR 72201

JIM HOOD
Attorney General
of Mississippi
Post Office Box 220
Jackson, MS 39205

XAVIER BECERRA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

DOUGLAS J. PETERSON
Attorney General
for Nebraska
2115 State Capitol
Lincoln, NE 68509

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

HECTOR BALDERAS
Attorney General
of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

KARL A. RACINE
Attorney General for the
District of Columbia
441 4th Street, NW
Washington, D.C. 20001

ERIC T. SCHNEIDERMAN
Attorney General
of New York
120 Broadway 25th Floor
New York, NY 10271

PAMELA JO BONDI
Attorney General
of Florida
The Capitol PL-01
Tallahassee, FL 32399

DOUGLAS S. CHIN
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street,
12th Floor
Chicago, IL 60601

CURTIS T. HILL, JR.
Attorney General of Indiana
Office of the
Attorney General
200 West Washington
Street, Room 219
Indianapolis, IN 46204

JOSH STEIN
Attorney General
of North Carolina
9001 Main Service Center
Raleigh, NC 27699-9001

WAYNE STENEHJEM
Attorney General
of North Dakota
500 North 9th Street
Bismarck, ND 58501

MICHAEL DeWINE
Attorney General of Ohio
30 E. Broad St.
17th Floor
Columbus, OH 43215

ELLEN F. ROSENBLUM
Attorney General
of Oregon
1162 Court Street N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General
of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

THOMAS J. MILLER
Attorney General of Iowa
1305 East Walnut Street
Des Moines, IA 50319

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

DEREK SCHMIDT
Attorney General
of Kansas
120 SW 10th Avenue
2nd Floor
Topeka, KS 66612

HERBERT H. SLATERY III
Attorney General
and Reporter
State of Tennessee
500 Charlotte Avenue
Nashville, TN 37202

ANDY BESHEAR
Attorney General
of Kentucky
700 Capitol Avenue
Suite 118
Frankfort KY 40601

KEN PAXTON
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

JANET T. MILLS
Attorney General
of Maine
6 State House Station
Augusta, ME 04333

SEAN D. REYES
Attorney General of Utah
P.O. Box 142320
Salt Lake City, UT 84114

BRIAN E. FROSH
Attorney General
of Maryland
200 Saint Paul Place
Baltimore, MD 21202

THOMAS J. DONOVAN, JR.
Attorney General
Office of the Vermont
Attorney General
109 State Street
Montpelier, VT 05609

MAURA HEALEY
Attorney General
Commonwealth of
Massachusetts
One Ashburton Place
Boston, MA 02108

BILL SCHUETTE
Michigan Attorney
General
P.O. Box 30212
Lansing, MI 48909

ROBERT W. FERGUSON
Attorney General
of Washington
P.O. Box 40100
1125 Washington Street SE
Olympia, WA 98504

BRAD D. SCHIMEL
Attorney General
of Wisconsin
P.O. Box 7857
Madison, WI 53703-7857

PETER K. MICHAEL
Wyoming Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF CHRIS COX, FORMER MEMBER OF CONGRESS AND CO-AUTHOR OF THE INTERNET TAX FREEDOM ACT, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DAVID B. SALMONS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004-2541
(202) 373-6283
david.salmons@morganlewis.com

December 7, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE ITFA HAS ESTABLISHED FEDERAL POLICY AGAINST MULTIPLE AND DISCRIMINATORY STATE TAXATION OF INTERNET COMMERCE. 4

A. Congress Has Recognized the Unique Vulnerability of Internet Commerce to Multiple and Discriminatory Taxation. 8

B. The ITFA Specifically Prohibits Multiple and Discriminatory Taxation of Internet Commerce. 9

C. State Sales Taxes Can Violate the ITFA's Ban on Multiple and Discriminatory Taxes. 9

II. SOUTH DAKOTA'S LAW VIOLATES BOTH THE LETTER AND THE NATIONAL POLICY AIMS OF THE ITFA. 11

A. The ITFA Applies to the Taxes on Internet Transactions That Are the Subject of South Dakota's Law 11

TABLE OF CONTENTS—Continued

Page

B. South Dakota's Preferred National Policy Is Directly at Odds with the ITFA's Policy Against Multiple and Discriminatory Taxation. 12

III. SOUTH DAKOTA'S PETITION IS NOT A LEGAL, BUT A POLICY ARGUMENT 16

A. This Action Provides No Factual Record to Support South Dakota's Alternative National Policy for Interstate Commerce 17

B. South Dakota's Policy Argument Is Based Upon a False Premise: Its Sales Tax Revenue Has Been Growing Rapidly, Not Shrinking. 18

C. Since *Quill* and *DMA II*, 'Changed Circumstances' Have Made 'Brick-and-Click' Ubiquitous, Negating South Dakota's Claims of Harm to 'Brick-and-Mortar' 20

IV. CONGRESS, NOT INDIVIDUAL STATES OR THE COURTS, IS BEST SUITED TO DEVISE A SOLUTION TO THESE COMPLEX MULTISTATE TAX POLICY ISSUES. 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Blum v. *Caldwell*,
446 U.S. 1311 26

Burger King Corp. v. *Rudzewicz*,
471 U.S. 462 (1985) 25

Coit Indep. Joint Venture v. *Fed. Sav. & Loan Ins. Corp.*,
489 U.S. 561 (1989) 26

Commonwealth Edison Co. v. *Montana*,
453 U.S. 609 (1981) 25

Direct Mktg. Ass'n v. *Brohl*,
135 S. Ct. 1124 (2015) 20

Direct Mktg. Ass'n v. *Brohl*,
814 F.3d 1129 (10th Cir. 2016) 20, 21

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) .....*passim*

Volkswagen Corp. v. *Woodson*,
444 U.S. 286 (1980) 25

Walden v. *Fiore*,
134 S. Ct. 115 (2014) 25

RULE

S. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS & STATUTES

47 U.S.C. § 151 5

Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note)) ..... *passim*

ITFA § 1101 9

ITFA § 1105 ..... 2, 9, 12

P. L. No. 114-125, § 992 (Feb. 24, 2016) 5

S.D. Codified Laws ch. 10-45 24

S.D. Codified Laws ch. 10-52 24

U.S. Const. amend. XIV 25

U.S. Const. art. I, § 8, cl. 3 26

OTHER AUTHORITIES

"The Framework for Global Electronic Commerce," THE WHITE HOUSE (1998) 6

144 Cong. Rec. E1288-03 (June 23, 1998) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Amazon Accounts for 43% of US Online Retail Sales, BUS. INSIDER (Feb. 3, 2017, 12:12 PM), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2 20

Andrew Nehring, *Internet Sales Taxes: To Kill or Not to Kill Quill?*, WASH. EXAMINER (Apr. 7, 2017, 3:23 PM), http://www.washingtonexaminer.com/internet-sales-taxes-to-kill-or-not-to-kill-quill/article/2619704 12

Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WOMEN'S WEAR DAILY (Apr. 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796 22

H.R. 1054 5

H.R. 3086 7

H.R. 3849 5

H.R. 4105 5

TABLE OF AUTHORITIES—Continued

Page(s)

H.R. 4105 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/house-bill/4105/all-actions 5

H.R. 4105, 105th Cong. (1998) 5

H.R. Rep. No. 113-510, "Dissenting Views," (2014) 7

Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUST, 3 (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf 18

Report to Congress of the Advisory Committee on Electronic Commerce, 70 (2000), http://govinfo. library.unt.edu/ecommerce/acec_report.pdf 13, 14

S.442 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/senate-bill/442/actions 5

S. 442, 105th Cong. (2d Sess. 1998) 5

S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016) 16

S. Rep. No. 105-184 (1998) 7, 8, 10

TABLE OF AUTHORITIES—Continued

Page(s)

South Dakota Bureau of Finance & Management, Economic and Revenue Update (July 2017), https://bfm.sd.gov/econ/current.pdf 20

South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf 18, 19

South Dakota Department of Revenue Annual Reports (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/ 18

South Dakota Department of Revenue, Sales and Use Tax Guide (July 2017) 11

South Dakota GDP, DEPARTMENT OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ 19

"Target Report Q3 2017 Earnings," TARGET.COM (Nov. 15, 2017), http://investors.target.com/phoenix.zhtml?c=65828&p=irol-newsArticle&ID=2317059 22

TABLE OF AUTHORITIES—Continued

Page(s)

Walmart Says Its Online Sales Will Explode Next Year Amid War With Amazon, FORTUNE (Oct. 10, 2017), http://fortune. com/2017/10/10/ walmart-says-its-online-sales-will-explode-next-year-amid-war-with-amazon 21

What Percentage of Small Businesses Have Websites? (Mar. 18, 2017), https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-websites/..... 22

INTEREST OF *AMICUS CURIAE*[1]

Chris Cox is a former United States Representative (R-CA), who with current United States Senator Ron Wyden (D-OR) is the co-author of the Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note)).

The Internet Tax Freedom Act establishes federal policy regarding Federal and State taxation of the internet, based upon its unique characteristics as a mode of interstate and global commerce uniquely susceptible to multiple and discriminatory taxation. The Act also establishes a process by which Congress and the States can address the subject of State efforts to impose sales and use tax collection responsibilities on out-of-state vendors who rely exclusively upon the internet, the mails, the telephone, and other instrumentalities of interstate commerce to fulfill orders. Amicus has been a leading participant in that ongoing process and in congressional deliberations on these issues. He is thus able to bring to the attention of the Court

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. eBay, a leading e-commerce business that provides a platform for small internet retailers, contributed funds for the preparation or submission of this brief. Counsel for *amicus* also represent that all parties have consented to the filing of this brief and that the parties were timely notified of his intent to file this brief.

relevant matters not already addressed by the parties.

SUMMARY OF ARGUMENT

Congress, exercising its authority over interstate commerce, enacted the Internet Tax Freedom Act ("ITFA") in 1998. The law was made permanent in 2016. The principal purpose of the ITFA is to prevent commerce over the internet—uniquely interstate because of its decentralized, packet-switched architecture—from being subjected to multiple and discriminatory taxation across a confusing patchwork of thousands of state and local taxing jurisdictions. To this end, state and local governments are prohibited from imposing taxes directly on the internet or online activity. The ITFA categorizes taxes targeted specifically to the Internet itself or to online commerce as "discriminatory." Discriminatory taxes are outlawed by the ITFA.

The ITFA prohibits States from establishing unique tax rules for internet transactions. It applies to "any tax imposed by a State or political subdivision thereof on electronic commerce." Any such tax is a "discriminatory tax" and therefore banned if it is imposed differently, or if the obligation to collect or pay it is assigned to a different person, "than in the case of transactions involving similar property, goods, services, or information accomplished through other means" than via the internet.[2]

---

[2] ITFA §§ 1105(2)(A)(i), (iii).

South Dakota enacted a law that it has acknowledged violates this Court's precedent, for the transparent purpose of provoking litigation that, it hoped, would lead to a forum in this Court. Not surprisingly, South Dakota's was a losing effort in both that State's Circuit Court and Supreme Court. But the law that has thus far been held unconstitutional has other deficiencies, as well, arising from the fact that it would impose unique, discriminatory burdens on internet transactions that in-state retailers would not be required to bear, in violation of the ITFA.

South Dakota's argument is purely policy-based. Even as Congress is in the midst of robust debate concerning how best to protect the interests of the several States in taxing their own citizens on purchases made over the internet, South Dakota wishes to impose its preferred solution upon the entire Nation through the repeal of this Court's long-standing precedent of *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). South Dakota's favored approach would give it new power to tax and regulate out-of-state persons. Unavoidably, it would give the same power to every one of the 46 States with sales and use taxes, as well as thousands of differentiated taxing sub-jurisdictions. Under this new regime, an out-of-state business that sells over the internet would have to comply with the conflicting rules of thousands of taxing jurisdictions. The non-internet merchant would not. This is precisely the discriminatory burden ITFA sought to avoid as a matter of national policy.

Because this lawsuit is a contrivance, moving directly to decision via an action for declaratory relief

and a facial evaluation of the law without meaningful discovery, there is no factual record upon which this Court can test South Dakota's policy-based claims. For example, South Dakota claims it is losing revenue because it cannot tax and regulate out-of-state persons who contact the State solely via the internet, telephone, and the mails. This oft-repeated claim is provably false, see Part III.C, *infra*, and should be subjected to challenge in the lower courts before being relied upon to overturn a precedent of this Court.

National policymaking is the role of the Congress. So is the regulation of interstate commerce. Congress has exercised its authority to establish policy in this area through the ITFA, most recently in 2016, and is currently in the midst of further legislative deliberations over the specific issue of how internet transactions involving out-of-state vendors may best be subjected to sales and use taxes. There is nothing "dormant" about Congress's currently robust exercise of its proper authority in this area. This Court should reject Petitioner's invitation to enter the policymaking arena on an issue that has long taxed the imaginations of those in Congress who have worked so hard on it.

ARGUMENT

I. THE ITFA HAS ESTABLISHED FEDERAL POLICY AGAINST MULTIPLE AND DISCRIMINATORY STATE TAXATION OF INTERNET COMMERCE.

When the Internet Tax Freedom Act ("ITFA") was signed into law by President Bill Clinton on October

21, 1998, it was a rare bipartisan accomplishment. It passed the U.S. House by unanimous consent in July 1998, H.R. 4105, 105th Cong. (1998), while the Senate companion bill, S. 442, 105th Cong. (2d Sess. 1998), passed the U.S. Senate by a vote of 96-2 in October 1998. At the conclusion of the 105th Congress, many observers viewed the ITFA as historic and one of Congress's most important and substantive accomplishments.[3]

The law, however, was never popular with State governments. Only four Governors endorsed it. The National League of Cities, the National Governors' Association, the U.S. Conference of Mayors, the National Association of Counties, and the National Conference of State Legislatures all worked against it, because all wanted to lay claim to their piece of

---

[3] The detailed legislative history of the ITFA is as follows. On March 13, 1997, Rep. Cox introduced H.R. 1054, titled the "Internet Tax Freedom Act," in the U.S. House, and Sen. Wyden introduced it in the Senate, where it was designated S. 442. Subsequently, Rep. Cox introduced two updated versions: H.R. 3849, in May 1998; and H.R. 4105, in June 1998. H.R. 4105 passed the U.S. House by unanimous consent in July 1998, see H.R. 4105 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/house-bill/4105/all-actions, while the Senate companion bill, S. 442, passed the U.S. Senate by a vote of 96-2 in October 1998, S.442 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/senate-bill/442/actions. The ITFA was then added to the omnibus appropriations bill for that year, and signed into law by President Clinton as Titles XI and XII of P. L. No. 105-277, on October 21, 1998. It is codified as a note to 47 U.S.C. § 151. The ITFA as originally enacted imposed a moratorium on discriminatory taxation of electronic commerce. The law was subsequently extended on multiple occasions by Congress, and in February 2016, it was made permanent. See P. L. No. 114-125, § 992(a) (Feb. 24, 2016).

the internet. Cities had taxed and regulated cable TV as if it were a public utility, and they saw the internet as no different. But in Congress and the White House, the uniquely interstate—indeed, global—characteristics of the internet featured more prominently in policy making. In a white paper entitled "The Framework for Global Electronic Commerce," the White House pointed to "the Internet's special characteristics" as reason for its concern "about possible moves by state and local tax authorities to target electronic commerce."[4]

The policy arguments made by South Dakota in this case are the same arguments it and other States unsuccessfully made to Congress during debate over the ITFA. They, along with counties, municipalities, and territorial governments, claimed they would exert only a light touch when it came to regulatory burden; that even though there were thousands of taxing jurisdictions, the collective compliance burden would not be a problem; and that it was their prerogative as States to protect in-state commerce from the unwanted disruption of internet business models from out-of-state sellers.

These same arguments were reprised in 2016, when Congress made the ITFA permanent. Claiming this would "substantially reduce revenues" for the States, the law's original opponents from 1998—including the National Governors Association, the National Association of Counties, the National

---

[4] "The Framework for Global Electronic Commerce," THE WHITE HOUSE, § I.1 (1998).

League of Cities, and the U.S. Conference of Mayors—all opposed it anew.[5]

Congress and the White House, in 1998 and 2016, believed otherwise. The specter of multiple States and municipalities all simultaneously taxing and regulating commerce on the internet was seen as the far greater concern. Congress believed the increase in GDP facilitated by internet commerce would boost state revenues, not cut them. The fact that in-state sellers would be challenged by out-of-state vendors via the internet was seen as a feature, not a bug.

As stated in the Committee Report accompanying the ITFA in the Senate, the internet "offers advantages such as providing small- and medium-sized companies the opportunity to compete with multinational conglomerates." But, the Report noted, there are thousands of state and local taxing jurisdictions in the United States, and "the potential costs of complying with the tax demands of these authorities could make use of the Internet uneconomical for such companies."[6]

In order to achieve the benefits of internet commerce through a national policy that prevents the internet from being exposed to every State's regulation and taxation, Congress enacted the ITFA.

---

[5] H.R. Rep. No. 113-510, "Dissenting Views," at 16 (2014) (discussing H.R. 3086, the Permanent Internet Tax Freedom Act).

[6] S. Rep. No. 105-184, at 2-3 (1998) (discussing S. 442, the Internet Tax Freedom Act).

A. Congress Has Recognized the Unique Vulnerability of Internet Commerce to Multiple and Discriminatory Taxation.

"Most State and local commercial tax codes," the Senate Commerce Committee observed at the time of enactment of the ITFA, "were enacted prior to the development of the Internet and electronic commerce. Efforts to impose these codes without any adjustment to Internet communications, transactions or services . . . will lead to State and local taxes that are imposed in unpredictable and overly burdensome ways."[7]

The internet's decentralized, packet-switched architecture has no precedent in U.S. or global commerce. While equally revolutionary when introduced, the telephone and telegraph are point-to-point communications. There is a point of origin and a terminus. A website, in contrast, has a unique point of origin (say, a small business's garage) that is immediately and uninterruptedly exposed to billions of internet users in every U.S. jurisdiction and around the planet. This makes internet commerce, unlike mail-order sales or telephone sales, uniquely vulnerable to tax and regulatory burdens in thousands of jurisdictions.

So too does the fact that the internet is utterly indifferent to State borders. In its nearly instant transit, an email from one cubicle to another in the same office may be atomized and routed in pieces through servers in multiple States before reaching its destination a few feet away.

---

[7] *Id.* at 3.

These characteristics of the internet, Congress recognized in the ITFA, would subject it to extravagant claims of nexus and a confusing patchwork of thousands of state and local taxing jurisdictions, unless federal policy remedied the situation.

B. The ITFA Specifically Prohibits Multiple and Discriminatory Taxation of Internet Commerce.

The ITFA provides that "No State . . . may impose . . . discriminatory taxes on electronic commerce."[8]

Discriminatory taxes are defined to include any tax that "is not generally imposed and legally collectible . . . on transactions involving similar property, goods, services, or information accomplished through other means."[9]

The definition also includes any state tax that "imposes an obligation to collect or pay the tax on a different person . . . than in the case of transactions . . . accomplished through other means."[10]

C. State Sales Taxes Can Violate the ITFA's Ban on Multiple and Discriminatory Taxes.

Sales taxes can, under the plain language of the law's definition, be discriminatory within the meaning of the ITFA.[11] That sales taxes were a

---

[8] ITFA § 1101(a).

[9] ITFA § 1105(2)(A)(i).

[10] ITFA § 1105(2)(A)(iii).

[11] ITFA § 1105(2)(A).

particular concern of the ITFA is evident from the fact that, in crafting the law, Congress stated its express reliance upon *Quill*'s physical presence rule for nexus.[12]

Indeed, Congress openly worried that even *Quill's* bright-line test might not be enough to prevent the burdens of having to comply with the laws, rules, filing requirements, and audits of so many jurisdictions. "These traditional notions of nexus," the Senate Committee Report states, referring to *Quill*, "are difficult to apply to the Internet because of the way that Internet transactions occur."[13]

In lieu of committee reports from the House Judiciary and Energy & Commerce Committees, the statement from Rep. Cox, the author of the bill, was published in the Congressional Record ("Statement of Intent").[14] No contrary statement of intent was ever made by any co-sponsor or supporter of the ITFA in either the Senate or the House. ITFA, explains the Statement of Intent, is intended to provide "certainty" that the rules of *Quill*'s physical-presence test "will continue to apply to electronic commerce just as they apply to mail-order commerce, unless and until a future Congress decides to alter the current nexus requirements."[15]

---

[12] S. Rep. No. 105-184, at 2 (1998).

[13] *Ibid.*

[14] 144 Cong. Rec. E1288-03 (June 23, 1998).

[15] *Ibid.*

II. SOUTH DAKOTA'S LAW VIOLATES BOTH THE LETTER AND THE NATIONAL POLICY AIMS OF THE ITFA.

A. The ITFA Applies to the Taxes on Internet Transactions That Are the Subject of South Dakota's Law.

As noted, the ITFA prohibits "discriminatory taxes on electronic commerce." This includes any tax imposed differently on internet commerce. The law also prohibits assigning the tax collection burden to a different person in internet and non-internet transactions.

There are two means by which a resident of South Dakota can buy goods from out-of-state sellers. She can pick up the goods herself and bring them home. Or she can have someone else do that for her.

In the first instance, South Dakota does not impose any obligation to collect or pay sales tax on the remote seller.[16] Only in the second instance, where the means of fulfilling the transaction is the internet, telephone, or the mail, does South Dakota require the remote seller to collect and pay.

In the two instances, South Dakota places the burden of tax compliance on different persons or entities. Yet both cases involve remote sellers and in-state purchasers.

---

[16] This is the flip side of South Dakota's merciful treatment of its in-state retailers, who are not required to collect tax on sales to non-residents if possession is taken outside of South Dakota. See South Dakota Department of Revenue, Sales and Use Tax Guide, 3 (July 2017).

In short, the way that South Dakota has contrived its "kill *Quill*" law[17] unavoidably burdens internet remote sellers while sparing sellers of exactly the same property, goods, or services who accomplish the transaction through other means. This violates Section 1105(2)(A)(i) of the ITFA.

Similarly, by placing the burden of tax compliance and payment on the seller in the case of internet remote sales, but on the purchaser in the case of non-internet remote sales, South Dakota's law violates Section 1105(2)(A)(iii) of the ITFA.

B. South Dakota's Preferred National Policy Is Directly at Odds with the ITFA's Policy Against Multiple and Discriminatory Taxation.

In addition to violating the letter of Federal law, the South Dakota law is thoroughly inconsistent with its spirit.

First, the ITFA recognizes that internet commerce is inherently susceptible to burdensome regulation and taxation simultaneously by multiple jurisdictions in ways that offline commerce is not. It therefore bans States from what it broadly defines as discriminatory taxation.

Second, the ITFA established a Federal commission to further the policy aims of the

---

[17] For a description of the "Kill *Quill*" movement among the States, see, e.g., Andrew Nehring, *Internet Sales Taxes: To Kill or Not to Kill Quill?*, WASH. EXAMINER (Apr. 7, 2017, 3:23 PM), http://www.washingtonexaminer.com/internet-sales-taxes-to-kill-or-not-to-kill-quill/article/2619704.

legislation, including the development of "model State legislation" to provide "uniform definitions of categories of property, goods, service, or information subject to or exempt from sales and use taxes." The purpose of such state legislation would be to ensure that "transactions using the Internet ... would be treated in a tax and technologically neutral manner *relative to other forms of remote sales.*"[18]

The Federal commission reported to Congress in 2000. Consistent with the ITFA itself, it recommended that States work with and through the National Conference of Commissioners on Uniform State Laws to draft "a uniform sales and use tax act" that would permit simplification of state and local sales and use taxation. This is a necessary prerequisite, the commission believed, "to creating parity of collection costs between remote sellers and comparable single-jurisdiction vendors that do not offer remote sales."[19] The commission believed five years would be a reasonable time for the States to enact such legislation.[20]

Seventeen years later, South Dakota and its sister States have effectively rejected this policy, preferring to maintain their own unique tax rules, definitions, rates, and regulations.[21] This has left

---

[18] Report to Congress of the Advisory Committee on Electronic Commerce, 70 (2000), http://govinfo. library. unt.edu/ecommerce/acec_report.pdf (emphasis added).

[19] *Id.* at 5.

[20] *Id.* at 2.

[21] South Dakota and less than half of the States joined the Streamlined Sales and Use Tax Agreement, which was supposed to achieve uniformity or simplicity, but has not, even among its members.

internet sellers confronting essentially the same maze of differing state and local rules and competing definitions, deadlines, filing requirements, and audit demands that produced the ITFA in 1998 and led Congress to make the law permanent in 2016.

The national policy reflected in the ITFA is concerned with ensuring that state sales tax compliance would "not be more burdensome on a business that collects and remits taxes to several taxing jurisdictions than it is to a business that collects and remits taxes in a single taxing jurisdiction."[22] South Dakota does not share this concern. It focuses instead on the presumed competitive burden on its in-state businesses and its purported lost revenue. These arguments were rejected in the ITFA and by the commission.

The result is that South Dakota has enacted an extreme form of long-arm sales tax jurisdiction that will punish even the smallest out-of-state internet retailer.

An example will serve to illustrate.

A woman opens a small business out of her apartment in Idaho, selling iPhone cases principally over the internet. They retail for $7. She doesn't sell on Amazon because the seller account fee, referral fee, and closing fee together would amount to nearly half the retail price—and she would still be responsible for the packing and shipping costs. So she sells via her own web storefront.

---

[22] Report to Congress of the Advisory Committee on Electronic Commerce, *supra*, at 2.

Her customers are mostly in the United States and Canada. In a typical week she fills orders primarily to New York, Florida, Texas, Illinois, Colorado, and California, with gross annual sales of $273,000. She rarely sells to customers in South Dakota—maybe four iPhone cases in an entire week. Her net income is $1.49 per phone case. On those South Dakota sales, therefore, she earns $309 in a year.

Because she lives and works in Idaho, she is registered with the Idaho State Tax Commission, the Idaho Department of Labor, and the Idaho Industrial Commission. She has paid the Idaho State Tax Commission for a seller's permit, and regularly files Idaho sales tax returns. Compliance with Idaho's rules requires her, like other businesses in Idaho, to be familiar with the State's varying tax rates and definitions of what is taxable, its audit and recordkeeping requirements, and its filing requirements (in her case, the requirement to file monthly sales tax reports).

As challenging as these regulatory burdens may be, at least they are the same for every similarly situated business in Idaho. The discrimination begins once she is required to comply not only with Idaho's rules, where she lives and works, but with the rules and burdens imposed by 46 different States. Forcing one small business, with one location, to bear this burden is discriminatory when a large in-state retailer has no such burden. The sole basis for this discrimination is that the Idaho seller uses the internet to fill orders for shipment out of state. This violates the ITFA.

Yet South Dakota's law would claim full tax and regulatory jurisdiction over the woman in this example. Despite her *de minimis* sales into South Dakota, her relatively few shipments into the State will subject her to the licensing, registration, audit, and fee-paying requirements of the South Dakota Department of Revenue.[23]

South Dakota approvingly reports that "many other States have [enacted] provisions materially identical to South Dakota's,"[24] meaning that if this Court upholds the contested law in this case, even the smallest internet sellers will quickly be subject to nationwide compliance burdens and the competing rules, filing requirements and audit demands of over 12,000 taxing jurisdictions. This would be directly at odds with the ITFA's policy against multiple and discriminatory taxation.

III. SOUTH DAKOTA'S PETITION IS NOT A LEGAL, BUT A POLICY ARGUMENT.

South Dakota seeks, by reversal of clearly established Supreme Court precedent, to win in the courts what it has been unable to win in Congress. If South Dakota succeeds, it will effectively neuter the national policy established by Congress in the ITFA. Once every website that fills orders nationally has to comply separately with the local tax laws, rules, regulations, filing and audit requirements of 46 States, and once millions of individual sellers with a website find themselves liable to summons and the *in personam* jurisdiction of those States, it will be South

---

[23] S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016).

[24] Pet. at 8.

Dakota's preferred national policy, not Congress's, that prevails.

A. This Action Provides No Factual Record to Support South Dakota's Alternative National Policy for Interstate Commerce.

It is not merely that South Dakota's legislative policy argument should be addressed to the Congress rather than the Court (though it should). Even were this Court a legislature, it would require an opportunity to weigh competing data on various sides of the policy argument. This case, because of the barren factual record produced by the state legislature's express-to-the-U.S. Supreme Court gimmick, has no meaningful findings of fact whatever.

Petitioner points to the "detailed findings" in the South Dakota law.[25] Except for a few naked conclusions, however, there are none. The law's Section 8 claims without proof that the status quo is "causing revenue losses and imminent harm." As demonstrated below, this is untrue—South Dakota's sales tax revenue is increasing.

The law's other relevant "finding" is that South Dakota's proposed tax compliance burdens, including the long-arm assertion of *in personam* jurisdiction, are "neither unusually difficult nor burdensome for remote sellers." Here, too, the record is barren. The fact is that mid-market internet retailers would have to spend $80,000 to $290,000 in integration costs just to use the "free" sales tax software discussed by

---

[25] Pet. at 6.

Petitioner. Each year thereafter, they would incur costs between $57,500 and $260,000 for maintenance, updates, audits, and service fees.[26] Beyond this, a retailer with a single place of business would face further compliance burdens in the form of monthly, quarterly, and annual filings not just in South Dakota but every one of the 46 States with a sales tax that chooses to follow in its footsteps, should South Dakota's law be upheld.

B. South Dakota's Policy Argument Is Based Upon a False Premise: Its Sales Tax Revenue Has Been Growing Rapidly, Not Shrinking.

"Internet sales," reports the Supreme Court of South Dakota in this case, "have risen," while "state revenues have decreased." The sole source for this questionable assertion is the "finding" to that effect in the South Dakota law.

Had there been actual fact-finding in this case, Petitioner and the state courts would have been confronted with the State's own data showing that sales and use tax revenue has not only grown every year for the past seven years, but it has grown at a substantially higher rate than the South Dakota economy.[27]

---

[26] Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUST, 3 (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

[27] South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf; South Dakota Department

South Dakota Sales and Use Tax Revenue 2013-18
(in millions)

2013	2014	2015	2016	2017	2018
$787.7	$831.1	$836.5	$860.9	$974.7	$1,013.1*

The Governor's budget for 2018 projects that South Dakota's sales and use tax revenue will be *29% higher* than just five years prior.[28] The compound annual growth rate in sales and use tax revenue for the five years ending in 2016 is over 5%, compared to a compound annual growth in state GDP during that period of just 1%.[29]

This is the "brutal" revenue "shortfall" described by Petitioner.[30]

There are many reasons for South Dakota's current economic woes, including recurrent droughts

---

of Revenue Annual Reports, 13 (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/. These are State-level data only. Sales and use taxes collected by South Dakota cities are proportional on an annual basis. Inclusion of these amounts would increase the amounts in the above table by approximately one-third. *2018 figure is the State's budget estimate.

[28] South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), *supra*. Effective for the second half of 2016, the State increased its sales tax rate by 0.5%.

[29] *South Dakota GDP*, DEPARTMENT OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ (reporting data from Bureau of Economic Analysis, U.S. Department of Commerce).

[30] Pet. at 14.

that have hurt agricultural production.[31] But State sales tax revenues are growing, not declining, contrary to the "findings" in the South Dakota law.[32] This is another reason that the lack of any factual record in this case makes it a poor vehicle for overturning *Quill*.

C. Since *Quill* and *DMA II*, 'Changed Circumstances' Have Made 'Brick-and-Click' Ubiquitous, Negating South Dakota's Claims of Harm to 'Brick-and-Mortar'

When Justice Kennedy wrote his concurrence in *Direct Marketing Association* v. *Brohl*, he could speak of "the dramatic technological and social changes" driving the growth of e-commerce as distinct from "brick-and-mortar" retail.[33]

Then, Amazon was the paradigm of the internet retailer. Today, with a substantial physical presence in all 46 U.S. States with a sales tax, Amazon is the paradigm not just of internet retail but of all U.S. retail. Amazon by itself accounts for over 40% of all online retail sales,[34] yet at the same time, its warehouses, fulfillment centers, grocery stores and

---

[31] South Dakota Bureau of Finance & Management, Economic and Revenue Update (July 2017), https://bfm.sd.gov/econ/current.pdf.

[32] Even if tax revenues *were* falling, which they are not, South Dakota would have a difficult time establishing causation, giving the myriad other factors currently depressing its regional economy.

[33] 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

[34] *Amazon Accounts for 43% of US Online Retail Sales*, BUS. INSIDER (Feb. 3, 2017, 12:12 PM), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2.

Pop-Up stores have made it into a local retailer in markets across the country.

Today, Amazon is putting pressure not just on established retailers but also on grocers, food delivery companies, fashion vendors and any number of other businesses. It has shown the importance of an e-commerce component to every retail business in every market. Those competitors who are not adapting are likely to go the way of Woolworth's, Sears, and Kmart. "Brick-and-mortar" may be threatened at the hands of Amazon, but not because of Amazon's sales tax advantage. It pays sales taxes in every State with a sales tax.

When, the year following Justice Kennedy's opinion, then-Judge Gorsuch wrote his concurrence in *DMA II*, he could still speak intelligibly of remote internet sellers and their "in-state brick-and-mortar rivals."[35] At the time, Walmart was the paradigm of brick-and-mortar retailing. Its sales that year exceeded $500 billion, making it the largest retailer in the country by far.

Today, the landscape of retail has changed. Walmart is competing head-to-head with Amazon in e-commerce. It is projecting a 40% increase in online revenue through 2019, while its overall revenue will grow only 3%.[36] Amazon's other closest competitors for online sales, like Walmart, also have retail stores

---

[35] *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

[36] Phil Wahba, *Walmart Says Its Online Sales Will Explode Next Year Amid War With Amazon*, FORTUNE (Oct. 10, 2017), http://fortune.com/2017/10/10/walmart-says-its-online-sales-will-explode-next-year-amid-war-with-amazon.

nationwide. Companies such as Apple, Target, and Macy's all have large online businesses as well as physical stores across the country, and already charge sales tax for virtually all their customers. These four entities alone accounted for two-thirds of the $220 billion of internet retail sales in 2016.[37]

At the same time, nearly all small retail businesses also sell via their own websites. Of those that do not, 92% report they plan to do so by the end of 2018.[38]

The paradigm "brick-and-mortar" store is thus increasingly rare. It has been replaced by "brick-and-click." The competition in retail today is not between in-state brick-and-mortar stores and remote internet sellers. It is between retail giants and small businesses. Those small businesses—in South Dakota and elsewhere—can only compete if they are not overwhelmed with a nationwide tax compliance burden simply by virtue of selling via the internet.

---

[37] Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WOMEN'S WEAR DAILY (Apr. 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796; "Target Report Q3 2017 Earnings," TARGET.COM (Nov. 15, 2017), http://investors.target.com/phoenix.zhtml?c=65828&p=irol-newsArticle&ID=2317059.

[38] *What Percentage of Small Businesses Have Websites?*, SMALLBUSINESS.COM (Mar. 18, 2017), https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-websites/.

IV. CONGRESS, NOT INDIVIDUAL STATES OR THE COURTS, IS BEST SUITED TO DEVISE A SOLUTION TO THESE COMPLEX MULTISTATE TAX POLICY ISSUES.

It is South Dakota's desire to expand sales tax collection responsibilities to all retail businesses, even the very small and very remote. This is, indeed, a clear desire of most States, because they believe it will protect local businesses from unfair remote competition while increasing their tax revenue.

Precisely because this is the aim of many States, their collective ambitions pose a threat to cross-border commerce. The development of e-commerce motivated Congress in the ITFA to warn of the inherent danger of multiple State regulators. It is a danger made more acute because of the ease with which a small business in one location can, via the internet, reach the entire United States.

Because a reversal of *Quill* would immediately apply to all States, the new burdens placed upon the remote seller will not be just those of South Dakota. Multiple States and their many taxing jurisdictions would also tax and regulate the remote internet seller with a single place of business. Maintaining a retail website would quickly subject its owner to audit in 46 States. These are burdens not borne by the in-state seller.

Congress, which is not limited to deciding cases, has more nuanced alternatives. It has been actively exploring a variety of ways to more elegantly solve these interdependent problems. One approach, outlined in the ITFA and addressed by the

commission authorized in the law, would require that States first harmonize their sales tax regimes. Then, with a simplified sales tax regime for online commerce in place nationwide, Congress would authorize States to enforce collection beyond their borders. The States, as noted, have not done this, but Congress could require it as a condition of permitting extraterritorial tax enforcement.

Another approach, now under active consideration in the Congress, would force remote sellers to collect, but permit them to comply by following their own State's rates and rules. The taxes collected would be paid to the seller's State, which would then remit it to the purchaser's State. Through an interstate compact authorized by Congress, the amounts due among States would be netted monthly, simplifying the distribution process. Under this system, the seller would be subject to audit only in those States where it is physically present, rather than in every one of 46 States.

Unlike the Court, Congress can actively monitor developments in the marketplace and in technology. It can craft legislation aimed at striking the right public policy balance in this rapidly evolving landscape. That this is precisely what Congress is now doing counsels strongly against the course Petitioner urges.

A final note. Subjecting out-of-state sellers to Chapters 10-45 and 10-52 of the South Dakota Codified Laws means they can be required to travel to South Dakota to appear before its auditors, its administrative tribunals, and its courts. However workable this might seem when the arrangement

involves only two States (the seller's and the purchaser's), it quickly becomes unreasonable when multiple States are involved.

The result will violate bedrock principles of due process and minimum contacts. To satisfy the Due Process Clause's requirement of minimum contacts, the actions of "defendant *himself*" must establish a relationship "with the forum State," not merely with individuals within the State. *Walden* v. *Fiore*, 134 S. Ct. 115, 1121-22 (2014) (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985)).

An out-of-state seller may establish contact with an individual South Dakota purchaser, but that does not show any relationship with the State itself. If it did, then everyone who sells online and ships anywhere in the United States would have minimum contacts with every State under the Due Process Clause—a proposition this Court has rejected. See *Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980).

Far from providing an appropriate vehicle for this Court to reconsider its holding in *Quill*, Petitioner's recommended course of action will solve one purported problem by creating many much larger ones. The wiser course is for this Court to recognize that Congress is currently active in this area and continues to exercise its Article I authority—as it already has done multiple times in the ITFA—to develop appropriate national policy.[39]

---

[39] See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 637-38 (1981) (White, J., concurring) ("[T]he better part of

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID B. SALMONS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004-2541
(202) 373-6283
david.salmons@morganlewis.com

December 7, 2017

---

wisdom and valor is to respect the judgment of the other branches," even where Congress is "aware" of the Commerce Clause matter and "is so far content to let the matter rest." See also *Blum* v. *Caldwell*, 446 U.S. 1311, 1317 (1980 (denying motion to stay mandate pending certiorari where "Congress is presently considering legislation" to address the issue); *Coit Indep. Joint Venture* v. *Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 592 (1989) (Scalia, J., concurring) (noting Court should have deferred to issues to the "legislative process," where "Congress is currently considering legislation."

RECORD
AND
BRIEFS

FILED
NOV 2 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
PETITIONER,

v.

WAYFAIR, INC., OVERSTOCK. CO, INC.
AND NEWEGG, INC.
RESPONDENTS.

On Petition for a Writ of Certiorari
to the Supreme Court of South Dakota

BRIEF OF AMICUS CURIAE OF FOUR UNITED STATES SENATORS AND TWO UNITED STATES REPRESENTATIVES IN SUPPORT OF THE PETITION

ALAN B. MORRISON
COUNSEL OF RECORD
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H STREET NW
Washington, DC 20052
(202) 994-7120
abmorrison@law.gwu.edu

November 2, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF THE AMICI CURIAE 1
SUMMARY OF ARGUMENT 3
REASONS FOR GRANTING THE WRIT 4
CONCLUSION 10
ADDENDUM
MARKETPLACE FAIRNESS TIMELINE Add-1

TABLE OF AUTHORITIES

Cases

Complete Auto Transit Inc. Brady, 430 U.S. 274 (1977) 8
Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124 (2015), *on remand*, 814 F.3d 1129 (10th Cir.), *cert denied*, 137 S.Ct. 591 (2016) 6
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 4, 8, 9
Quill Corp v. North Dakota, 504 U.S. 298 (1992) .....passim

Legislative Materials

159 Cong Rec. S2273-78 (Mar. 22, 2013) 6
Marketplace Fairness Act of 2017 (S. 976) ..passim
Remote Transactions Parity Act of 2017 (H.R. 2193) .....passim
Marketplace Fairness Act of 2013 (S. 743) 6

Other Authorities

State and Local Sales Tax Rates in 2017, Tax Foundation, https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017 5

INTEREST OF THE AMICI CURIAE[1]

Amici are four United States Senators and two United States Representatives who support the Petition asking this Court to overturn its decision in *Quill Corp v. North Dakota*, 504 U.S. 298 (1992). Heidi Heitkamp is a United States Senator from North Dakota, Lamar Alexander is a United States Senator from Tennessee, Richard Durbin is a United States Senator from Illinois, and Michael Enzi is a United States Senator from Wyoming. Two are Democrats, and two are Republicans. Kristi Noem is a United States Representative from South Dakota. John Conyers, Jr. is a United States Representative from Michigan and the Ranking Member of the House Committee on the Judiciary. They are a Republican and Democrat, respectively. The Senators and Representatives maintain a vital interest in the laws affecting their states' ability to assess and collect sales and use taxes by state and local governments. They are among the co-sponsors of S. 976, the Marketplace Fairness Act of 2017, and H.R. 2193, the Remote Transactions Parity Act, as well as other versions of those bills in prior Congresses. Senator Heitkamp previously served as the State of North Dakota's Tax Commissioner and represented the State of North Dakota in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

---

[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amici and their counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. On October 18, 2017, counsel provided counsel of record for all parties the notice required by Rule 37.2.a.

Amici are filing this brief in support of the Petition in this case. The States which they represent have sales and uses taxes that this Court's decision in *Quill* prevents them from enforcing. It is estimated that, as of 2015, total sales and use taxes uncollected because of *Quill* amounted to almost $26 billion annually.

Not only does *Quill* cause a loss in revenue to their States, but it also places merchants with physical locations in their States at an economic disadvantage because they must, in effect, charge a higher price for a product also sold by an out-of-state retailer that does not have to collect a tax that is imposed on in-state buyers and must be collected by in-state sellers. For states like Illinois, North Dakota, Tennessee, and Wyoming, which rely heavily on state sales taxes for revenue, respondents have a price advantage of up to 11% in Illinois, 8.5% in North Dakota, 9.75% in Tennessee, and 6.0% in Wyoming over businesses with a physical presence in the respective States simply because they cannot be required to collect those State taxes.

Amici are filing this brief to provide an anticipatory response to the inevitable objection that respondents will make that this Court should stay its hand and allow Congress to address the serious unfairness problems created by *Quill*.

SUMMARY OF ARGUMENT

Congress has plenary authority under the Commerce Clause to permit States to require interstate sellers of products to collect sales and use taxes imposed on the recipients of those products who reside in their State. It also has the power to do what *Quill Corp v. North Dakota*, 504 U.S. 298 (1992), currently does – forbid States from collecting such taxes unless the seller has a physical presence in that State. And it has the power to allow States to collect such taxes, but impose conditions on doing so, as the Marketplace Fairness Act of 2017, and the Remote Transactions Parity Act of 2017, of which *amici* are co-sponsors, would do. But despite these powers, and despite the enormous increase in Internet commerce in the 25 years since *Quill*, with resulting loss of billions of dollars, and the ever-increasing unfairness to local merchants, Congress has been unable to reach a consensus on a legislative solution. That impasse is, in our view, largely due to the structural advantages and disadvantages created by the *Quill* decision. As a result, this inaction continues to benefit respondents and other out-of-state sellers.

Moreover, declining to re-visit *Quill* does not make the Court a neutral party in this very contentious matter. *Quill* is the law of the land, and it is the status quo against which all federal legislation must be considered. In the typical situation, a party interested in receiving an advantage from Congress must persuade both Houses and the President to agree. Here, as was

recognized at the time *Quill* was decided, the advantage was instead granted by this Court, and it is therefore the States that must persuade Congress and the President to take it away. Given the built-in, indeed intended, difficulties in enacting federal laws, the current *Quill*-determined status quo places a very large thumb on the scales on the side of out-of-state sellers. This is especially problematic on federalism grounds because the States are being forced to surmount these hurdles in order to obtain permission from the federal government to use their own taxing powers.

To redress this legislative imbalance, the Court should grant the Petition and overturn *Quill*. At that point, Congress can act if it concludes that legislation is necessary, in light of what States do with their ability to protect their fiscal interest and to level the playing field for their local merchants. Moreover, overturning *Quill* would not render this Court powerless to redress any perceived overreaching by a State. The decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), adequately protects respondents from any overreaching by the States if the "burden imposed [by state laws] is clearly excessive in relation to the putative local benefits."

REASONS FOR GRANTING THE WRIT

The Petition fully explains why this case is a proper vehicle to re-visit *Quill* and reconsider its prior decision that physical presence is a necessary precursor to a State's authority to require a retailer

to collect sales and use taxes on products that are sold to the State's citizens. Respondents will undoubtedly contend that this Court should decline review and leave the matter to Congress to repair the ever-increasing fiscal damage that *Quill* causes to the 45 States and the District of Columbia that have sales and use taxes and retailers in those states that suffer a competitive harm.[2] As Senators and Representatives who have tried to enact laws such as the Marketplace Fairness Act of 2017, and the Remote Transactions Parity Act of 2017, *amici* urge the Court not to accept the suggestion to stay its hand and remain neutral. Several reasons support this position.

First, in his dissenting opinion in *Quill*, Justice White correctly observed that the decision "creates an interstate tax shelter for one form of business — mail-order sellers — but no countervailing advantage for its competitors." 504 U.S. at 329. Unlike the typical Dormant Commerce Clause case, in which the issue is whether a state has erected a barrier that unduly burdens out-of-state businesses, the barrier here was created by the Court, and it advantages those very out-of-state businesses at the expense of physically present in-state retailers. Because *Quill* is the source of this barrier, it would be inappropriate for this Court to decline to reconsider that decision on the ground that another branch of Government –

---

[2] *See* State and Local Sales Tax Rates in 2017, Tax Foundation, https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017.

the Congress – is also empowered to remedy the problems caused by it.

Second, the majority in *Quill* never disputed that the result was unfair to North Dakota's retailers and deprived the State of the means of collecting taxes to which everyone agreed it was lawfully entitled. Whatever the basis for giving Congress an opportunity in 1992 to find an appropriate remedy for these problems, it no longer applies 25 years later. Attached as an addendum to this brief is a history of the principal efforts in Congress from 2001-2017 to secure passage of legislation to overrule *Quill*, like S. 976, the Marketplace Fairness Act of 2017, and the House version, H.R. 2193, the Remote Transactions Parity Act. In those 16 years, through numerous changes in the party leadership of both Houses and the Administration, a legislative solution has not been reached. Congressional committees have held five hearings on the topic, and the Senate has conducted three roll call votes on the matter including passage of S. 743, the Marketplace Fairness Act (sponsored by Senator Enzi) by a vote of 69 to 27 in May 2013.

Indeed, as can be seen from the vigorous opposition in the 2013 debate from Senators whose states do not have sales taxes, and the stakes for the out-of-state sellers that would have to collect those taxes if *Quill* were set aside, see, *e.g.*, 159 Cong Rec. S2273-78 (Mar. 22, 2013), respondents and their allies have very strong incentives to keep *Quill* in place. This conclusion is confirmed by the willingness of the industry trade association to sue

over Colorado's reporting-only law that was applicable to its members and to take the case to this Court, not once but twice. *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015), *on remand*, 814 F.3d 1129 (10th Cir.), *cert denied*, 137 S.Ct. 591 (2016).

Third, it is particularly appropriate for this Court to take the case to consider the constitutional issue because overturning *Quill* would not only redress the harms to South Dakota and its local merchants, but would also restore the usual situation in Congress, with state sovereign power as the default. As a result, both sides would have equal incentives to try to persuade Congress to support their policy preferences in this area. As it is now, out-of-state businesses have the status quo on their side in an institution in which inertia generally results in nothing happening. Thus, if the Court declines to accept the Petition, that will continue the *Quill*-based advantage that respondents currently have in Congress.

Fourth, overruling *Quill* would not remove Congress from the process; instead, Congress would be in the rightful position of being asked to determine whether state laws like South Dakota's interfere with interstate commerce by creating improper barriers, and if so, what to do about the problem. In that situation, Congress would also be able to consider any state laws enacted after a post-*Quill* reversal in deciding whether its intervention was needed. Congress would retain its authority to consider any concrete evidence that out-of-state sellers presented of actual burdens caused by such

laws. Congress would still be able to consider which laws would be necessary to protect sellers, without eliminating the ability of States to collect sales and use taxes that are conceded to be constitutional, although very difficult to collect after *Quill*. In our federal system, the burden of persuading Congress to act is generally on those who object to what a State has done, not on a State to justify actions taken within its powers as a sovereign. Overturning *Quill* would restore the legislative posture to that constitutional norm, without preventing Congress from acting as necessary.

Last, overturning *Quill* would not preclude this Court from entertaining claims by out-of-state businesses that particular requirements of a state law created undue burdens on them. In such a challenge, the case would be decided by the principles enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970, rather than those in *Complete Auto Transit Inc. Brady*, 430 U.S. 274 (1977), which was relied on in *Quill*. *Complete Auto* involved the legality of a tax imposed by a State, whereas here no one questions the authority of South Dakota to impose these taxes, but only the means by which they may be collected. For that reason, this South Dakota law is more like laws regulating the manner in which a business may be conducted, which was the issue in *Pike*. Thus, under *Pike*, the South Dakota law in this case would "be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," 397 U.S. at 80. As such, the case involves the same kind of

inquiry as if the state law being challenged required, for example, certain disclosures in connection with the sale of a complex financial product to South Dakota residents, or that specified safety features that had to be included in a potentially dangerous product sent into the State. Although *amici* are confident that this South Dakota law would pass the *Pike* test, the more important point is that out-of-state sellers would still have an opportunity to seek redress from the federal courts if they contended that state laws involving the collection of sales and use taxes imposed undue burdens on them. And they would still retain the right to seek to persuade Congress that such laws should be preempted or that conditions should be imposed on their continued use.

CONCLUSION

For the foregoing reasons, in addition to those in the Petition, the writ should be granted, and the Court should not stay its hand to await Congressional action.

Respectfully submitted,

Alan B. Morrison
Counsel of Record
George Washington
University Law School
2000 H Street NW
Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu

Darien Shanske
UC Davis School of Law
Davis CA 95616
(530) 752-5860
dshanske@ucdavis.edu

November 2, 2017

ADDENDUM

MARKETPLACE FAIRNESS TIMELINE

107th Congress (2001-2002)

S. 512, Internet Tax Moratorium and Equity Act
Senator Byron Dorgan - introduced 3/9/2001
Referred to: Senate Finance
Finance Committee hearing – 8/1/2001

S. 1542, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/11/2001
Referred to: Senate Commerce

S. 1567, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/18/2001
Referred to: Senate Commerce

Senate Amdt. # 2156 to H.R.1552
Motion to table amendment was agreed to – 57-43 on 11/15/2001

108th Congress (2003-2004)

S. 1736, Streamlined Sales and Use Tax Act
Senator Michael Enzi - introduced 10/15/2003
Referred to: Senate Finance

109th Congress (2005-2006)

S. 2152, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 12/20/2005
Referred to: Senate Finance

S. 2153, Streamlined Sales Tax Simplification Act
Senator Byron Dorgan - introduced 12/20/2005
Referred to: Senate Finance

Senate Finance Subcommittee on International Trade hearing on sales tax fairness and other state/local tax issues – 7/25/2006

110th Congress (2007-2008)
S. 34, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 5/22/2007
Referred to: Senate Finance

Senate Commerce Committee hearing on "Communications, Federalism, and Taxation" where it was discussed – 5/23/2007

111th Congress (2009-2010) - No bill introduced

112th Congress (2011-2012)
S. 1452, The Main Street Fairness Act
Senator Dick Durbin - introduced 7/29/2011
Referred to: Senate Finance

S. 1832, The Marketplace Fairness Act
Senator Michael Enzi – introduced 11/9/2011
Referred to: Senate Finance

11/30/2011 – House Judiciary Committee hearing on "Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce."

1/31/2012 – Official letter requesting Finance Committee hearing on S. 1832

4/25/2012 – Senate Finance Committee hearing on state and local tax issues, including S. 1832

8/1/2012 – Senate Commerce Committee hearing on Marketplace Fairness: Leveling the Playing Field for Small Business

11/29/2012 – S. Amdt. 3223 filed to the National Defense Authorizations Act

113th Congress (2013-2014)

S. 336, The Marketplace Fairness Act
Senator Michael Enzi - introduced 2/14/2013
Referred to: Senate Finance

3/21/2013 – S. Amdt. 578 (Enzi 2nd Degree S. Amdt. #656) – Deficit Neutral Reserve Fund enabling Congress to pass the Marketplace Fairness Act
Senate Record Vote # 62 - Enzi Amendment agreed to 75 to 24

S. 743, Marketplace Fairness Act of 2013 (revised)
Senator Michael Enzi – introduced April 16, 2013
Referred to: Senate Finance

05/06/13 – S. 743 was passed by the Senate in a vote of 69 to 27

S. 2609, Marketplace and Internet Tax Fairness Act
Senator Michael Enzi – introduced July 15, 2014
Referred to: Senate Finance
March 2014: Hearing entitled "Exploring Alternative Solutions on the Internet Sales Tax Issue" before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary.

114th Congress (2015-2016)
S. 698, Marketplace Fairness Act of 2015
Senator Michael Enzi – introduced March 10, 2015
Referred to: Senate Finance

H.R. 2775, Remote Transactions Parity Act of 2015
Congressman Jason Chaffetz – introduced June 15, 2015
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

115th Congress (2017-2018)
S. 976, Marketplace Fairness Act of 2017
Senator Michael Enzi – introduced April 27, 2017
Referred to: Senate Finance

H.R. 2193, Remote Transactions Parity Act of 2017
Representative Kristi Noem – introduced April 27, 2017
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

July 2017: Hearing entitled "No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders" before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary.

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF *AMICI CURIAE* REPRESENTATIVE ROBERT W. GOODLATTE, CHAIR OF THE HOUSE COMMITTEE ON THE JUDICIARY, SENATOR RON WYDEN, REPRESENTATIVE F. JAMES SENSENBRENNER, JR., REPRESENTATIVE ANNA G. ESHOO, SENATOR MICHAEL S. LEE, AND REPRESENTATIVE STEVEN J. CHABOT IN OPPOSITION TO THE PETITION

Of Counsel

DANIEL M. FLORES
DANIEL HUFF
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House
Office Building
Washington, DC 20515
Daniel.Flores@mail.house.gov
Daniel.Huff@mail.house.gov

CHARLES A. TROST
Counsel of Record
CHRISTOPHER A. WILSON
SARAH F. BOTHMA
WALLER LANSDEN
DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
(615) 244-6380
charles.trost@wallerlaw.com
chris.wilson@wallerlaw.com
sarah.bothma@wallerlaw.com

Counsel for Amici Curiae

December 7, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	5
CONCLUSION	25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 7

General Motors Corp. v. Tracy, Tax Comm'r of Ohio, 519 U.S. 278 (1996).....23, 24

H.P. Hood and Sons v. Du Mond, 336 U.S. 525 (1949).....7

Miller Bro. v. Maryland, 347 U.S. 340 (1954).....10

National Bellas Hess v. Illinois, 386 U.S. 753 (1967).....3, 9, 10, 24

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982).....24

Quill Corp. v. North Dakota, 504 U.S. 298 (1992).....*passim*

STATE CASES

Marshall v. Sherman, 42 N.E. 419 (N.Y. 1895).....7

LEGISLATIVE MATERIALS

Marketplace Fairness Act (MFA), S. 976, 115th Cong. (2017).....16

No Regulation Without Representation Act (NRWR), H.R. 2887, 115th Cong. (2017).....16

Online Sales Simplification Act (OSSA), draft, 114th Cong. (2016), *available at* http://www.mtc.gov/getattachment/2016-08-25-Online-Sales-Simplification-Act-of-2016-(OSSA).pdf.aspx.....16

TABLE OF AUTHORITIES – Continued

Page

Remote Transactions Parity Act (RTPA), H.R. 2193, 114th Cong. (2016) 16

Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 922, 130 Stat. 122 (2015) 23

OTHER AUTHORITIES

Arthur Zaczkiewicz, *Amazon, Wal-Mart Lead Top 25 E-commerce Retail List*, WWD (Mar. 7, 2016); http://wwd.com/business-news/financial/amazon-walmart-top-ecommerce-retailers-10383750/ 15, 17

Brief of National Retail Federation as *Amicus Curiae* in Support of Petitioner at 23, *South Dakota v. Wayfair, et al.*, No. 17-494 (Nov. 2, 2017) 15

Brief of States of Nebraska, Iowa, et al. as *Amici Curiae* in Opposition to Appellant's Motion for a Stay of the District Court's Preliminary Injunction Order and 54(b) Judgment Pending Appeal at 4-6, *Rocky Mount Farmers Union, et al. v. Goldstene, et al.*, 730 F.3d 1070 (2012) (No. 12-15131) 12

Brief for the State of Utah as *Amicus Curiae* in Support of Appellants at 4-5, *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (2015) No. 14-17111 13

TABLE OF AUTHORITIES – Continued

Page

Chris Isidore, *Amazon to start collecting state sales taxes everywhere*, CNN.com (Mar. 29, 2017); http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html 15

Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC § 20 (Boston, Hillard, Gray, & Co. 1834) 7

Michael S. Greve, *Government By Indictment: Attorneys General and Their False Federalism* 6 (The American Enterprise Institute, Working Paper No. 110, May 24, 2005), *available at* https://www.aei.org/wp-content/uploads/2011/10/20050525-Greve-newAug09.pdf 8

Press Release, NetChoice, Businesses United Behind Goodlatte Sales Tax Plan (Sept. 1, 2016); https://netchoice.org/library/businesses-unite-behind-goodlatte-sales-tax-plan/ 17

Press Release, U.S. Senator John Thune; Thune, Wyden Introduce Bill to Protect Innovative Digital Goods and Services from Multiple and Discriminatory Taxes (Mar. 24, 2015); https://www.thune.senate.gov/public/index.cfm/2015/3/thune-wyden-introduce-bill-to-protect-innovative-digital-goods-and-services-from-multiple-and-discriminatory-taxes 23

Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017); https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052 ..... *passim*

INTEREST OF THE *AMICI CURIAE*[1]

Amicus Curiae, United States Congressman Robert W. Goodlatte, is the Chairman of the United States House of Representatives Committee on the Judiciary, which has jurisdiction over legislation that would address the interstate commerce and state tax nexus issue presented in this case. He also is the sponsor of bipartisan draft compromise legislation to address the issues presented in this case.

Amicus Curiae, United States Senator Ron Wyden, is the former Chairman and current Ranking Member of the United States Senate Committee on Finance which has jurisdiction over legislation that would address the interstate commerce and state tax nexus issues presented in this case.

Amicus Curiae, United States Congresswoman Anna G. Eshoo, is a senior Member of Congress representing the State of California. She is the sponsor, along with Chairman Goodlatte, of bipartisan draft compromise legislation to address the issues presented in this case.

---

[1] This Brief is filed pursuant to a blanket consent filed by all parties. No person other than the *Amici* and their counsel has authored this Brief in whole or in part, or made a monetary contribution toward its preparation or submission. Counsel in the Birmingham, Alabama office of Waller Lansden Dortch & Davis represents Newegg, Inc. in a separate matter pending in Alabama Tax Court. However, Newegg, Inc. has not contributed financially to the preparation of this Brief. On November 27, 2017, counsel provided counsel of record for all parties the notice required by Rule 37.2.a.

Amicus Curiae, United States Congressman F. James Sensenbrenner, is a former Chairman and current senior member of the House Committee on the Judiciary. He has played an active role in helping the Committee on the Judiciary resolve the issues presented in this case and also is the sponsor of relevant legislation.

Amicus Curiae, United States Senator Michael S. Lee, has played an active role in helping to resolve the issues presented in this case.

Amicus Curiae, United States Congressman Steven J. Chabot, is the Chairman of the House Committee on Small Business and a senior Member of the House Committee on the Judiciary. He has played an active role in addressing the issues presented in this case in light of the interests of small businesses.

SUMMARY OF ARGUMENT

The Court should deny Certiorari. The Constitution assigned to Congress the domain and power to regulate and control commerce among the States, and the House of Representatives' committee with jurisdiction over this issue has been working diligently and assiduously to find legislative means by which remote vendors may be required to collect use taxes from residents of States in which the vendors have no physical nexus, but which avoids violating the fundamental principle against States regulating activity that occurs

beyond their borders. *Amici* refer to this principle as that of "No Regulation Without Representation."

Petitioner seeks to have the Court take this authority from Congress and impose a judicial mandate that for the first time ever would require a vendor residing in another State to collect use tax from its customers in a State in which it has no substantial physical presence. Were the Court to do so, it would have to breach its rule of *stare decisis*, overrule its prior decisions in *Quill Corp. v. North Dakota*[2] and *National Bellas Hess v. Illinois*,[3] as well as a long, consistent line of authorities upon which the decisions in those cases rest, and, ultimately, sanction States taxing and regulating the conduct outside of their borders of persons with no physical presence in the State by seeking to tax or regulate that conduct. In short, Petitioner in this case asks the Court to authorize "regulation without representation," contrary to Constitutional tradition.

The fact that Congress thus far has not enacted a federal solution to the problem of the collection of State use taxes on sales by remote vendors should not be seen by the Court as a reason to give up on Congress. Rather, the Court should recognize that a lasting solution will require compromise, and respect and accommodate the ongoing, diligent efforts of Congress to find a fair solution consistent with Constitutional norms. The Court also should recognize, as it did in *Quill*, that the only tool with which it might address this problem

---

[2] 504 U.S. 298 (1992).

[3] 386 U.S. 753, 760 (1967).

is a binary one, while Congress has not only the power to legislate, but the greater variety of tools needed to reach a compromise that takes into account the constitutional and practical nuances behind an acceptable compromise.

South Dakota, in another context, has taken a position diametrically opposed to its position in this matter, and, in doing so, has elsewhere affirmed its belief that there should be "No Regulation Without Representation." In that instance, South Dakota strongly opposed California's efforts to regulate activity in South Dakota in the context of California's Low Carbon Fuel Standard, by asserting that California's action was an attempt to invade South Dakota's sovereignty.

Even as Congress has worked towards a solution, the actual magnitude of the problem posed by use tax collection for sales by remote vendors has significantly lessened. Seventeen of the top eighteen online retailers have already begun collecting sales tax on both online and in-store sales. This development means that the problem Congress is confronting is becoming progressively less difficult to solve through legislation, and that the Court has even less reason now to intervene, short-circuit Congress' efforts, and overturn *Quill*.

While Congress is making progress based on the principles set forth herein, a key obstacle to the parties' agreement on a final legislative compromise is the pendency of this case. States that prefer *Quill*'s limitation on cross-border taxation to be eliminated have

diminished incentive to compromise with Congress while they pursue *Quill*'s reversal by this Court. As a result, South Dakota's Petition has hindered Congress' ability to fulfill the duty the Court in *Quill* recognized to belong to Congress.

For these reasons as well as those others set forth in Respondent's Brief in Opposition to Granting the Petition, this Court should deny the Petition and leave it to the Congress to forge a lasting solution to the problem of the collection of use taxes on sales by out-of-state vendors who do not have a substantial physical presence in the taxing state.

REASONS FOR DENYING THE WRIT

Amicus, Representative Robert W. Goodlatte, is the Chairman of the House of Representatives Committee on the Judiciary, the House committee with jurisdiction over proposed legislation which deals with the issue sought to be presented in this case. He and the other *Amici* agree with the reasons presented in Respondents' Brief in Opposition to the Petition regarding why the Court should not grant Certiorari in this case. But they present this Brief to bring before the Court their unique insight into the work that the House Committee on the Judiciary and other concerned members of Congress working with the Committee have undertaken to date, in a sustained effort to carry out the Constitutional duty assigned to Congress to regulate commerce among the States with

regard to the issues presented in this case. These on-going efforts have been directed at finding a way in which use taxes not currently being collected, due to a State from a citizen who buys from a remote vendor not physically present in the State, can begin effectively to be collected by the State in which the remote vendor resides. The linchpin of this effort has been to accomplish that end while avoiding legislation that would violate the principle of "No Regulation Without Representation," because doing so would allow the taxing State to impose requirements of conduct upon the remote vendor, who lacks physical presence and rights to legislative representation in the taxing State.

Were the Court to reverse its decision in *Quill* and require a remote vendor to collect use taxes due on sales to a consumer located in a State in which the vendor does not reside and has no physical presence, its decision would upset long-settled Constitutional authority, be at odds with the fundamental principle of "No Regulation Without Representation," be in derogation of Congress' predominant authority to regulate interstate commerce – authority which embodies the principle of "No Regulation" of interstate commerce "Without Representation" in Congress – and hinder on-going efforts by Congress to reach a compromise solution that would allow collection of use taxes on cross-border sales without violating this important principle.

I. Constitutional Tradition and the Principle of "No Regulation Without Representation."

A. In General

It has been understood since the earliest days of the Republic that States do not have the power to regulate beyond their borders. In his "Commentaries on the Conflict of Laws," Justice Story wrote in 1834 that "no State . . . can, by its laws, directly affect, or bind . . . persons not resident therein."[4]

Writing for a unanimous Court, Justice Waite observed that "[n]o State can legislate except with reference to its own jurisdiction."[5]

In 1895, the New York Court of Appeals stated, it is "a principle of universal application, recognized in all civilized states, that the statutes of [one] state have . . . no force or effect in another."[6]

In 1945, the Court said "It was the vision of the Founders" that: "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . and no foreign state will by . . . regulations exclude them."[7]

This bedrock principle of "No Regulation Without Representation" keeps governmental regulation in

---

[4] Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC § 20 (Boston, Hillard, Gray, & Co. 1834).

[5] *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

[6] *Marshall v. Sherman*, 42 N.E. 419, 423 (N.Y. 1895).

[7] *H.P. Hood and Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

check by allowing citizens, through the franchise, to ensure accountability between the regulator and those who are regulated. It is also a sensible way to protect States' rights. States speak of sovereignty, but as a prominent scholar has written, the "idea of a 'states' right' to exercise extraterritorial authority is incoherent. If equal states are to retain autonomy over their own affairs, they must refrain from regulating each other's affairs."[8]

The importance of this principle, and the ingenuity required to adhere to it while devising legislation to facilitate the effective collection of use taxes on sales by remote vendors, are at the heart of why Congress, although it has diligently tried to date, has thus far not been able to reach a consensus solution to the problem of use tax collection on remote sales – what Petitioner posits as "the *Quill* issue." The solution insisted on by the Petitioner and other States – to allow a State to impose on remote vendors with no physical presence in the taxing State an obligation to collect use tax from customers who are residents of the taxing State – causes concern among Members of Congress who do not wish to take congressional action further opening the door to allowing States to tax and regulate businesses beyond their borders. Many Members, from both parties and many States from all parts of the

---

[8] Michael S. Greve, *Government By Indictment: Attorneys General and Their False Federalism* 6 (The American Enterprise Institute, Working Paper No. 110, May 24, 2005), *available at* https://www.aei.org/wp-content/uploads/2011/10/20050525-GrevenewAug09.pdf.

country, are simply unwilling to abandon this principle for the sake of finding an expedient solution to the problem of use tax collection on remote sales.

However, States have not yet been sufficiently willing to compromise their position in order to accommodate this principle, and even bristle at any suggestion that they should have to compromise. They instead see this Court's holding in *Quill* as "constitutional error" and "an affront to their sovereignty," and resist being "forced," as they say, to negotiate a legislative solution with Congress' help in lieu of fully exercising the sovereign authority they say the Constitution already grants them.

That Petitioner would have the Court accept its interpretation of the Constitution as inherently correct seems rather an odd position, given that until 1950 the accepted rule was that States could not tax interstate commerce at all. Even though that rule has been somewhat relaxed in some instances, in no case has the power to impose a duty to collect sales and use taxes ever been extended to include vendors with no physical presence in the taxing State. In enunciating this rule in *Quill*,[9] the Court was merely upholding its prior ruling in *Bellas Hess*, which itself was yet one more iteration of the rule taken from a long line of earlier cases.

In *Bellas Hess* the Court said:

> The very purpose of the Commerce Clause was to ensure a national economy free from

---

[9] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

> such unjustifiable local entanglements. Under the Constitution, ***this is a domain where Congress alone has the power of regulation and control***. (Emphasis added).[10]

And, further in its decision in *Bellas Hess* the Court pointed out that:

> [I]n order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.[11]

This Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connections with customers in the state are by common carrier or the United States Mail.[12]

The primary constraint on State regulatory and taxing power, other than the Commerce Clause, is the democratic franchise within each State – the ballot box. When a state overtaxes or overregulates, its

---

[10] *Bellas Hess*, 386 U.S. at 760.

[11] *Id.* at 759.

[12] *See Miller Bro. v. Maryland*, 347 U.S. 340 (1954).

citizens are empowered by the franchise to resist in opposition to those in government who persist in doing so. But this check on governmental overreach is undone when the burdens and consequences of the overreach are shifted away from voting citizens and onto non-residents. When the burden of state regulation falls on interests outside of the State, it is unlikely to be alleviated by the operation of the political constraints normally exerted when the interests of residents within the State are affected. Not surprisingly, as the needs and appetite for revenue have increased, States have become increasingly aggressive in exporting tax compliance burdens onto residents of other States, and the risks of overreaching have also increased. This concern is not limited to administrative actions, but applies as well to state court proceedings that often follow. There is a reason why federal courts have been given diversity jurisdiction, but this additional safeguard for non-residents is not available in the state tax arena, due to the Tax Injunction Act.

B. Petitioner and Other States, in Other Contexts, Have Strongly Advocated for Respect for the Principle of "No Regulation Without Representation."

Ironically, outside of the sales tax context, South Dakota has shown that it keenly perceives the dangers of permitting States to violate the principle of "No Regulation Without Representation" and attempt to regulate beyond their borders. South Dakota and other states, for example, joined in an *Amicus* Brief filed in a

suit challenging California's Low Carbon Fuel Standard ("LCFS"), which seeks to regulate the out-of-state production of ethanol sold in California, in order to reduce carbon emissions. In its Brief, South Dakota acknowledged California's sovereignty within its own borders, but saw California's attempt to regulate ethanol as impinging South Dakota's sovereignty.

> As sovereign states, Amici recognize California's ability to regulate conduct that occurs wholly within its borders. . . . But here, the LCFS reaches out, across the Rockies and into the Plains, to regulate Amici States' ethanol industry, corn farming, and a host of activities that are far removed from California. . . . It is none of California's business how farmers [in other states] choose to grow their corn. The United States is a common market.[13]

What is "sauce for the goose, is sauce for the gander," and the principle South Dakota asserts in the context of LCFS – "No Regulation Without Representation" – applies with equal if not greater force in the context of cross-border state taxation and tax collection requirements.

Similarly, in 2015, the State of Utah filed an *Amicus* Brief challenging a California law that applied California cage-size requirements to laying hens outside

---

[13] Brief of States of Nebraska, Iowa, et al., at 4-6, as *Amici Curiae* in Opposition to Appellant's Motion for a Stay of the District Court's Preliminary Injunction Order and 54(b) judgment pending appeal, *Rocky Mount Farmers Union, et al. v. Goldstene, et al.*, 730 F.3d 1070 (2012) (No. 12-15131).

the latter state. The Brief explained that Utah's interests in the case included:

> Federalism concerns regarding policy that each State should not expect that their internal policies are dictated by another State where citizens of different States have no democratic representation. Indeed, California regulators have already inspected egg producers for compliance outside of California.[14]

These examples, including one from the very State formally seeking to have this Court reverse *Quill*, neatly illustrate why South Dakota and other States should insist that Congress respect the "No Regulation Without Representation" principle as it strives to help resolve the sales tax issue, and why this Court should refrain from granting South Dakota's Petition for a Writ of Certiorari in the instant case.

II. Solutions Are Available to the States That They Could Adopt at Their Own Instance Without Disturbing or Offending the Principle of "No Regulation Without Representation." Meanwhile, the Problem Sought to be Addressed is Diminishing.

Importantly, the States also have available to them less offensive means to achieve collection of use taxes on remote sales on their own – while respecting the

---

[14] Brief for the State of Utah as *Amicus Curiae* in Support of Appellants at 5, *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (2015) (No. 14-17111).

principle of "No Regulation Without Representation," and without disturbing *Quill* – either individually or through collective action. Use tax States could, for example, more vigorously enforce their use tax laws on their own residents, within their own borders, such as by legislatively enhancing their reporting-and-collection regimes, then more actively pursuing collection and auditing. States could also enter into an interstate compact, through which each party State could regulate its own in-state sellers, require those sellers to collect tax, and then forward taxes collected to the customers' states. Under such a compact, all regulated entities would always have legislative recourse, through the franchise, to hold accountable those who impose burdens upon them. States similarly could enter into an interstate compact through which each party State could impose reporting, rather than collection, burdens on sellers within their jurisdictions. In either of these examples, the need to disturb *Quill* would be completely obviated and the principle of "No Regulation Without Representation" would be respected.

The States have not chosen to devote their efforts to the implementation on their own of such solutions. Perhaps it is because they would prefer the Court or the members of Congress to be held accountable to their citizens, rather than themselves. But, whatever the States' reasons for not pursuing these other paths, the availability of these paths strongly suggests that it would be improvident for the Court to grant the Petition and unnecessarily revisit the *Quill* issue.

Further, even as the States have refrained from pursuing these solutions, the magnitude of the problem they confront has lessened. E-commerce today is dominated by large retailers that have a physical presence in almost all of the States and, therefore, collect use tax in almost all of the States.[15] These retailers include Amazon, with its warehouses, and major, multi-channel "clicks-and-mortar" retailers such as Wal-Mart, Target, Best Buy, and Lowes, who sell both in traditional stores and online.[16] Seventeen of the top eighteen online retailers collect use tax on all of their online sales.[17] This development means both that Congress is confronting a problem that is becoming progressively less difficult to solve through legislation, and that the Court has less reason than ever to intervene, short-circuit Congress' efforts, and overturn *Quill*.

---

[15] *See* Brief of National Retail Federation as *Amicus Curiae* in Support of Petitioner at 23, *South Dakota v. Wayfair, et al.*, No. 17-494 (Nov. 2, 2017) (Amazon's current market share is over 40 percent, and will reach 50 percent by 2021); Chris Isidore, *Amazon to start collecting state sales taxes everywhere*, CNN.com (Mar. 29, 2017); http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

[16] *See* Arthur Zaczkiewicz, *Amazon, Wal-Mart Lead Top 25 E-commerce Retail List*, WWD, Mar. 7, 2016; http://wwd.com/business-news/financial/amazon-walmart-top-ecommerce-retailers-10383750/.

[17] *Id.*

III. Since The States Refuse To Solve Their Use Tax Collection Problem Themselves, the Only Provident Decision for This Court To Take Is To Deny the Petition and Leave It To Congress to Pursue Its Fuller and More Appropriate Means of Arriving at a Solution.

Congress, in contrast to the States, is living up to its responsibility to use the means available to it to address the remaining problem of use tax collection on remote sales and its effects on interstate commerce. Despite Petitioner's suggestions to the contrary, Congress has been far from derelict in its duties. The inability to reach a compromise solution to the problem at hand has not been for lack of significant effort. Congress has been working persistently for several terms to find a solution that lies between the poles of exclusive state action, such as adopting effective means of collecting use taxes from use tax States' own residents or forging a workable interstate compact, and this Court's overturning of *Quill*, as Petitioner urges. In the process, Congress has considered several approaches[18] and has been making steady incremental progress over at least the past three terms of Congress.

---

[18] Among the proposals being considered are the Online Sales Simplification Act (OSSA), draft, 114th Cong. (2016), *available at* http://www.mtc.gov/getattachment/2016-08-25-Online-Sales-Simplification-Act-of-2016-(OSSA).pdf.aspx; Remote Transactions Parity Act (RTPA), H.R. 2193, 114th Cong. (2016); Marketplace Fairness Act (MFA), S. 976, 115th Cong. (2017); and No Regulation Without Representation Act (NRWR), H.R. 2887, 115th Cong. (2017).

Since Chairman Goodlatte assumed the Chairmanship of the House Committee on the Judiciary in 2013, under his leadership, the Members and staff of the Committee have devoted thousands of hours in an effort to find a resolution of this issue satisfactory to all interested parties, recognizing that all parties and their constituents and customers have significant and legitimate interests at stake.[19]

In this process, the Committee has produced multiple iterations of a draft compromise bill.[20] Each successive draft has brought the interested parties closer together, and in the process has won the support of numerous internet retailers and consumer groups that previously had opposed any change in the *status quo*.[21] Over 100 online retailers wrote to Congress in support of the 2016 draft.[22] Meanwhile, even as Congress has worked towards forging a compromise solution, the magnitude of the problem has lessened, as seventeen of the top eighteen online retailers collect use tax on all of their online sales.[23] It is estimated that, if enacted, the most recent version of the proposed bill would result in collection of between 80 to 100 percent

---

[19] *See* Statement of Chairman Robert W. Goodlatte, at 1-3 (Dec. 4, 2017); https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.

[20] *Id.*

[21] *See id.*

[22] Press Release, NetChoice, Businesses United Behind Goodlatte Sales Tax Plan (Sept. 1, 2016); https://netchoice.org/library/businesses-unite-behind-goodlatte-sales-tax-plan/.

[23] Zaczkiewicz, *supra*, note 16.

of the sales/use tax revenue on cross-border sales not currently being collected.[24]

The approach taken in the Committee's drafts has been to respect the principle of "No Regulation Without Representation" and simplify compliance burdens by ensuring that, in collecting tax, remote sellers are responsible only to their home states and states within which they have a physical presence or have voluntarily registered as "dealers."[25] Remote sellers without a physical presence in the buyer's State and who have not voluntarily registered with the buyer's State to collect and remit the State's tax, would collect tax and remit it to the remote sellers' home state taxing authorities, who would then be responsible for forwarding it to the customer's State using a proven clearinghouse method similar to that used in the fuel tax context.[26]

Under each successive Committee draft, audits to assure compliance with tax collection obligations would be conducted by appropriate officials in the State of the vendor's place of business, and the proceeds received would be remitted by the vendor's State tax collecting authorities to the sales and use tax

---

[24] Statement of Chairman Robert W. Goodlatte, at 2 (Dec. 4, 2017); https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.https://protect-us.mimecast.com/s/7GwWBJTD210YSk.

[25] *See id.* at 1-3.

[26] *See id.*

collecting authorities in the States of residence of the customers from whom the taxes were collected.[27]

The Committee's successive drafts have raised successive issues, which were addressed as explained by Chairman Goodlatte:

> In 2015, we proposed a revised compromise, under which sellers would follow their home state rules on taxability (base), but would collect at the rates applicable in their customers' states, provided that the seller's home state incorporated those rates into its own tax laws. This approach achieved critical price parity for traditional retailers while keeping compliance simple for online sellers. In fact, because compliance would be so simple, no State-subsidized software would be necessary for sellers to identify taxability, saving States an estimated $2 billion annually as compared to other approaches. As before, Internet sellers would answer only to their home state taxing authority, so there would be no cross-border reach.[28]

This latest compromise proposal would level the playing field between remote vendors and brick-and-mortar vendors, and would also permit States to recover use tax revenues they are not now collecting from consumers residing in their State. At the same time, the proposal would not grant those States cross-border taxing and regulatory authority. Rather, it would allow

---

[27] *See id.* at 1-2.

[28] *Id.* at 2.

remote vendors to be responsible to and audited only by their home-State authorities.[29] The proposal provides for remote sellers to apply tax rates applicable in their customers' states, but it makes that imposition dependent upon the sellers' states first adopting those rates into their own law, for use in remote sellers' sales.[30] This avoids the "No Regulation Without Representation" problem with respect to tax rates.

In addition, the proposal would avoid the costly administrative problem for sellers of having to comply with as many as 13,000 taxing jurisdictions, each with its own set of rules to follow – a requirement that is particularly burdensome on small vendors who wish to engage in the national market via the Internet, but might not be able to afford the costs of compliance.[31] This approach is a solution that is far simpler than previous alternatives, has the support of many small businesses, and does not require a *de minimis* threshold amount of sales.[32]

This novel approach has taken time to develop, and required thought and effort to educate the interested parties as to the underlying principles and framework of the solution. As with any new approach, questions have been raised about how this framework

---

[29] *See id.*

[30] *See id.* at 1-2.

[31] *See id.* at 2 n.5.

[32] *See id.* at 2.

would operate.[33] The parties understandably still need time to work together to resolve these questions.[34]

Were either the Court to mandate or Congress to allow States to regulate or tax beyond their borders, that would be inconsistent with our Constitutional history, most particularly the Commerce Clause, and would open up a "Pandora's Box" of ills the Court cannot fully predict, at least not based on the inadequate and incomplete record in this case. *Amici* and the other members of the House Committee on the Judiciary, if not perhaps the whole membership of Congress, are keenly aware of the need for Congressional action to resolve the impasse. Their constituents have been vocal about the need for a solution, and they have been diligent in their attempts to find a fair and principled solution.

In its decision in *Quill*, the Court recognized that while it only has binary authority to rule on the case before it, Congress uniquely has the tools necessary to enable it to resolve the myriad of issues that create the burden on interstate commerce through crafting compromises and drafting rules that simplify procedures and minimize complexities and the expense of compliance.

---

[33] The work by the House Committee on the Judiciary reflects Congress' active engagement to find a solution on remote sales tax collection. The discussion of that work and what it produced should not be interpreted as meaning that Senator Wyden supports the Goodlatte measure.

[34] *See id.* at 2-3.

> This aspect of our decision [the Commerce Clause issue] is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.[35]

This is precisely what various members of Congress, and specifically *Amici* and the other members of the House Committee on the Judiciary have been doing and should be permitted to continue to do until a compromise legislative solution can be reached that serves the needs of the States for revenue while preserving the principle of "No Regulation Without Representation."

Additionally, the Senate Committee on Finance has been actively engaged on these matters in recent years. Ranking Member Wyden has been closely following Chairman Goodlatte's efforts, recognizing that the Senate will have to reconcile its views with those of the House of Representatives. While there may be stakeholders that are frustrated that the Congress has not produced an enduring solution to the question of remote sales tax collection, it is important to bear in mind that it has legislated on matters related to interstate commerce and state and local tax collection, most recently by making permanent the Internet Tax Freedom Act, which prevents states from, for example,

---

[35] *Quill*, 504 U.S. at 318.

imposing multiple and discriminatory taxes on electronic commerce.[36] Furthermore, a number of legislative initiatives have been proposed to address particular questions in the area. For example, Senators Ron Wyden and John Thune have advanced legislation to address uncertainty around where digital goods and services can be taxed, given that those goods may originate from a server in one state, and be consumed on a mobile device in another state.[37] Senator Wyden takes his oversight responsibility seriously and tasked the Government Accountability Office to investigate matters related to collection of sales and use taxes on remote sales. This more than year-long investigation draws to a close this month and will present Congress with potential options to resolve thorny questions that have vexed lawmakers for many years. In short, the House, the Senate and the entire Congress is considering matters that the Court would inject itself into, should it grant Certiorari.

The reasoning of the Court in *Quill* in this regard is consistent with the Court's reasoning in other cases that presented the same issue in somewhat different contexts. For instance, in *General Motors Corp. v. Tracy*, the Court declared it "lack[s] the expertness and the institutional resources necessary to predict the

---

[36] Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 922, 130 Stat. 122, 281 (2015).

[37] *See* Press Release, U.S. Senator John Thune; Thune, Wyden Introduce Bill to Protect Innovative Digital Goods and Services from Multiple and Discriminatory Taxes (Mar. 24, 2015); https://www.thune.senate.gov/public/index.cfm/2015/3/thune-wyden-introduce-bill-to-protect-innovative-digital-goods-and-services-from-multiple-and-discriminatory-taxes.

effects of judicial intervention invalidating Ohio's tax scheme."[38] Should intervention by the National Government be necessary, Congress has both the "power and institutional competence to decide upon and effectuate any desirable changes in the scheme that has evolved. Congress has the capacity to investigate and analyze facts beyond anything the judiciary could match, joined with the authority of the commerce power. . . ."[39] Similarly, in *Patsy v. Board of Regents of Florida*, the Court stated that the "very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable."[40]

Ironically, a key obstacle to the parties being able to reach a final compromise is the pendency of this case. Petitioners and other opponents of the *status quo* who advocate obliterating the bright line physical presence standard enunciated in *Bellas Hess* 50 years ago, and reconfirmed in *Quill* 25 years ago, appear to believe they have little incentive to accept a proposed, compromise Congressional solution when they think they can wait and potentially get 100 percent of what they want from the Court in this case – including, from the States' perspective, the opening of the Pandora's box of the ability to regulate beyond their borders.[41]

---

[38] *General Motors Corp. v. Tracy, Tax Comm'r of Ohio*, 519 U.S. 278, 304 (1996).

[39] *Id.* at 309.

[40] *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 513 (1982).

[41] As observed by Chairman Goodlatte,

"[i]n 2017, at the start of the 115th Congress, the Committee resumed its work, but, frankly, the pendency of

For the Court to deny granting any Writ of Certiorari in a case presenting the issue of use tax collection on sales by remote vendors will provide all of the relevant parties with a greater incentive to remain creatively and diligently at the Congressional negotiating table in the effort to achieve a consensus legislative solution – an effort the *Quill* Court itself emphasized as the better path for resolution of the relevant issues. Indeed, affording more time for legislative action is all the more appropriate since a central issue in the resolution of the problem at hand is the principle of "No Regulation Without Representation." By contrast, for the Court to grant a Writ improvidently now would lead to a short-circuiting of the legislative process – an outcome that would come at the expense of Congress, the Court's sister branch, and an outcome that the Court should, out of comity, eschew.

CONCLUSION

The House Committee on the Judiciary has worked assiduously with concerned members in both the House and the Senate on resolving the issue before the Court

---

the litigation challenging *Quill* has hindered negotiations. In particular, States that oppose the limitations of *Quill* believe that the U.S. Supreme Court will overturn that decision if they simply wait for action by the Court and do not agree to a congressionally proposed solution. This leaves them less open to compromise with Congress."

Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017); https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.

and has made significant progress towards completion of an enactable Bill. That negotiations have been protracted is not due to neglect on the part of Congress, but to the *bona fide* concerns its Members have with extending the permissible cross-border reach of States. While the Court has two options – uphold or reverse the lower court, Congress uniquely has the tools required to achieve the dual goals of effectively enabling the collection of use taxes on sales by remote vendors and avoiding impermissible regulation by the States outside of their borders. The best way the Court can contribute to resolving this issue is to deny the Petition and leave it to the affected parties to make the compromises necessary to forge a lasting solution to the problem.

Respectfully submitted,

Of Counsel

DANIEL M. FLORES
DANIEL HUFF
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House
Office Building
Washington, DC 20515
Daniel.Flores@mail.house.gov
Daniel.Huff@mail.house.gov

CHARLES A. TROST
Counsel of Record
CHRISTOPHER A. WILSON
SARAH F. BOTHMA
WALLER LANSDEN
DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
(615) 244-6380
charles.trost@wallerlaw.com
chris.wilson@wallerlaw.com
sarah.bothma@wallerlaw.com
Counsel for Amici Curiae

December 7, 2017

RECORD AND BRIEF

No. 17-494

Supreme Court, U.S.
FILED
NOV 2 - 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR AMICI CURIAE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INVESTMENT PROGRAM ASSOCIATION, NAREIT, NATIONAL ASSOCIATION OF REALTORS®, AND THE REAL ESTATE ROUNDTABLE IN SUPPORT OF PETITIONER

JANINE M. LOPEZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

SETH P. WAXMAN
Counsel of Record
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *QUILL*'S CONTINUED VIABILITY IS AN ISSUE OF EXCEPTIONAL IMPORTANCE 4

A. *Quill* Directly Harms Brick-And-Mortar Retailers 4

B. *Quill* Severely Harms Local Communities 8

C. *Quill* Also Severely Burdens The Retail Real Estate Industry 11

D. *Quill* Deprives State And Local Governments Of Much-Needed Revenue 16

II. THIS COURT SHOULD ABROGATE *QUILL*'S PHYSICAL-PRESENCE REQUIREMENT 20

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Page(s)

American Trucking Ass'ns v. *Scheiner*, 483 U.S. 266 (1987) 23

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 20, 21

Direct Marketing Ass'n v. *Brohl*, 135 S. Ct. 1124 (2015) 5, 23

Direct Marketing Ass'n v. *Brohl*, 814 F.3d 1129 (10th Cir. 2016) 20, 24

National Bellas Hess, Inc. v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967) 2, 23

Oklahoma Tax Commission v. *Jefferson Lines, Inc.*, 514 U.S. 175 (1995) 21

Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992) 23, 24

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) ..... *passim*

United Haulers Ass'n v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007) 20

Vasquez v. *Hillery*, 474 U.S. 254 (1986) 24

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Abrams, Rachel & Robert Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017, https://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html?_r=0 8

Alster, Norm, *Investing in Malls, Despite Store Closings*, N.Y. Times, July 14, 2017, https://www.nytimes.com/2017/07/14/business/mutfund/real-estate-investment-malls.html?_r=0 13

American Booksellers Association et al., *Amazon and Empty Storefronts, 2015 Update: The Fiscal and Land Use Impacts of Online Retail* (Sept. 2016), *available at* http://www.civiceconomics.com/empty-storefronts.html 11, 17

Anderson, Eric T., et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229 (Apr. 2010) 14

Baugh, Brian, et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* (Apr. 2014, revised Sept. 2016), *available at* http://www.nber.org/papers/w20052.pdf 6

TABLE OF AUTHORITIES—Continued

Page(s)

Baen, John S., *The Effects of Technology on Retail Sales, Commercial Property Values, and Percentage Rents* (2000), *available at* http://jrdelisle.com/JSCR/IndArticles/Baen_N100.pdf 11

Bodamer, David, *Retail Real Estate Trends 2017, Part 3: Sliding Fundamentals*, National Real Estate Investor (Aug. 18, 2017), http://www.nreionline.com/retail-cre-market-study/retail-real-estate-trends-2017-part-3-sliding-fundamentals 11

Corkery, Michael, *Is American Retail at a Historic Tipping Point?*, N.Y. Times, Apr. 15, 2017, https://www.nytimes.com/2017/04/15/business/retail-industry.html 7, 18

Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* (Oct. 2011), *available at* http://www.efairness.org/pdf/economicscenter-study.pdf 12

Einav, Liran, et al., *Sales Taxes and Internet Commerce*, Am. Econ. Review (2014), *available at* https://web.stanford.edu/~jdlevin/Papers/SalesTaxes.pdf 6

Goolsbee, Austan, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, (Dec. 1998), *available at* http://www.nber.org/papers/w6863.pdf 6

TABLE OF AUTHORITIES—Continued

Page(s)

Green, Dennis, *Bonobos Is Opening Retail Stores—But You Can't Actually Take Any of the Clothes Home*, Business Insider, July 16, 2015, http://www.businessinsider.com/bonobos-opened-a-store-where-you-cant-physically-buy-anything-2015-7 14

Gustafson, Krystina, *As Online Sales Reach New Highs, Rent the Runway Goes Analog*, CNBC, Dec. 5, 2016, https://www.cnbc.com/2016/12/05/as-online-sales-reach-new-highs-rent-the-runway-goes-analog.html 15

Howland, Daphne, *Rent the Runway Boosting Physical Store Strategy with New Flagship*, Retail Dive, Dec. 6, 2016, http://www.retaildive.com/news/rent-the-runway-boosting-physical-store-strategy-with-new-flagship/431747/ 15

Hughes, C.J., *Pop Up Goes the Retail Scene as Store Vacancies Rise*, N.Y. Times, May 30, 2017, https://www.nytimes.com/2017/05/30/realestate/commercial/pop-up-stores-retail-vacancies.html 13

International Council of Shopping Centers, *How Do Shopping Centers Impact the U.S. Economy?*, https://www.icsc.org/uploads/t07-subpage/US-Economic-Impact-2017.pdf (last visited Nov. 2, 2017) 17

TABLE OF AUTHORITIES—Continued

Page(s)

International Council of Shopping Centers, *Shopping Centers: America's First and Foremost Marketplace* (Oct. 2014), *available at* https://www.icsc.org/uploads/research/general/America-Marketplace.pdf 9

Isidore, Chris, *Store Closings Have Tripled So Far This Year*, CNN Money, June 23, 2017, http://money.cnn.com/2017/06/23/news/companies/store-closings/index.html 7

Jeffres, Leo, et al., *The Impact of Third Places on Community Quality of Life* (2009), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1011&context=clcom_facpub 9

Joffe-Walt, Chana, *Most People Are Supposed To Pay This Tax. Almost Nobody Actually Pays It*, NPR, Apr. 16, 2013, http://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax 16

L2, *Intelligence Report: Death of Pureplay Retail* (Jan. 12, 2016), *available at* https://www.l2inc.com/research/death-of-pureplay-retail 15

Lerner, Michele, *Retail REITs in Adaptation Mode*, REIT, July 27, 2017, https://www.reit.com/news/reit-magazine/july-august-2017/retail-reits-adaptation-mode 13

TABLE OF AUTHORITIES—Continued

Page(s)

Lund, Donald J., et al., *Brick vs. Click: A Resource Based View of Community Engagement*, *in* Society for Marketing Advances, Advances in Marketing (Rebecca VanMeter & Jeri Weiser eds., 2015), *available at* http://c.ymcdn.com/sites/www.marketingadvances.org/resource/resmgr/2015_Forms/2015_SMAProceedings-V2.pdf#page=379 11

Marketplace Fairness Coalition, *Case for Fairness*, http://www.efairness.org/files/united-states.pdf (last visited Nov. 2, 2017) 17

New York University Stern School of Business, *Margins by Sector (US)*, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html (last visited Nov. 2, 2017) 7

Parker, Richard, *Flawed System: Online Sales Tax Collection: Economic Impact upon California Businesses and Employers* (Aug. 2010), *available at* https://media.gractions.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/1d71e284-6837-4452-a1f4-0a2f90faaf4c.pdf 5, 6, 12, 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Portnoy, Jenna, *Va. Gas Tax Set to Increase After Congress Fails to Pass Online Sales Tax Bill*, Wash. Post, Nov. 27, 2014, https://www.washingtonpost.com/local/virginia-politics/va-gas-tax-set-to-increase-after-congress-fails-to-pass-online-sales-tax-bill/2014/11/27/609952ea-74fa-11e4-9d9b-86d397daad27_story.html?utm_term=.46d4e18314c4 19

PwC, *Total Retail 2015: Retailers and the Age of Disruption* (Feb. 2015), *available at* https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf 5

Rigby, Darrell, et al., Bain & Co., *Digical® Retail and Why Stores Matter*, Dec. 18, 2015, http://www.bain.com/publications/articles/retail-holiday-newsletter-2015-2016-4.aspx 7

Shulman, David, *In the E-Commerce Revolution, Brick-and-Mortar Defenses Are Limited and Costly* (Oct. 2017), *available at* http://www.anderson.ucla.edu/Documents/areas/ctr/ziman/UCLA_Economic_Letter_Shulman_10.10.17.pdf 12

Taylor, William C., *Who's Writing the Book on Web Business*, Fast Co. (Oct. 31, 1996), https://www.fastcompany.com/27309/whos-writing-book-web-business 22

TABLE OF AUTHORITIES—Continued

Page(s)

Urban Institute, *State and Local Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state -local-finance-initiative/projects/state-and-local-backgrounders/ state-and-local-expenditures (last visited Nov. 2, 2017).....18

Velasco, Schuyler, *America's Stores Are Closing. Why Isn't That Raising a Jobs Alarm?*, Christian Science Monitor, Aug. 4, 2017, https://www.csmonitor.com/Business/2017/0804/America-s-stores-are-closing.-Why-isn-t-that-raising-a-jobs-alarm 10

Wiley, Jonathan A., *The Impact of Commercial Development on Surrounding Residential Property Values* (Apr. 2015), *available at* https://www.gamls.com/images/jonwiley.pdf 9

Wolff-Mann, Ethan, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016, http://time.com/money/4192512/walmart-stores-closing-small-towns/ 8

Yetter, Diane L. & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes (Aug. 7, 2017), *available at* http://www.yettertax.com/wp-content/uploads/2017/09/State_Tax_Notes_Automation_Article.pdf 23

INTEREST OF AMICI CURIAE[1]

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry, and represents over 70,000 shopping center owners, developers, managers, investors, retailers, brokers, academics, lawyers, and public officials. ICSC represents the interests of all 124 shopping centers in South Dakota, which employ over 43,870 people and generate approximately $137.5 million in state sales tax revenue.

The Investment Program Association is a non-profit organization that engages in advocacy and education relating to portfolio diversifying investment products, including Real Estate Investment Trusts.

Nareit is the global association of Real Estate Investment Trusts and publicly traded real estate companies with an interest in U.S. real estate and capital markets.

The National Association of REALTORS® is a trade association that represents 1.2 million members, including residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry.

The Real Estate Roundtable is a non-profit public policy organization that brings together business and

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief on October 20, 2017. Letters from the parties giving blanket consent to the filing of amicus briefs are on file with the Clerk.

trade association leaders to address policy issues relating to real estate and the overall economy.

Collectively, amici represent a variety of stakeholders in the real estate industry. Their interest in the case is twofold. First, because amici's members own, operate, and/or finance the physical space occupied by brick-and-mortar stores, they have a substantial interest in ensuring that those stores remain viable. To do so, brick-and-mortar stores must be able to compete on a level playing field with other retailers, including on issues like sales tax collection. Second, amici's members also supply retail and commercial real estate to online retailers looking to establish storefronts, offices, distribution centers, and warehouses. Accordingly, they have an interest in encouraging companies to expand their physical presence into new areas—an interest that *Quill* impedes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Brick-and-mortar retail stores across the country have long collected state and local sales taxes as a necessary cost of doing business. At the register, in-store customers pay not just the price of their merchandise, but also an amount ranging anywhere from 3 percent to 10 percent of the purchase price, depending on state and local tax rates.

As a result of this Court's decisions in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967), online and mail-order customers very often do not pay the same taxes. Out-of-state retailers, including online companies, cannot be required to collect sales taxes unless they have a "physical presence" in the State. While their customers still owe an equiva-

lent "use" tax, they rarely pay it and instead mistakenly view the transaction as being tax-free. The direct harm this rule inflicts on brick-and-mortar retail stores is considerable. Local businesses struggle and increasingly fail to compete against online retailers that can offer customers identical goods for what is in effect up to a 10 percent discount.

Quill's distorting effects reach far beyond brick-and-mortar stores themselves and provide further reason for this Court to reevaluate *Quill*. *First*, the loss of brick-and-mortar stores, many of which are integral to the social fabric of their communities, increases unemployment and creates a sense of dislocation among community residents. *Second*, the decline in the retail sector reduces the value of retail real estate, discourages further development of retail properties, and impedes innovation in the retail sector. *Third*, the lost revenue from sales, property, and income taxes threatens the ability of state and local governments to provide much-needed public services, including those that benefit online retailers.

These cascading effects plainly call for revisiting *Quill*, a decision that relied primarily on *stare decisis*. As *Quill* all but acknowledged, developments in this Court's dormant commerce clause jurisprudence require a different conclusion today. The Court has now repeatedly held that the dormant commerce clause is meant to *level* the playing field so that businesses can compete fairly, not skew the playing field toward one subset of interstate actors and away from others. By mandating differential treatment of in-state and out-of-state interests, and by stifling interstate commerce rather than promoting it, *Quill* offends the clause's animating principles.

Stare decisis does not justify retaining *Quill*'s physical-presence rule. Many of the reasons this Court has recognized for departing from precedent apply with special force here. For one thing, the dramatic economic and technological changes over the past 25 years have substantially undermined *Quill*'s reasoning and made its unfairness to retailers, States, and others all the more apparent. And increasingly, *Quill* has been recognized as a doctrinal aberration, out of step with the Court's recent dormant commerce clause jurisprudence.

The petition should be granted and this Court should abrogate *Quill*'s anachronistic physical-presence requirement.

ARGUMENT

I. *QUILL*'S CONTINUED VIABILITY IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

Quill effectively discriminates against brick-and-mortar retail stores, which must collect sales taxes, in favor of online and mail-order companies, which need not. As explained below, tilting the playing field in this way imposes severe, concrete harms not just on brick-and-mortar retailers, but also on related industries, the communities that surround them, and the state and local governments that support them. Because all retailers should have to play by the same rules, it is exceptionally important for this Court to reconsider *Quill*.

A. *Quill* Directly Harms Brick-And-Mortar Retailers

As a direct result of *Quill*, customers do not pay sales taxes when making purchases from out-of-state mail-order and online companies. Although they technically owe *use* taxes at exactly the same rate, online

and mail-order customers often (wrongly) perceive their purchases to be tax-free—and thus substantially cheaper than if they had bought the same items in person. This (ostensible) subsidy can add up quickly. For high-priced items like jewelry, electronics, and appliances, a 5 or 10 percent difference in the effective price can easily translate to hundreds of dollars.

Unsurprisingly, then, brick-and-mortar stores are losing sales as a result of this competitive disadvantage. *See Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (acknowledging that *Quill* unfairly harms "local retailers and their customers who do pay taxes at the register"). One study estimates that, in 2010, brick-and-mortar stores in California alone lost $4.1 billion in sales to online retailers—a number expected to reach $14.3 billion by 2020.[2] Several factors (including convenience) have contributed to the rise of online shopping. But tax avoidance has played an important role. The most commonly cited reason for online shopping is the perception that online retailers offer lower prices than their brick-and-mortar counterparts—a perception directly tied to *Quill*.[3]

Several studies confirm that customers, including online shoppers, are sensitive to changes in sales tax. As an obvious example, consumers who live near state

---

[2] Parker, *Flawed System: Online Sales Tax Collection: Economic Impact upon California Businesses and Employers* 11 (Aug. 2010) [hereinafter *California Study*], *available at* https://media.gractions.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/1d71e284-6837-4452-a1f4-0a2f90faaf4c.pdf.

[3] PwC, *Total Retail 2015: Retailers and the Age of Disruption* 6 (Feb. 2015), *available at* https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf.

lines often shop across the border to take advantage of lower sales-tax rates. Studies show that buyers in eBay's online marketplace engage in comparable behavior.[4] In response to an increase in a state's sales-tax rate, buyers decreased total purchases and increased purchases from out-of-state sellers, which do not collect sales taxes under *Quill*.[5] Amazon observed a similar phenomenon when it began collecting sales taxes in certain States. Households in those States reduced their Amazon purchases by 9.4 percent (or higher, for low-income families and for larger purchases).[6] The study concluded that at least some of those sales were likely diverted to online-only competitors that continued to enjoy a tax advantage.[7]

Consistent with those findings, one influential study estimated that approximately 24 percent of online buyers and 30 percent of online purchases would shift back to brick-and-mortar stores if online retailers were required to collect sales taxes.[8] In other words, in a fair, competitive environment, a substantial portion of online shoppers would return to shopping at local

---

[4] Einav et al., *Sales Taxes and Internet Commerce*, Am. Econ. Review (2014), *available at* https://web.stanford.edu/~jdlevin/Papers/SalesTaxes.pdf.

[5] *Id.*

[6] Baugh et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* 4-5 (Apr. 2014, revised Sept. 2016), *available at* http://www.nber.org/papers/w20052.pdf.

[7] *Id.* at 21.

[8] Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce* 16 (Dec. 1998), *available at* http://www.nber.org/papers/w6863.pdf; *see also California Study* 9-10, *supra* note 2.

stores. That should not be surprising. Even as online commerce increases, the phenomenon of "showrooming"—in which prospective customers visit stores to ask questions and to see, feel, and try on merchandise—confirms that customers still value the in-person shopping experience.[9]

As long as customers can order the same items online at lower effective prices, however, local businesses will continue struggling to preserve their market share. If they slash prices to compete with online retailers, their already-thin margins will be reduced to almost nothing.[10] But if they cannot overcome the price disadvantage, their only option may well be to close. A growing number of major national retailers have in fact filed for bankruptcy, and stores, large and small, are shuttering at an alarming rate. In the first half of 2017 alone, an estimated 5,300 retail locations closed around the country,[11] putting the industry "on pace this year to eclipse the number of stores that closed in the depths of the Great Recession of 2008."[12] Because this upheaval

---

[9] *Cf.* Rigby et al., Bain & Co., *Digical® Retail and Why Stores Matter*, Dec. 18, 2015, http://www.bain.com/publications/articles/retail-holiday-newsletter-2015-2016-4.aspx (noting that in-store conversion rates are 25% to 45%, while online conversion is only 2% to 5%).

[10] NYU Stern School of Business, *Margins by Sector (US)*, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html (last visited Nov. 2, 2017) (net margin for general retail store is 2.6%).

[11] Isidore, *Store Closings Have Tripled So Far This Year*, CNN Money, June 23, 2017, http://money.cnn.com/2017/06/23/news/companies/store-closings/index.html.

[12] Corkery, *Is American Retail at a Historic Tipping Point?*, N.Y. Times, Apr. 15, 2017, https://www.nytimes.com/2017/04/15/business/retail-industry.html.

results not just from shifting consumer preferences and evolving technology but also from *Quill*'s market-distorting rule, it demands this Court's attention.

B. *Quill* Severely Harms Local Communities

The harm *Quill* causes to the national economy spreads far beyond brick-and-mortar retailers. To start, the decline in the retail industry tangibly impacts the economic and social vitality of local communities in various ways. Some of these ways are obvious: Unemployment rises whenever stores shut down, particularly in the rural and small metropolitan areas where retail stores are replacing steel mills and factories as a key source of employment.[13] The shuttering of local stores also forces residents to travel greater and greater distances to purchase basic items—again, a challenge felt most acutely by rural communities.[14]

When a brick-and-mortar store closes its doors, however, the community loses more than a source of jobs and merchandise. As one architect stated, "the physical world of the marketplace—unlike the Internet—captures the vitality of civic life, which can yield a potentially unparalleled and needed experience for cus-

---

[13] Abrams & Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017, https://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html?_r=0.

[14] *E.g.*, Wolff-Mann, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016, http://time.com/money/4192512/walmart-stores-closing-small-towns/ (noting that the departure of a Wal-Mart can leave a rural town with no grocery stores or pharmacies in a 50-mile radius).

tomers."[15] The physical space provided by retail stores—particularly Main Streets and shopping malls—helps foster and maintain a sense of community in an increasingly mobile and disconnected world. Shopping is often a social activity, and retail centers serve as important "third places" that bring people together outside the home and the workplace.[16] Retail centers also often draw other "third places"—like coffee shops, restaurants, and bars—to the area, further enhancing the community environment.[17]

In fact, studies have shown that home prices increase significantly in areas surrounding new brick-and-mortar retail developments.[18] People will naturally pay more to live in a vibrant, walkable area with easy access to stores, restaurants, and markets. New retail development is thus considered a "neighborhood amenity and an important aspect to community revitalization."[19]

Store vacancies, by contrast, have the opposite effect. As South Dakota has noted (Pet. 17), empty storefronts can signal a community in decline, increasing

---

[15] International Council of Shopping Centers, *Shopping Centers: America's First and Foremost Marketplace* 11 (Oct. 2014) (quoting Eric Kuhne), *available at* https://www.icsc.org/uploads/research/general/America-Marketplace.pdf.

[16] *Id.*

[17] Jeffres et al., *The Impact of Third Places on Community Quality of Life* (2009), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1013&context=clcom_facpub.

[18] Wiley, *The Impact of Commercial Development on Surrounding Residential Property Values* 3-4, 15-16 (Apr. 2015), *available at* https://www.gamls.com/images/jonwiley.pdf.

[19] *Id.* at 3-4.

anxiety among community members and discouraging new residents from settling in the area. As the area becomes less attractive to new residents, home prices and property values will likely decline. New businesses, too, are less likely to move into a community where stores have already begun to close, as unemployment in the area is likely higher and disposable income lower.[20] The community thus loses important "third places," and vacant stores and strip malls instead become places to avoid—potentially even places of vandalism and criminal activity. The overall level of social interaction in the community decreases. Neighbors no longer run into each other at their local stores, and the social fabric frays.

Relatedly, the loss of a locally owned store means the loss of a crucial community resource. Retail stores provide daily opportunities for local business owners to build relationships with their neighbors and benefit from their patronage. These interactions build a sense of loyalty and accountability to the community, and make locally owned stores substantially more likely than faceless online retailers to invest in their neighborhoods. Their activities run the gamut from granting scholarships to local students; donating to local charities, schools, civic groups, and little leagues; and hosting workshops, fundraisers, and other philanthropic events. By actively participating in civic life, businesses give back to the communities that support them while also "generating goodwill and enhancing [their]

---

[20] Velasco, *America's Stores Are Closing. Why Isn't That Raising a Jobs Alarm?*, Christian Science Monitor, Aug. 4, 2017, https://www.csmonitor.com/Business/2017/0804/America-s-stores-are-closing.-Why-isn-t-that-raising-a-jobs-alarm.

image."[21] Online retailers with no physical presence in the area—the very companies benefited by *Quill*—are substantially less likely to serve this role.

C. *Quill* Also Severely Burdens The Retail Real Estate Industry

The decline in brick-and-mortar retail stores also predictably impacts the retail real estate industry that provides the space these stores use. By 2015, the growth in online commerce had reduced the demand for retail space by 133 million square feet.[22] As stores close down, retail operators expect to see lower occupancy rates and lower rents.[23] These trends drive down property values.[24] One study estimated that retail real estate values in Ohio had already decreased by

---

[21] Lund et al., *Brick vs. Click: A Resource Based View of Community Engagement*, *in* Society for Marketing Advances, Advances in Marketing 379 (VanMeter & Weiser eds., 2015), *available at* http://c.ymcdn.com/sites/www.marketingadvances.org/resource/resmgr/2015_Forms/2015_SMAProceedings-V2.pdf#page=379.

[22] American Booksellers Association et al., *Amazon and Empty Storefronts, 2015 Update: The Fiscal and Land Use Impacts of Online Retail* 3 (Sept. 2016) [hereinafter *Empty Storefronts*], *available at* http://www.civiceconomics.com/empty-storefronts.html.

[23] Bodamer, *Retail Real Estate Trends 2017, Part 3: Sliding Fundamentals*, National Real Estate Investor (Aug. 18, 2017), http://www.nreionline.com/retail-cre-market-study/retail-real-estate-trends-2017-part-3-sliding-fundamentals.

[24] Baen, *The Effects of Technology on Retail Sales, Commercial Property Values, and Percentage Rents* 98-101 (2000), *available at* http://jrdelisle.com/JSCR/IndArticles/Baen_N100.pdf.

$184 million in 2012,[25] and another estimated that retail real estate values in California will decrease by $3.4 billion in 2020.[26]

Shopping centers in less desirable areas have been hit particularly hard, as the markets already reflect substantially lower property values.[27] Shopping centers in higher-income areas have been more able to adapt to the changing market—but only at considerable cost. These malls are undergoing fundamental transformations as they move toward "experiential" retail—*i.e.*, mixed-use centers that focus on providing unique and innovative experiences for their customers. High-end restaurants are increasingly important tenants, yet require significant capital expenditures before they can open.[28] Markets, fitness centers, grocery stores, and other non-traditional tenants are replacing department stores as anchors, but these, too, require substantial investments and come with additional risk. It is unclear, for example, whether people are as likely to continue shopping after leaving the gym or buying groceries as they were after shopping at a department store; if not, total foot traffic at the mall will decline and other stores will suffer. Thus, even in these shopping malls, *Quill*'s impact can readily be felt.

---

[25] Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* 10 (Oct. 2011), *available at* http://www.efairness.org/pdf/economicscenter-study.pdf.

[26] *California Study* 13-14, *supra* note 2.

[27] Shulman, *In the E-Commerce Revolution, Brick-and-Mortar Defenses Are Limited and Costly* (Oct. 2017), http://www.anderson.ucla.edu/Documents/areas/ctr/ziman/UCLA_Economic_Letter_Shulman_10.10.17.pdf.

[28] *Id.*

That impact reverberates to real estate investors, including investors in Real Estate Investment Trusts ("REITs"). REITs are companies that own and operate income-producing real estate and often trade on public markets. Retail REITs tend to own properties in more desirable, higher-income areas, and should be well-positioned to adapt to the changing market.[29] Yet even they have struggled in recent months—retail REIT investors earned approximately 10 percent less in dividends in early 2017 than in the same period the previous year.[30] Other real estate investors, including individuals and pension funds, are likely experiencing similarly disappointing returns. The experience of the real estate industry and its investors over the past several years thus illustrates how far downstream *Quill*'s effects can be felt.

What is more, *Quill* actively impedes the industry's efforts to adapt to the changing retail market. Retailers and real estate companies are experimenting with innovative ways to attract new tenants and customers notwithstanding the growth of online retail. One promising strategy is to cater to online-only retailers seeking to develop or expand their brick-and-mortar presence, either permanently or through "pop-up" shops.[31]

---

[29] Lerner, *Retail REITs in Adaptation Mode*, REIT, July 27, 2017, *available at* https://www.reit.com/news/reit-magazine/july-august-2017/retail-reits-adaptation-mode.

[30] *Id.*; *see also* Alster, *Investing in Malls, Despite Store Closings*, N.Y. Times, July 14, 2017 (noting 17 percent average negative return among retail REITs since last June), https://www.nytimes.com/2017/07/14/business/mutfund/real-estate-investment-malls.html?_r=0.

[31] *See, e.g.*, Hughes, *Pop Up Goes the Retail Scene as Store Vacancies Rise*, N.Y. Times, May 30, 2017,

These arrangements, however, would undoubtedly be much more robust if not for *Quill*, which *expressly* penalizes physical presence. Indeed, one study found that a 1 percent increase in a state's sales tax rate decreased the probability that an online-only retailer would open a store in that state by approximately 4 percent.[32] And an online-only retailer seeking to open a temporary pop-up store in a new state might be even more hesitant to do so, given considerable uncertainty about how the physical-presence rule could affect its long-term operations (*e.g.*, whether a temporary pop-up store would be enough to trigger the tax-collection obligation and whether that obligation would continue even after the pop-up store had run its course).

Quill's physical-presence rule thus hampers the very innovation that retailers and real estate companies are undertaking in response to the rise of online retail (which *Quill* itself has helped fuel). What is innovative about these new arrangements is the seamless integration of online and in-store shopping experiences. The clothing company Bonobos, for example, now has over a dozen "guideshops" where customers can try on clothing in every size, color, fit, and fabric that the company offers, order their desired merchandise, and receive those items in the mail a few days later.[33] Simi-

---

https://www.nytimes.com/2017/05/30/realestate/commercial/pop-up-stores-retail-vacancies.html.

[32] *See* Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 238 (Apr. 2010).

[33] Green, *Bonobos Is Opening Retail Stores—But You Can't Actually Take Any of the Clothes Home*, Business Insider, July 16, 2015, http://www.businessinsider.com/bonobos-opened-a-store-where-you-cant-physically-buy-anything-2015-7.

larly, Warby Parker's brick-and-mortar stores allow shoppers to try on dozens of pairs of glasses, assisted by employees with easy access to their online accounts. And at Rent the Runway's flagship store, employees can immediately see the options customers have been eyeing online and offer on-the-spot personal styling.[34]

All these companies have combined the most valuable features of online shopping—convenience and selection—with the attentive, one-on-one customer experience that online companies cannot provide. These experiences also help recapture the sense of place and community that many retail centers are in danger of losing as traditional retailers close down. The results have been positive for the retail industry; companies that have both an online and a physical presence have proven more profitable than companies that rely on either channel alone.[35] The retail real estate companies that amici represent also benefit significantly from this kind of innovation, as the unique experiences offered by online companies draw new customers and help revitalize their shopping centers.

The law should foster this kind of innovation. *Quill*, however, stifles it, by raising the costs and creating uncertainty for online companies experimenting

---

[34] Howland, *Rent the Runway Boosting Physical Store Strategy with New Flagship*, Retail Dive, Dec. 6, 2016, http://www.retaildive.com/news/rent-the-runway-boosting-physical-store-strategy-with-new-flagship/431747/; Gustafson, *As Online Sales Reach New Highs, Rent the Runway Goes Analog*, CNBC, Dec. 5, 2016, https://www.cnbc.com/2016/12/05/as-online-sales-reach-new-highs-rent-the-runway-goes-analog.html.

[35] L2, *Intelligence Report: Death of Pureplay Retail* 39 (Jan. 12, 2016), *available at* https://www.l2inc.com/research/death-of-pureplay-retail.

with physical presence as a way to reach new markets. That provides yet another reason for this Court to grant the petition and abrogate *Quill*.

D. *Quill* Deprives State And Local Governments Of Much-Needed Revenue

All the consequences of *Quill* described above—on brick-and-mortar retail, on unemployment, on property values, and so on—have a concrete impact on public coffers. State and local governments derive an overwhelming percentage of their budgets from three key sources of tax revenue: sales, property, and income taxes. *Quill* reduces all three revenue streams, with severe consequences for public services.

First, *Quill* directly and indirectly reduces sales-tax revenue in the 45 States that collect it by permitting—and even encouraging—widespread tax evasion. Sales tax is most easily collected at the point of sale, but *Quill* prevents States from requiring online and mail-order retailers to take on the responsibility of collecting it. While *Quill* does not absolve consumers of paying taxes on their purchases (an online customer still owes the State a *use* tax set at exactly the same rate), few taxpayers are even aware of this obligation, and only 1.6 percent nationwide comply.[36]

As South Dakota has explained (Pet. 13), state and local governments would have collected an additional $23 billion in sales-tax revenue in 2012 if not for *Quill*'s loophole. That number is projected to rise to $33.9 bil-

---

[36] Joffe-Walt, *Most People Are Supposed To Pay This Tax. Almost Nobody Actually Pays It*, NPR, Apr. 16, 2013, http://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax.

lion in 2018 and $51.9 billion in 2022.[37] And the loss of brick-and-mortar stores drives that number up even higher by further eroding the tax base. Once shuttered, these businesses can neither make additional sales themselves nor purchase goods from their own suppliers in other sectors. Although difficult to quantify, *Quill*'s total effect on sales tax revenues is undeniably significant.

Second, *Quill*'s impact on the real estate industry reduces state and local property tax revenues. Shopping centers, for example, currently pay $27.8 billion in local property taxes nationwide.[38] But that figure stands to decrease as more and more retail real estate remains vacant and property values decline. A nationwide study estimated that, by lowering the value of retail real estate, the decline in demand for such real estate has resulted in uncollected property taxes of $528 million dollars.[39] A California-specific study estimated that retail real estate value in that State alone will decrease by $3.4 billion by 2020, resulting in lost property taxes of approximately $34 million.[40] And, as explained above (at 9-10), the decline in retail also reduces residential property values in surrounding neighborhoods.

---

[37] Marketplace Fairness Coalition, *Case for Fairness*, http://www.efairness.org/files/united-states.pdf (last visited Nov. 2, 2017).

[38] International Council of Shopping Centers, *How Do Shopping Centers Impact the U.S. Economy?*, https://www.icsc.org/uploads/t07-subpage/US-Economic-Impact-2017.pdf (last visited Nov. 2, 2017).

[39] *Empty Storefronts* 3, *supra* note 22.

[40] *California Study* 13-14, *supra* note 2.

That, too, will ultimately reduce the property taxes that state and local governments can collect.

Third, *Quill* further strains state and local coffers by contributing to rising unemployment in the retail industry. An estimated 89,000 employees in general merchandise stores lost their jobs between October 2016 and April 2017—a number that exceeds the entire workforce of the U.S. coal industry.[41] Again, studies have demonstrated that *Quill* is responsible for at least some of this job loss. In California, for example, the ability of online retailers to avoid sales taxes will cause the loss of approximately 38,900 jobs in the retail sector (and 63,400 jobs total) by 2020.[42] The increase in unemployment decreases state income tax revenues and burdens state unemployment programs.

These budget shortfalls strain state and local governments' ability to provide much-needed public services. Notably, many of those services *directly benefit* online retailers. For example, approximately 8 percent of state spending and 4 percent of local spending goes toward building and maintaining highways and roads[43]—*i.e.*, the very infrastructure that online retailers use to deliver their goods from distant States. *Cf. Quill*, 504 U.S. at 328-329 (White, J., dissenting in part) (noting that "out-of-state seller" may "creat[e] the

---

[41] Corkery, *Is American Retail at a Historic Tipping Point?*, *supra* note 12.

[42] *California Study* 15, *supra* note 2.

[43] Urban Institute, *State and Local Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-expenditures (last visited Nov. 2, 2017).

greatest infrastructure burdens"). These improvements are often funded by sales-tax revenue. Indeed, Virginia's legislature hoped to fund its 2013 transportation bill with revenue from online sales taxes, but after Congress failed to pass the necessary legislation the State had to increase the state gas tax instead.[44]

Other state and local services that may suffer as a result of *Quill* include health care, fire protection, law enforcement, and, perhaps most importantly, education. In South Dakota, for example, the lost sales-tax revenue directly impacted the State's ability to pay teachers' salaries and forced the State to increase the sales-tax rate to make up the difference. Pet. 13-14. *Quill* thus severely burdens state and local governments' ability to provide needed services and accurately plan for their futures.

* * *

The unanticipated growth in online retail at the expense of brick-and-mortar stores is reason enough to reevaluate whether the dormant commerce clause requires *Quill*'s market-distorting rule. But the need to revisit the decision is all the more pressing in light of *Quill*'s substantial spillover effects on state and local coffers, on the real estate industry, and on local communities around the country.

---

[44] Portnoy, *Va. Gas Tax Set to Increase After Congress Fails to Pass Online Sales Tax Bill*, Wash. Post, Nov. 27, 2014, https://www.washingtonpost.com/local/virginia-politics/va-gas-tax-set-to-increase-after-congress-fails-to-pass-online-sales-tax-bill/2014/11/27/609952ea-74fa-11e4-9d9b-86d397daad27_story.html?utm_term=.46d4e18314c4.

II. This Court Should Abrogate *Quill*'s Physical-Presence Requirement

As *Quill* acknowledged, the dormant commerce clause is meant to safeguard the national economy against the "structural ills" that afflicted it under the Articles of Confederation. *Quill*, 504 U.S. at 312. Those problems stemmed from "state taxes and duties [that] *hindered and suppressed* interstate commerce." *Id.* (emphasis added). To promote a unified economy instead, the Court has repeatedly struck down state regulations and taxes that "discriminat[e] against" or "unduly burden" interstate commerce. *Id.*; *see also Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Under that framework, South Dakota's law is perfectly constitutional. Requiring out-of-state online retailers to collect the same sales tax as in-state retailers neither discriminates against nor burdens interstate commerce. *Exempting* out-of-state retailers from that obligation does both.

1. A state requirement that out-of-state retailers collect and remit state and local sales taxes plainly does not discriminate against interstate commerce at all. A critical element of "discrimination" in this context is "'*differential treatment* of in-state and out-of-state economic interests.'" *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (emphasis added). But quite to the contrary, a law like South Dakota's merely levels the playing field between in-state and out-of-state retailers. *See, e.g., id.* at 345 (no dormant commerce clause violation where local ordinances "treat[ed] in-state private business interests exactly the same as out-of-state ones"); *see also Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring), *cert. denied*, 137 S. Ct. 591 (2016).

Nor does such a requirement unduly burden interstate commerce. As *Quill* acknowledged, the *Complete Auto* standard includes two prongs that deliberately protect against overly burdensome state taxation. *See Quill*, 504 U.S. at 313. First, a state tax must be "fairly related" to services provided by the State. That would plainly be satisfied here, *see supra* pp. 18-19; indeed, no one has suggested it is not, *see* Pet. 21. Second, under *Complete Auto*, there must be a "substantial nexus" between the taxing State and the activities subject to the tax. 430 U.S. at 279. If not for *Quill*, this element, too, would be easily satisfied: The tax applies to online purchases made by and delivered to residents *in the State*. *See, e.g., Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) ("a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State"). Thus, South Dakota's law and others like it do not unduly burden interstate commerce under the *Complete Auto* standard applicable to state taxation.

2. Although state taxation of online retailers does not discriminate against or unduly burden interstate commerce, the *Quill* rule does. *Quill* undisputedly mandates differential treatment of in-state and out-of-state retailers. By its own terms, the decision "create[d] a safe harbor" for out-of-state online and mail-order retailers, retaining the "'sharp distinction'" between them and their in-state, brick-and-mortar counterparts. *Quill*, 504 U.S. at 307, 315.

Quill also directly stifles interstate commerce by skewing the playing field toward some interstate actors and away from others. Online and mail-order companies' interstate operations thrive thanks to the effective tax subsidy that *Quill* provides. But other inter-

state companies suffer, including many of the retail real estate companies that amici represent. These companies often own properties in multiple States that could be leased to out-of-state companies looking to open retail stores, office space, local distribution centers, or warehouses. Yet *Quill* gives out-of-state companies a powerful incentive to maintain all physical infrastructure in as few States as possible. *See* Pet. 17-18.[45]

The incentive to minimize physical presence, in turn, stifles innovation in the retail industry. *See supra* pp. 13-16. As amici have found, the relationship between online and brick-and-mortar retail can and should be complementary. But *Quill*'s bright-line rule systematically discourages online companies from experimenting with physical stores by exposing them to new tax-collection obligations every time they expand into a new State. In this way, too, *Quill* burdens interstate commerce by hindering innovation that would ultimately benefit consumers, local communities, and online companies themselves.

3. Finally, *stare decisis* does not require adhering to *Quill*. Whether or not the physical-presence rule was reasonable when adopted, it no longer makes sense.

---

[45] Notably, companies also have an incentive to settle in the *least* densely populated states in order to minimize the number of purchases on which they can be required to collect taxes. For example, Jeff Bezos referenced the *Quill* rule in explaining the original decision to locate Amazon's headquarters in Washington: "[I]t had to be in a small state. In the mail-order business, you have to charge sales tax to customers who live in any state where you have a business presence. It made no sense for us to be in California or New York." Taylor, *Who's Writing the Book on Web Business*, Fast Co. (Oct. 31, 1996), https://www.fastcompany.com/27309/ whos-writing-book-web-business.

This Court may depart from precedent where the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-855 (1992); *see also American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 302 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate ...."). *Quill* was decided in 1992, before the global Internet boom. In today's world, a brick-and-mortar presence is no longer necessary to ensure a sufficient "nexus" between the taxed activities and the taxing State. As Justice Kennedy has observed, "cell phones, tablets, and laptops" now allow businesses to "be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Direct Mktg. Ass'n*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

Advances in technology have also undermined another key aspect of the reasoning in *Bellas Hess* and *Quill*. Collecting sales taxes in multiple states is now a straightforward task, not a "'virtual welter of complicated obligations.'" *See, e.g.*, *Quill*, 504 U.S. at 313 n.6; *Bellas Hess*, 386 U.S. at 759-760. As one study explained: "Since *Quill*, we have witnessed a proliferation of more sophisticated technology through which sellers can affordably track sales tax collection rules, collect taxes owed, remit them to taxing jurisdictions, and comply with other requirements. The technology available today bears *no resemblance* to what existed in 1992."[46] Meanwhile, the rule's impact on brick-and-

---

[46] Yetter & Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 571 (2017) (emphasis added).

mortar retailers, on the real estate industry, on local communities, and on state and local coffers make it patently unfair to continue affording online companies this unwarranted competitive advantage. *See supra* pp. 4-19.

Just as significantly, *Quill*'s vitality has been undermined by subsequent dormant commerce clause decisions. *Stare decisis* is meant to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986). Accordingly, this Court can and does revisit prior decisions when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 854-855.

The *Quill* rule is indeed an outdated relic. It is out of step with the Court's present-day focus on eradicating discriminatory and unduly burdensome restrictions on interstate commerce. *Supra* pp. 20-21. And it has not prevented States from "imposing regulatory and tax duties of comparable severity to sales and use tax collection duties." *Direct Mktg. Ass'n*, 814 F.3d at 1149 (Gorsuch, J., concurring). These efforts—many of which "consciously stop[] (just) short of doing what *Quill*'s holding forbids," *id.* at 1148—have almost uniformly been upheld by lower courts. *Quill* has thus increasingly become a doctrinal "island," *id.* at 1151—the kind of case this Court has freely reconsidered. Indeed, under these circumstances, revisiting *Quill* will serve precisely the values that *stare decisis* protects—namely, promoting a coherent and principled body of law.

For these reasons, as well as those set forth in South Dakota's petition (at 27-35), there is "special

justification" for departing from *stare decisis* and abrogating the *Quill* rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JANINE M. LOPEZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

SETH P. WAXMAN
Counsel of Record
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

NOVEMBER 2017

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV - 2 2017
OFFICE OF THE CLERK

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND ECONOMISTS IN SUPPORT OF PETITIONER

DEBRA L. GREENBERGER
Counsel of Record
Emery Celli Brinckerhoff
& Abady LLP
600 Fifth Avenue, 10th Fl.
New York, New York 10020
(212)763-5000
dgreenberger@ecbalaw.com

QUESTION PRESENTED

Whether this Court should overrule the dormant Commerce Clause holding of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii-vi

INTEREST OF THE *AMICI* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. *STARE DECISIS* APPLIES WITH "LESS-THAN-USUAL FORCE" TO THE PHYSICAL PRESENCE RULE 3

II. THE COURT SHOULD OVERRULE *QUILL* IN LIGHT OF CHANGED COMPETITIVE CONDITIONS AND EVOLVING ECONOMIC UNDERSTANDINGS 8

A. Revenue Losses Resulting from the Physical Presence Rule Have Skyrocketed Since *Quill* 9

B. The Physical Presence Rule Leads to Economically Inefficient Consumption Choices 11

C. The Physical Presence Rule Discourages Vendors from Expanding Across State Lines 14

D. The Physical Presence Rule Likely Raises the Aggregate Cost of Complying with State Sales and Use Tax Laws 17

CONCLUSION 19

APPENDIX A (List of *Amici*) ..... App. 1 - App. 4

TABLE OF AUTHORITIES

Page

CASES

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 16

Compare State v. Wayfair Inc., 2017 SD 56 (2017) 6

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 4, 11

Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) 7

Dennis v. Higgins, 498 U.S. 439 (1991) 16

Dep't of Revenue of Ky. v. Davis, 553 U.S. 328 (2008) 4

Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734 (1978) 4

Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124 (2015) 11

Healy v. Beer Inst., 491 U.S. 324 (1989) 4

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) 4

Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947) 4

Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) ..... *passim*

National Bellas Hess, Inc. v. Department of Revenue of Illinois,
386 U.S. 753 (1967) 2

Or. Waste Sys. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994) 11

Puget Sound Stevedoring Co. v. State Tax Comm'n,
302 U.S. 90 (1937) 4

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Spector Motor Serv. v. O'Connor,
340 U.S. 602 (1951) 4

United States v. Ross,
456 U.S. 798 (1982) 6

W. Lynn Creamery v. Healy,
512 U.S. 186 (1994) 7

Walling v. Michigan,
116 U.S. 446 (1886) 7

OTHER AUTHORITIES

Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*,
115 Q. J. Econ. 561 (2000) 12

Austan Goolsbee, *The Implications of Electronic Commerce for Fiscal Policy (and Vice Versa)*,
15 J. Econ. Perspectives 13 (2001) 13

Avalara, *Avalara TrustFile: Pricing*,
https://perma.cc/S65G-2WRP
(last visited Oct. 30, 2017) 18

Cong. Budget Office, Economic Issues in Taxing Internet and Mail-Order Sales (Oct. 2003) ... 14

Emma Durmain, *Last-Ditch Push to Pass Marketplace Fairness Act in House Falls Short*, Roll Call (Dec. 3, 2014) 5

Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229 (2010) 12, 15

Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 Mgmt. Sci. 563 (2000) 16

Fed'n of Tax Adm'rs, *State Sales Tax Rates and Vendor Discounts* (Jan. 2017), https://perma.cc/K4TH-A3JQ 18

James Alm & Mikhail I. Melnik, *Sales Taxes and the Decision to Purchase Online*, 33 Pub. Fin. Rev. 184 (2005) 12

Jay Greene, *Amid Rapid Expansion, Amazon to Shutter Kansas Warehouse*, Seattle Times (Oct. 1, 2014) 16

Joe Crosby & Diane Yetter, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571 (Aug. 7, 2017) 17

Linda Qiu, *Does Amazon Pay Taxes? Contrary to Trump Tweet, Yes*, N.Y. Times (Aug. 16, 2017) 15

Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1 (2014) 12

Marketplace Fairness Coalition, *$221 Billion in Lost Revenue Over the Next 5 Years*, https://perma.cc/5YDL-WAZW (last visited Oct. 30, 2017) 9

Michael L. Klassen, Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer Purchasing Decisions*, 8 J. Direct Marketing 21 (1994) 12

Nat'l Ass'n of State Budget Officers, Budget Processes in the States (2015) 10

Nina Manzi, *Use Tax Collection on Income Tax Returns* 10 (Minn. House of Representatives, Research Dep't, Policy Brief, Apr. 2015) 19

PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate—Volume One: Main Report* 18 (2006) 17

Stu Woo, *Amazon Battles States Over Sales Taxes*, Wall St. J. (Aug. 3, 2011) 15

TaxJar, *Pricing*, https://perma.cc/VR3V-J9N4 (last visited Oct. 30, 2017) 18

U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 30, 2017)..... 10

William F. Fox, *Retail Sales and Use Taxation, in* The Oxford Handbook of State and Local Government Finance (Robert D. Ebel & John E. Petersen eds., 2012)..... 10

INTEREST OF THE *AMICI*

Amici are professors of tax law and economics at universities across the United States. As scholars and teachers, they have considered the economic consequences of this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and have concluded that *Quill*'s dormant Commerce Clause holding should be overruled. *Amici* join this brief solely on their own behalf and not as representatives of their universities. A full list of *amici* appears in *Appendix A*.[1]

SUMMARY OF THE ARGUMENT

While the Supreme Court is rightly reluctant to overrule its own precedents under any circumstances, the force of *stare decisis* is less powerful in some contexts than in others. Specifically, *stare decisis* exerts a weaker pull when judicial doctrine in the relevant area is based not on statutory interpretation but on changing competitive circumstances and evolving economic understandings. Antitrust law is a paradigmatic example of an area in which these conditions are met, but the argument for a flexible application of

---

[1] Pursuant to Supreme Court Rule 37.2, petitioner and respondents have granted blanket consent to *amicus* briefs, and *amici* have provided notice to all parties of their intention to file this brief. None of the parties or their counsel authored any part of this brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief, and no person or entity other than *amici* and their counsel made such a monetary contribution to the preparation or submission of this brief.

precedent is similarly strong with respect to dormant Commerce Clause tax cases such as this one.

In *Quill Corp. v. North Dakota*, the Court emphasized that its dormant Commerce Clause analysis was based on "structural concerns about the effect of state regulation on the national economy." 504 U.S. 298, 312 (1992). The Court was especially concerned about the effect of taxation on the mail-order industry, and it believed that maintaining the physical presence rule would "foster[] investment by businesses and individuals." *Id.* at 315-18. It also believed that its rule would reduce compliance costs for businesses and individuals engaged in commerce across state lines. *See id.* at 313 n.6. For those reasons, the Court reaffirmed the physical presence rule first announced in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

The Court's decision in *Quill* was predicated on then-current competitive circumstances and economic understandings. And in the quarter century since *Quill*, those circumstances and understandings have evolved. While the *Quill* Court was focused on the mail-order industry, it could not and did not foresee the meteoric rise of online retail, which has magnified the revenue losses that result from the physical presence rule. In the age of online retail, the physical presence rule has become a drag on economic efficiency and a potential impediment to investment across state lines. Meanwhile, the development of tax automation software over the past quarter century has led to a dramatic reduction in sales tax compliance costs for multistate retailers—so much so that overruling *Quill* would likely *reduce* aggregate compliance costs for

individuals and firms seeking to abide by state tax laws.

Thus, to overrule *Quill* now based on changed competitive circumstances and evolving economic understandings would be to take it on its "own terms." *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2413 (2015). It would be to acknowledge that—regardless of whether *Quill* was rightly decided at the time—the factual assumptions upon which it was based do not apply to the Internet age. The Court should grant South Dakota's petition so it can revisit those assumptions and update its dormant Commerce Clause jurisprudence to a new technological and economic environment.

ARGUMENT

I. *STARE DECISIS* APPLIES WITH "LESS-THAN-USUAL FORCE" TO THE PHYSICAL PRESENCE RULE

It is "never a small matter" for the Supreme Court to overrule its own precedent. *See Kimble*, 135 S. Ct. at 2409. But it is a smaller matter in some areas of law than in others. For example, the Court "has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act." *Id.* at 2412. The same reasons that justify a less rigid approach to precedent in the antitrust context apply equally to dormant Commerce Clause tax cases such as this one.

The Court in *Kimble* identified a number of factors that determine the strength of *stare decisis*, and each of these factors favors a flexible application of precedent here. First, "*stare decisis* carries enhanced force when a decision . . . interprets a

statute"—and correspondingly weaker force when a decision does not. *Id.* at 2409. Dormant Commerce Clause rules are, of course, nonstatutory. And while Congress could in theory modify any rule rooted in the dormant Commerce Clause doctrine, that fact alone has not stopped this Court from revising its dormant Commerce Clause precedents in the past. *See Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989) (overruling *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)); *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749-50 (1978) (overruling *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) and *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937)); *Complete Auto Transit v. Brady*, 430 U.S. 274, 289 (1977) (overruling *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951)). Indeed, one objective of the Court's dormant Commerce Clause case law is "to eliminate the demand and necessity for sweeping national legislation." *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 365 (2008) (Kennedy, J., dissenting).

Second, *stare decisis* is stronger where Congress intervenes with frequency—and thus where Congress's decision not to supersede a judicial decision might be interpreted as acquiescence. *See Kimble*, 135 S. Ct. at 2409-10. In the area of state sales and use tax collection, congressional intervention is rare, and Congress cannot be said to have acquiesced to the Court's dormant Commerce Clause holding in *Quill*.[2] To the contrary, the Senate

---

[2] The last significant congressional act addressing nexus requirements for state tax collection came nearly six decades

voted 69-27 in May 2013 to pass the Marketplace Fairness Act, which would have overturned *Quill*'s holding and allowed states to impose sales tax collection obligations on retailers with annual gross receipts in total remote sales exceeding $1 million nationwide. *See* S. 743, 113th Cong. (as passed by Senate, May 6, 2013). The Marketplace Fairness Act also enjoyed strong bipartisan support in the House of Representatives, but that chamber's leadership refused to bring the bill to a floor vote. *See* Emma Durmain, *Last-Ditch Push to Pass Marketplace Fairness Act in House Falls Short*, Roll Call (Dec. 3, 2014), https://perma.cc/5WM3-YY6Q. The failure of the Marketplace Fairness Act suggests—at most—that a handful of members of one house of Congress are reluctant to jettison the physical presence rule, but it does not indicate broad congressional support for the status quo.

Third, *stare decisis* is more powerful with respect to precedents that generate significant reliance interests. *See Kimble*, 135 S. Ct. at 2410 ("[C]onsiderations favoring *stare decisis* are at their acme" in "cases involving property and contract rights" because "parties are especially likely to rely on such precedents when ordering their affairs" (internal quotation marks omitted)). But importantly, the Court has said that only a "legitimate reliance interest" will warrant judicial accommodation. *See United States v. Ross*, 456 U.S.

---

ago with the Interstate Income Act of 1959, Pub. L. No. 86-272, 73 Stat. 555 (codified at 15 U.S.C. §§ 381–391). That legislation concerned income tax collection rather than the sales and use tax collection issues implicated by *Quill*.

798, 824 (1982) (noting that "the doctrine of *stare decisis* does not preclude" overruling precedent when "it is clear that no *legitimate* reliance interest can be frustrated by our decision" (emphasis added)). While other dormant Commerce Clause precedents may engender legitimate reliance interests, the physical presence rule has not. As long as consumers comply with state tax law, there is no tax advantage in purchasing goods from out-of-state vendors because consumers must pay use taxes when vendors fail to collect sales taxes.[3] Thus, insofar as consumers and vendors have come to rely on the tax evasion opportunities that the physical presence rule avails, that reliance interest is illegitimate because it is based on noncompliance with valid use tax laws.

Fourth and finally, *stare decisis* is at its weakest when the relevant area of law is explicitly based on changing competitive circumstances and evolving economic understandings. As the Court in *Kimble* explained, *stare decisis* operates with diminished force in the context of the Sherman Antitrust Act because

> Congress . . . intended that law's reference to "restraint of trade" to have

---

[3] Taxes collected and remitted by out-of-state vendors are sometimes denominated as "sales taxes" and sometimes as "use taxes." *Compare State v. Wayfair Inc.*, 2017 S.D. 56, ¶5 (2017) (decision below) (describing tax that South Dakota requires out-of-state vendors to remit as "sales tax"), *with Quill*, 504 U.S. at 301 (describing tax that North Dakota sought to require out-of-state vendors to remit as "use tax"). The brief refers to taxes collected and remitted by vendors as "sales taxes" to distinguish them from "use taxes" remitted by consumers.

> changing content, and authorized courts to oversee the term's dynamic potential. We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences. Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them on their own terms.

Kimble, 135 S.Ct. at 2412-13 (alterations, citations, and internal quotation marks omitted).

The central question in dormant Commerce Clause tax cases is not far from the question in the Sherman Act context: whether a challenged tax "is, in effect, a regulation in restraint of commerce among the States." *Walling v. Michigan*, 116 U.S. 446, 455 (1886). The Court often relies on economic analysis to answer that question. *See, e.g.*, *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1803-04 (2015); *W. Lynn Creamery v. Healy*, 512 U.S. 186, 195 n.10 (1994). *Quill* itself is an example. There, the Court explained that "the Commerce Clause and its nexus requirement are informed . . . by structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312. In particular, the Court suggested that the physical presence requirement had supported the growth of the mail-order retail industry, and that maintaining the rule would

"foster[] investment by businesses and individuals." *See id.* at 316. The Court was especially concerned about the cost to small vendors of complying with sales tax obligations imposed by each of "the Nation's 6,000–plus taxing jurisdictions." *See id.* at 313 n.6. Its decision to reaffirm the physical presence requirement rested on its understanding of the rule's economic effects. Thus, to overturn *Quill* "in light of sounder economic reasoning" would be to take the decision "on [its] own terms." *Cf. Kimble*, 135 S. Ct. at 2413.[4]

II. THE COURT SHOULD OVERRULE *QUILL* IN LIGHT OF CHANGED COMPETITIVE CONDITIONS AND EVOLVING ECONOMIC UNDERSTANDINGS

While *Quill* was largely based on "structural concerns" about the effect of state taxation on the "national economy," those same concerns now cut against the physical presence rule. Four negative effects of the physical presence requirement merit emphasis. *First*, the physical presence rule poses a much more serious threat to the fiscal stability of state and local governments than the *Quill* Court could have anticipated. *Second*, the rule results in economically inefficient consumption choices to an extent that the *Quill* Court could not have foreseen. *Third*, the physical presence rule distorts firms' decisions about production, distribution, and

---

[4] Overruling *Quill*'s dormant Commerce Clause holding would still leave in place the limits on state taxing power imposed by the Fourteenth Amendment's Due Process Clause. *See Quill*, 504 U.S. at 307-08.

corporate structure in ways that perversely discourage businesses from expanding across state lines. *Fourth* and finally, the physical presence rule likely *raises* the aggregate cost to consumers and businesses of complying with state sales and use tax laws.

A. Revenue Losses Resulting from the Physical Presence Rule Have Skyrocketed Since *Quill*

The revenue losses to state and local governments as a result of the physical presence rule far exceed anything that the *Quill* Court could have imagined—most notably because the *Quill* Court could not and did not foresee the rise of Internet retail. The Court in *Quill* was confronted with revenue-loss estimates of up to $3.27 billion per year across all 50 states.[5] Now, the best available estimate pegs the revenue loss to state and local governments as a result of the physical presence requirement at $33.9 billion in 2018, rising to $51.9 billion by 2022.[6] Accounting for

---

[5] Brief of Amici Curiae Nat'l Gov'rs Ass'n et al. in Supp. of Resp. 24 n.13, 1991 U.S. S. Ct. Briefs LEXIS 666 (reporting $3.27 billion estimate for 1992 (citing Advisory Comm'n on Intergovernmental Relations, State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992, at 2 (1991))); *see also* Brief of Amici Curiae Ariz. Mail Order Co. et al. in Supp. of Pet'r 34 & n.40, *Quill v. North Dakota*, No. 91-194, 1991 U.S. S. Ct. Briefs LEXIS 537 (filed Nov. 21, 1991) ("Recent estimates of revenue loss range from $694 million to $3 billion per year.").

[6] Marketplace Fairness Coalition, *$221 Billion in Lost Revenue Over the Next 5 Years*, https://perma.cc/5YDL-WAZW (last visited Oct. 30, 2017).

inflation, the revenue impact of *Quill* has jumped roughly six-fold since the time that *Quill* was argued and decided, with further increases yet to come.[7]

States effectively have two ways to make up for that revenue loss.[8] One is to cut spending on public goods and services. The other is to raise taxes on income, property, and sales made by retailers who maintain a physical presence within the state. Yet higher taxes on a narrower base generally reduce economic growth more than lower taxes on a broader base. For this reason, excluding online and other remote transactions from the sales tax base likely decreases the overall efficiency of state tax systems. *See* William F. Fox, *Retail Sales and Use Taxation*, *in* The Oxford Handbook of State and Local Government Finance 406, 415-16, 422-23 (Robert D. Ebel & John E. Petersen eds., 2012).

The fiscal cost of the physical presence requirement is especially significant given that *Quill* itself rested on the premise that interstate commerce generally "may be required to pay its fair share of state taxes." *Quill*, 504 U.S. at 301 n.5. Online retailers unquestionably benefit from state and local government investment in transportation and broadband infrastructure. Allowing these vendors to

---

[7] *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 30, 2017).

[8] Forty-six states are subject to constitutional or statutory balanced budget requirements of varying force. *See* Nat'l Ass'n of State Budget Officers, Budget Processes in the States 52 tbl.9 (2015).

avoid state and local sales taxes is at odds with the "fair share" principles underlying the Court's dormant Commerce Clause tax cases. *See Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 102 (1994) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens." (alteration and internal quotation marks omitted)); *Complete Auto Transit*, 430 U.S. at 281 ("[T]he Court consistently has indicated that interstate commerce may be made to pay its way . . . ." (internal quotation marks omitted)).

Thus, what at the time of *Quill* looked like a relatively narrow exemption for a mail-order industry of modest size has grown to be a gaping hole in state and local sales and use tax bases. As Justice Kennedy has noted, "*Quill* now harms States to a degree far greater than could have been anticipated earlier." *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). These revenue consequences are one—though not the only—reason that the Court should reconsider its physical presence rule.

B. The Physical Presence Rule Leads to Economically Inefficient Consumption Choices

In the age of online retail, the physical presence rule reduces economic efficiency in ways that were not apparent at the time of *Quill*. When that case was decided, there was little evidence to suggest that consumers were changing their purchasing decisions in order to circumvent state and local sales taxes. *See* Michael L. Klassen, Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer*

Purchasing Decisions, 8 J. Direct Marketing 21, 22 (1994) (noting "a paucity of research on the subject of state sales tax effects on consumer behavior in mail order purchasing decisions"). Thus, there was little reason to believe that the differential taxation of in-state and out-of-state retailers distorted consumer decisionmaking to an economically significant degree.

Now, however, peer-reviewed economic research has demonstrated that a significant share of online shoppers alter their purchasing patterns so that they can evade state and local sales and use taxes. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q. J. Econ. 561, 568 (2000) (estimating that as many as 24 percent of online shoppers would purchase offline if not for the opportunity to circumvent state and local sales taxes); James Alm & Mikhail I. Melnik, *Sales Taxes and the Decision to Purchase Online*, 33 Pub. Fin. Rev. 184, 186 (2005) (putting that figure at 6 percent); Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1, 3 (2014) (estimating that "on average, the application of a 10 percent sales tax reduces purchases by 15 percent among buyers who clicked on an item" on eBay). If online retailers had collected sales taxes on those transactions, a large number of consumers would have switched to brick-and-mortar stores instead. Moreover, consumers are much more likely to alter their online purchasing patterns than to change their mail-order purchasing decisions in response to sales tax collection. *See* Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 239 (2010) (finding that after a retailer begins

collecting state sales taxes, "Internet orders decrease by 11.6%" but "there is no apparent effect on catalog orders"). In other words, the physical presence rule appears to distort the decisions of online shoppers much more than it distorted the decisions of mail-order customers—a phenomenon that can be attributed to the fact that comparison-shopping is much easier online than via catalog. *See id.* at 236.

The distortion of consumer purchasing patterns resulting from the physical presence rule has negative consequences for economic efficiency. *See* Austan Goolsbee, *The Implications of Electronic Commerce for Fiscal Policy (and Vice Versa)*, 15 J. Econ. Perspectives 13, 19 (2001). The Congressional Budget Office offers the following example to illustrate the negative economic consequences that result from consumers altering their purchasing patterns in order to circumvent state and local sales taxes:

> For example, a consumer might choose to purchase books over the Internet for $100 inclusive of the shipping cost, pay no sales tax, and fail to comply with the use tax rather than purchase the same books at a local bookstore for $102 inclusive of a local $5 sales tax. The real resource cost of the books . . . purchased from the Internet seller is $100 . . . . The real resource cost of the same books . . . available for sale from the local bookseller is $97 . . . . Thus, the tax differential that results from the consumer's noncompliance with the use tax causes this consumer to make a choice that increases the production

> costs of books by $3. That money represents a loss of economic well-being to society because those $3 worth of resources could have been used to produce $3 worth of other goods or services.

Cong. Budget Office, Economic Issues in Taxing Internet and Mail-Order Sales, at 8 (Oct. 2003).

In sum, the physical presence rule leads consumers to make purchasing decisions that increase overall production costs—and those extra costs are, from society's perspective, pure waste. The result is that a doctrine motivated by "structural concerns about the effects of state regulation on the national economy" instead undermines economic well-being. *Cf. Quill*, 504 U.S. at 312. The *Quill* Court could not have perceived the full economic-efficiency costs of the physical presence rule because it could not have foreseen that the rule would distort the behavior of online shoppers so much more than it affected the purchasing patterns of catalog customers. *Cf. Kimble*, 135 S.Ct. at 2413 (Court "relatively free" to reverse precedent "that misperceived a practice's competitive consequences"). *Stare decisis* does not prevent the Court from correcting that error.

C. The Physical Presence Rule Discourages Vendors from Expanding Across State Lines

Beyond the distortion of consumers' purchasing decisions, the physical presence rule leads vendors to make inefficient decisions regarding production, distribution, and corporate structure. More specifically, the physical presence rule discourages

vendors from expanding their operations into new states when doing so would trigger sales tax collection obligations in additional jurisdictions. *See* Anderson et al., *supra*, at 238-39 (analyzing store expansion decisions of 14 retailers over 3 years and finding strong evidence that physical presence rule causes retailers to avoid opening stores in new states with sales taxes). This not only has negative effects on economic well-being but also undermines the dormant Commerce Clause's objective of promoting interstate economic activity.

The early years of Amazon.com provide a particularly vivid illustration of the "extreme measures" some companies take to avoid collecting state sales taxes. *See* Stu Woo, *Amazon Battles States Over Sales Taxes*, Wall St. J. (Aug. 3, 2011). The company reportedly distributed color-coded maps and spreadsheets to employees highlighting states that employees should avoid on business travel for fear that a physical presence—even if temporary—might trigger sales tax collection obligations. The company stopped recruiting at business schools in some states, and employees reportedly refrained from sending work-related e-mails if they ended up in a state where the company did not collect sales taxes. *See id.*[9]

Amazon and other companies have taken a number of further steps to avoid sales tax collection

---

[9] Amazon now collects sales taxes in all states that have one, but it does not require third-party sellers on its site to collect state sales taxes. *See* Linda Qiu, *Does Amazon Pay Taxes? Contrary to Trump Tweet, Yes*, N.Y. Times (Aug. 16, 2017).

obligations in additional jurisdictions. In some cases, they have shut down warehouses for fear that a physical presence in a state might trigger sales tax liability. *See, e.g.*, Jay Greene, *Amid Rapid Expansion, Amazon to Shutter Kansas Warehouse*, Seattle Times (Oct. 1, 2014). In other cases, companies have split off their Internet businesses so that ownership of brick-and-mortar stores would not force the firm to collect sales taxes online. *See* Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 Mgmt. Sci. 563, 570 (2000). In many of these instances, firms are adopting inefficient distribution strategies and corporate structures solely for tax avoidance purposes. The resources that they devote to these efforts rather than to more productive ends constitute a deadweight loss to the national economy.

Worse yet, by discouraging firms from expanding across state lines, the physical presence rule undermines the dormant Commerce Clause's goal of promoting "economic union." *See Dennis v. Higgins*, 498 U.S. 439, 453 (1991) (Kennedy, J., dissenting). When the physical presence rule causes a company to split off its operations in another state or to shutter its operations across state lines, it contributes to the very "economic Balkanization" that dormant Commerce Clause doctrine strives to avoid. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997). This marks one more way in which the *Quill* Court misperceived—or failed to foresee—the economic consequences of its holding, and one more reason why that holding merits reconsideration.

D. The Physical Presence Rule Likely Raises the Aggregate Cost of Complying with State Sales and Use Tax Laws

Finally, the physical presence rule—which the *Quill* Court thought would reduce the cost of complying with state tax laws—likely has the exact opposite effect. The *Quill* Court expressed concern about the "administrative and record-keeping requirements [that] could entangle a mail-order house" if it were subject to sales tax obligations in every jurisdiction. *Quill*, 504 U.S. at 313 n.6 (alterations omitted). But what the *Quill* Court failed to appreciate is that the physical presence rule does not make those administrative and recordkeeping burdens go away. It merely shifts those burdens from vendors to consumers, who are then left to comply with use tax obligations on their own.

In the years since *Quill*, vendors have gained access to sophisticated tax automation software that dramatically reduces the cost of complying with sales tax obligations in multiple jurisdictions. *See* Joe Crosby & Diane Yetter, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571, 575, 580 (Aug. 7, 2017) (concluding that in light of technological advances that post-date *Quill*, "even if a sales tax applied to every individual sale in every jurisdiction . . . , robust sales tax compliance would still be reasonably possible for all businesses at prices commensurate with their other regulatory obligations."); PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate—Volume One: Main Report* 18 (2006) (finding—in survey of retailers nationwide—that "having more

nexus states did not necessarily result in higher sales tax compliance costs"). For $20 per month or less, small businesses can automate their sales tax preparation for every state. *See* Avalara, *Avalara TrustFile: Pricing*, https://perma.cc/S65G-2WRP (last visited Oct. 30, 2017); TaxJar, *Pricing*, https://perma.cc/VR3V-J9N4 (last visited Oct. 30, 2017). Amazon also offers to calculate and remit sales taxes for sellers on its Marketplace platform for a small fee. Amazon.com, *Selling at Amazon.com: Tax Calculation Service Terms*, https://perma.cc/A654-H9NR (last visited Oct. 30, 2017).[10]

There has been no comparable technological transformation that has slashed compliance costs for consumers seeking to comply with their use tax obligations. Consumers still must track all of their purchases over the course of the year, determine when the vendor has collected sales tax and when it has not, and then calculate the use tax due on each item. Even the most fastidious personal recordkeepers will face difficult challenges in interpreting and applying state and local use tax laws that impose different rates on different products.

It is safe to assume, then, that the cost of complying with state sales and use tax obligations

---

[10] In addition, a majority of states now allow vendors to retain a small percentage of the sales taxes they collect in order to partially offset compliance costs. *See* Fed'n of Tax Adm'rs, *State Sales Tax Rates and Vendor Discounts* (Jan. 2017), https://perma.cc/K4TH-A3JQ.

will be lower if the compliance burden is borne by vendors than if it is shouldered by consumers. Vendors generally enjoy scale economies and access to technologies that most consumers cannot match. To be sure, many consumers will incur no compliance costs because they will simply disregard their jurisdiction's use tax laws. *See* Nina Manzi, *Use Tax Collection on Income Tax Returns* 10 (Minn. House of Representatives, Research Dep't, Policy Brief, Apr. 2015) (noting that fewer than 2 percent of taxpayers reported use tax on state income tax returns in 2012). But insofar as the Court's concern is to make it easier for individuals and firms to comply with the law, that concern weighs against the physical presence rule's retention. By overruling *Quill*, the Court would reallocate the compliance burden from consumers—who are ill-equipped to handle it—and to the vendors that are generally in a much better position to calculate and pay state sales taxes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DEBRA L. GREENBERGER
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000
dgreenberger@ecbalaw.com

NOVEMBER 2, 2017 *Attorneys for Amici Curiae*

APPENDIX A

Amici are listed below in alphabetical order. Their institutional affiliations are provided for identification purposes only.

Reuven S. Avi-Yonah, Irwin I. Cohn Professor of Law, University of Michigan Law School

Joseph Bankman, Ralph M. Parsons Professor of Law and Business, Stanford Law School

Jordan M. Barry, Professor of Law, University of San Diego School of Law

Lily Batchelder, Professor of Law and Public Policy, New York University School of Law

John R. Brooks, Professor of Law, Georgetown University Law Center

Samuel D. Brunson, Professor of Law, Loyola University Chicago School of Law

J. Clifton Fleming, Ernest L. Wilkinson Chair and Professor of Law, J. Reuben Clark Law School, Brigham Young University

David Gamage, Professor of Law, Indiana University Maurer School of Law

Ari Glogower, Assistant Professor of Law, Ohio State University Moritz College of Law

Jacob Goldin, Assistant Professor of Law, Stanford Law School

Andrew J. Haile, Associate Professor of Law, Elon University School of Law

Daniel Hemel, Assistant Professor of Law, University of Chicago Law School

David Herzig, Professor of Law and Michael and Dianne Swygert Research Fellow, Valparaiso University Law School

Hayes Holderness, Assistant Professor of Law, University of Richmond School of Law

Calvin H. Johnson, John T. Kipp Chair in Corporate and Business Law, University of Texas School of Law

Richard L. Kaplan, Guy Raymond Jones Chair in Law, University of Illinois at Urbana-Champaign College of Law

Michael S. Knoll, Theodore K. Warner Professor, University of Pennsylvania Law School

Zachary Liscow, Associate Professor of Law, Yale Law School

Yair Listokin, Shibley Family Fund Professor of Law, Yale Law School

Ruth Mason, Class of 1957 Research Professor of Law, University of Virginia School of Law

Goldburn P. Maynard Jr., Assistant Professor of Law, University of Louisville Brandeis School of Law

Orly Mazur, Assistant Professor of Law, Southern Methodist University Dedman School of Law

Susan C. Morse, Professor of Law, University of Texas School of Law

Richard Pomp, Alva P. Loiselle Professor of Law, University of Connecticut School of Law

James R. Repetti, William J. Kenealy, S.J. Professor of Law, Boston College Law School

Julie A. Roin, Seymour Logan Professor of Law, University of Chicago Law School

Daniel Schaffa, Assistant Professor of Law, University of Richmond School of Law

Daniel N. Shaviro, Wayne Perry Professor of Taxation, New York University School of Law

Jay Soled, Professor, Rutgers Business School

Erin Scharff, Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University

Sloan Speck, Associate Professor of Law, University of Colorado Law School

Kirk J. Stark, Barrall Family Professor of Tax Law and Policy, University of California at Los Angeles Law School

John A. Swain, Chester H. Smith Professor of Law, James E. Rogers College of Law, University of Arizona

Adam Thimmesch, Associate Professor of Law, University of Nebraska College of Law

Manoj Viswanathan, Associate Professor of Law, University of California Hastings College of Law

Edward Zelinsky, Morris and Annie Trachman Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University

Eric M. Zolt, Michael H. Schill Distinguished Professor of Law, University of California at Los Angeles Law School

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV - 2 2017
OFFICE OF THE CLERK

No. 17-494

In the
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

Gregory S. Matson
Executive Director
Helen Hecht*
General Counsel
**Counsel of Record*
Lila Disque
Bruce Fort
Sheldon H. Laskin
Richard Cram
Counsel

Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300
hhecht@mtc.gov

Counsel for *Amicus Curiae*
Multistate Tax Commission

November 2, 2017

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The physical presence standard is unworkable as a general nexus standard and now, increasingly, impinges on state sovereignty. As the Court's creation, it must be limited or eliminated by the Court. 6

A. While Quill's physical presence standard provided a bright line "demarcation" within the mail-order industry, whose specific burdens the Court had twice weighed, if the standard is to continue to apply as a general nexus standard, it must be effective at differentiating constitutionally permissible and impermissible burdens, and its application must lead to predictable and consistent results. 6

B. The physical presence standard is unworkable as a general nexus standard because a seller's physical presence has little or no bearing on the relative burdens that tax collection may place on that seller, and because the nature of physical presence, which can be intermittent or impermanent, and

may vary in quantity or quality, confounds its use as a consistent or predictable bright-line rule. 10

C. If the physical presence rule has now proven unworkable as a nexus standard, then it cannot be defended under the doctrine of *stare decisis*, nor can this issue, so critical to state sovereignty, simply be deferred to Congress to correct. 16

II. While the Court has determined that its rulings should generally apply retroactively, if it now finds that *Quill's* standard has become unworkable as a general nexus standard, it may take this case to overrule Quill and should apply this ruling prospectively. 18

III. A sales threshold standard, like the one enacted by South Dakota, represents a fairer, more workable alternative to the physical presence standard, and, to the extent the Court deems it necessary, it can provide further guidance to the states for adopting and applying such standards. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Appeal of Scholastic Book Clubs, Inc.,
920 P.2d 947 (Kan. 1996) 12

Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue,
567 A.2d 773 (Pa. Commw. Ct. 1989) 13

Cleveland v. U.S.,
329 U.S. 14 (1946) 17

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 2, 3, 19

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) 3

Harper v. Virginia Dep't of Taxation,
501 U.S. 1247 (1991) 18

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993) 18

In re Intercard, Inc.,
14 P.3d 1111 (Kan. 2000) 12

J. McIntyre Mach., Ltd. v. Nicastro,
564 U.S. 873 (2011) 7

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 5, 18

Western Live Stock v. Bureau of Revenue,
303 U.S. 250 (1938) 8, 10

Wisconsin Dep't of Revenue v.
William Wrigley, Jr., Co.,
505 U.S. 214 (1992) 2

Other Authorities

Mechanisms for the Effective Collection of VAT/GST Where the Supplier Is Not Located in the Jurisdiction of Taxation, Report of the Organisation for Economic Co-operation and Development, Oct. 24, 2017 3

State Taxation of Interstate Commerce: Report of the Special Subcomm. on State Taxation of Interstate Commerce of House Comm. on the Judiciary, 89th Cong., 1st Sess., H. Rept. 565 (1965) 2

INTEREST OF THE *AMICUS CURIAE*

The Multistate Tax Commission (the Commission) respectfully submits this brief as *amicus curiae* in support of the Petitioner, the State of South Dakota, urging this Court to grant certiorari to review the decision of the Supreme Court of South Dakota.[1]

The Commission is composed of the heads of the tax agencies in states that have adopted the Multistate Tax Compact (the Compact) by statute. Forty-eight states and the District of Columbia currently participate in the Commission's activities.[2] As the Court itself has described it, the Commission's history is bound up with the Court's shifting dormant commerce clause and state tax nexus jurisprudence. *See U.S. Steel Corp. v. Multistate Tax*

---

[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state other than South Dakota. Counsel of record for the parties received timely notice of the intent to file this brief and have granted consent.

[2] *Compact members* are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington.

Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia.

Associate Members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

Comm'n, 434 U.S. 452, 555–556 (1978). In 1959, the Court in *Northwestern States Portland Cement Co. v. Minnesota* found that an out-of-state corporation's small Minnesota sales office provided a constitutionally sufficient nexus for the state to impose its income tax. 358 U.S. 450, 464 (1959). Almost immediately, complaints from the business community over the uncertainty created by this decision prompted Congress to enact a statute setting out certain minimum standards for states to follow when imposing business income taxes. *U.S. Steel* at 455; and *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 221–22 (1992). A congressional committee (the "Willis Committee"), established to further study the matter, also recommended more comprehensive requirements,[3] which were debated for several years, but never adopted. *U.S. Steel* at 454–5. In a later case, the Court rejected a challenge to the reasoning of *Northwestern States*, and explicitly overruled earlier, conflicting precedent. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)(overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1950)).

The Compact, which was formed in 1967, was one response by the states to the concerns raised by the Willis Committee that, "as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer." *Id.* at 456. The Compact's stated purposes are: (1) prop-

---

[3] *See State Taxation of Interstate Commerce*: Report of the Special Subcomm. on State Taxation of Interstate Commerce of House Comm. on the Judiciary, 89th Cong., 1st Sess., H. Rept. 565 (1965)(referred to as the Willis Committee for its Chairman, Representative Willis).

er determination of state and local tax liability of multistate taxpayers, (2) promoting uniformity and compatibility, (3) facilitating taxpayer convenience, and (4) compliance, and avoiding duplicative taxation. *Id.* at 456–57. Since its creation by the Compact, the Commission has sought to achieve these purposes and thereby preserve the states' sovereign authority to fairly impose taxes on interstate businesses, free from federal interference.

SUMMARY OF ARGUMENT

At issue in this case are two decisions, *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which exempt all sellers lacking physical presence in a state from having to collect sales and use tax on sales made into that state. The seller-collection mechanism, on which the sales and use tax system relies, is an essential component to the fair administration and enforcement of every consumption tax.[4] Attempts to find an adequate substitute for the seller-collection mechanism have failed. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015)(Kennedy, J. concurring). So the inevitable effect of exempting certain sellers from tax-collection obligations is to give them an unfair competitive advantage. This very same effect was raised by North Dakota and its *amici* twenty-five

---

[4] *See Mechanisms for the Effective Collection of VAT/GST Where the Supplier Is Not Located in the Jurisdiction of Taxation*, Report of the Organisation for Economic Co-operation and Development, Oct. 24, 2017, *available at* https://search.oecd.org/tax/tax-policy/mechanisms-for-the-effective-collection-of-VAT-GST.pdf (last visited Oct. 28, 2017).

years ago in *Quill*. But instead of counting it as an unfortunate but unavoidable cost of the physical presence standard, the *Quill* Court treated it as important grounds for retaining that standard, saying: "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." *Quill* at 316. While we question whether the Court may enlist the states' own tax systems in achieving an economic purpose not intended by state lawmakers, *see Quill* at 331 (White, J., concurring in part and dissenting in part), this brief merely asks the Court to discard such dubious grounds of support, and instead, subject the physical presence standard and its performance to more exacting constitutional scrutiny.

In *Bellas Hess* and *Quill*, this Court, having weighed the relevant burdens imposed on mail-order sellers, found that the presence of "retail outlets, solicitors, or property" in a state served as a "sharp distinction" and a useful bright-line between those mail-order sellers that could be required to collect sales and use taxes and those that could not, concluding that the standard thus alleviated the need for case-by-case evaluation in this area. *See Bellas Hess* at 758 and *Quill Corp.* at 317. But if physical presence is to continue to function as a general nexus standard, then it must do more than serve as a line of demarcation between distinct business models used in a particular industry. It must adequately reflect the underlying constitutional principles. But the standard has not proven useful in weighing the relative burdens of tax collection, nor has it provided consistent, predictable results outside the traditional

mail-order industry. It cannot, therefore, reliably distinguish the tax burdens that states have the constitutional authority to impose, from the tax burdens that, under this Court's dormant commerce clause jurisprudence, may be impermissible. If the standard is now found unworkable as a general nexus standard, the doctrine of *stare decisis* does not require that it be retained. Nor can the Court simply defer to Congress to relieve the states from a standard that does not adequately protect their sovereign interests.

Of course, the *Quill* Court had another reason to defer to Congress. The Court's own rulings are generally given retroactive effect, *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991)(opinion of Souter, J., joined by Stevens, J.) which raised concerns for the mail-order industry's reasonable reliance interests. *See Quill* at 317 and 332 (White, J., concurring in part and dissenting in part)("The Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability.") Overruling *Bellas Hess* by legislative enactment, which would be given prospective effect, would have allowed for these reliance interests to be protected. But here, the Court is not being asked to apply its ruling retroactively to the parties, and if the Court finds that physical presence has proven to be unworkable as a general nexus standard, it should apply that ruling prospectively.

Even if the Court agrees that the physical presence standard is unworkable as a general nexus standard, it is reasonable to ask whether a sales threshold, like the one adopted by South Dakota,

would be a more workable alternative. We argue that this sales threshold standard is, by its nature, better able to reflect the factors that tend to increase relative tax collection burdens. We also expect that the application of this kind of threshold will lead to more predictable and consistent results. But we anticipate certain criticisms of this threshold standard which we briefly note, and we conclude that this Court is more than capable of providing any guidance to the states that may be needed to address these concerns

ARGUMENT

I. The physical presence standard is unworkable as a general nexus standard and now, increasingly, impinges on state sovereignty. As the Court's creation, it must be limited or eliminated by the Court.

A. While Quill's physical presence standard provided a bright line "demarcation" within the mail-order industry, whose specific burdens the Court had twice weighed, if the standard is to continue to apply as a general nexus standard, it must be effective at differentiating constitutionally permissible and impermissible burdens, and its application must lead to predictable and consistent results.

To discern whether any standard has, with time and changed circumstances, become unworkable, it is necessary to first consider the standard's

purpose and intended operation. But here, both the question and its answer are obscured by the bifurcation of *Quill's* holding between due process and the dormant commerce clause.

The inherent function of a bright-line rule is to provide notice, which is a purpose that sounds in due process, a doctrine that focuses on fairness and foreseeability. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). The *Quill* court made similar observations about the general nature of a bright-line test, saying it "reduces litigation" and "encourages settled expectations." *Quill* at 315–16. But the *Quill* Court held that: "to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process." *Quill* at 308. Moreover, there was no question that Quill, despite having no physical presence in the state, had received sufficient benefits from access to the state's markets to be subjected to a tax collection burden under due process. *Id.*

The *Quill* Court, instead, grounded the physical presence standard in the Court's dormant commerce clause doctrine, and in particular, in the burdens' analysis required by that doctrine. *Id.* at 309–315. But the specific connection it drew between physical presence and the relevant burdens' analysis was a very simple one:

> Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual

> burdens imposed by particular regulations or taxes, but also, *in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation.*

Id. at 314–15 (emphasis added).

It might be possible to read this statement as suggesting that the relevant burdens' analysis is a one-way inquiry, geared solely to alleviate undue burdens on interstate commerce, and that any bright-line rule will therefore suffice. What that reading obviously omits, however, is that some burdens are constitutionally permissible, meaning, the constitution protects state sovereign authority to impose those burdens. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."); *see also New York v. United States*, 505 U.S. 144, 157-159 (1992) (explaining that the federal government is one of limited powers and this, as well as the Tenth Amendment, preserve the core sovereignty of the states). Nor did *Quill* attempt to alter this fundamental tenet of our federal system. *See Quill* at 309 (explaining that the Court long ago rejected the view that states could not tax interstate commerce and had also renounced formalistic distinctions between so-called direct and indirect burdens). Therefore, to the extent the *Quill* Court also claimed that the physical presence standard itself "establishes the boundaries of legitimate state authority," *see Quill* at 315–16, that claim cannot

stand. What establishes the boundaries of legitimate state authority are the constitution's explicit limitations of the federal government's authority and the Tenth Amendment, which confirms those limitations. As this Court has acknowledged, the federal government must respect these limits, otherwise the exercise of federal powers might "undermine the status of the States as independent sovereigns." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012). Instead, this statement connecting physical presence to the Court's burdens' analysis must be read as directed to two members of the same traditional mail-order industry, whose burdens would have been virtually identical. In weighing those particular burdens, the Court had found a "sharp distinction" between "mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier." *Bellas Hess* at 758. If the burdens on these two companies merited protection under the dormant commerce clause, based on their lack of physical presence, then the Court could certainly extend that same protection, on the basis of the same physical-presence distinction, to all similarly situated mail-order sellers, without the need to weigh their individual burdens.

But the states have had to apply *Quill's* physical presence standard to circumstances increasingly removed from those of traditional mail-order sellers. Nor has this Court revisited the particular burdens under the state sales and use tax system for 25 years. For the physical presence standard to be considered workable when applied outside the traditional mail-order industry, it must not only demar-

cate a consistent and predictable bright line, but must reasonably differentiate between constitutionally permissible and impermissible burdens. Yet, it is inherently unsuited to this.

B. The physical presence standard is unworkable as a general nexus standard because a seller's physical presence has little or no bearing on the relative burdens that tax collection may place on that seller, and because the nature of physical presence, which can be intermittent or impermanent, and may vary in quantity or quality, confounds its use as a consistent or predictable bright-line rule.

As the sole means for determining whether interstate sellers may be protected from, or subjected to, state sales tax collection requirements, the physical presence standard has a demanding role to fill. It must not only stand in for the burdens' analysis required by the Court's dormant commerce clause jurisprudence, but must do so in a predictable and consistent way. Indeed, these two requirements are connected.

Whatever the absolute burden of collecting state sales taxes may be, that burden is not constitutionally impermissible when imposed on interstate commerce generally. *See Western Live Stock v. Bureau of Revenue*, 303 U.S. at 254. So the question is whether a seller's lack of physical presence in a state may effectively elevate that otherwise permissible burden to an unconstitutional level. The general fac-

tors that tend to affect the relative burden of sales tax collection are easily identified and include: (1) a seller's overall size—which affects its capacity to meet the administrative requirements; (2) a seller's volume and dollar amount of sales into each state—which affects the total variable costs of collection and the relative burden of the fixed costs as spread out over the total activity in the state; and (3) the nature of the seller's products or services (*e.g.*, whether its sales are wholesale or retail, the similarity or diversity of the items sold, etc.), which may require product-level analysis of whether sales are taxable or exempt. Not only is physical presence, itself, not a direct factor, but any indirect connection it may have had, historically, to these factors, has all but disappeared.

In what way, then, can physical presence, or the lack of it, reflect the factors that give rise to a potentially heightened burden? It can't. The physical presence standard says: regardless of the seller's size, the volume or amount of its sales, or the nature or type of those sales, if the seller lacks physical presence, no tax collection burden may be imposed. In short, the physical presence standard is not just artificial at its edges, but through and through. Given this inherent artificiality, it is hard to see how it can be generally employed as the sole test for undue burdens. Nor can it possibly protect the states' sovereign interests in imposing permissible tax collection obligations.

Numerous examples demonstrate that the physical presence standard has also proven to be incapable of producing consistent or predictable re-

sults, not just at its "artificial edges, but whenever the presence at issue is something other than the "retail outlets, solicitors, or property" that marks the difference between traditional mail-order sellers' primary business models. When the particular presence involves less permanent, intermittent contacts, or contacts of a different nature, the physical presence standard will not serve to avoid case-by-case analysis. *See Quill* at 315. Nor will the results of any one case be of particular use in predicting the results of another. *See, e.g., Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954 (N.Y. 1995), *cert. denied* 516 U.S. 989 (1995)(nexus established by 19 customer visits on an average of four times a year; nexus established by 41 service visits over three years); *Town Crier, Inc. v. Illinois*, 733 N.E.2d 780 (Ill. Ct. App. 2000)(nexus established by deliveries over two years, 30 of which were in company's trucks); *but see In re Intercard, Inc.*, 14 P.3d 1111 (Kan. 2000)(nexus not established by 11 in-state installation visits to the company's largest in-state customer over three month period).

Courts have also struggled to apply the physical presence standard to achieve consistent results where the physical presence at issue is that of a third party performing activities for the seller. In those cases, it is not only the quantity and quality of the physical presence itself that is at issue, but also the relationship with between the seller and the third party. *Compare Appeal of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996), *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 255 Cal. Rptr. 77 (Cal. Ct. App. 1989), *Scholastic Book Clubs, Inc. v. Farr*, 373 S.W.3d 558 (Tenn. Ct. App.

2012), *cert. denied*, 133 S.Ct. 663 (2012)(in-state school teachers taking and placing orders for books sold by out-of-state book club and delivered by US Mail held to be in-state representatives of book club creating substantial nexus with state), *with Scholastic Book Clubs, Inc. v. State, Dep't of Treasury, Revenue Div.*, 567 N.W.2d 692 (Mich. Ct. App. 1997), *appeal denied* 586 N.W.2d 923 (Mich. 1998), *Pledger v. Troll Books, Inc.*, 871 S.W.2d 389 (Ark. 1994)(such in-state teachers do not create substantial nexus with state).

Courts have also split over whether the activities of an in-state entity may create nexus for an out-of-state affiliate. In *New Mexico Taxation & Revenue Dep't v. Barnesandnoble.com LLC*, 303 P.3d 824 (N.M. 2013), involving a traditional in-state retailer and its out-of-state online affiliate, the court considered, among other things, the degree of affiliation, the sharing of brand names, common advertising and promotional materials, and merchandise return policies. Finding that the relationship between the in-state and out-of-state affiliates was sufficient to require the out-of-state affiliate to collect tax, the court also recognized "that courts in several states have reached a different conclusion, holding that the presence of affiliated brick-and-mortar stores in a state does not create a nexus that would allow the state to tax catalogue or online sales." *Barnesandnoble.com LLC* at 828–29 (citing *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 668 (Conn. 1991); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693, 695, 698 (Ohio 1995); *Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue*, 567 A.2d 773, 778-79 (Pa. Commw. Ct. 1989); and *St. Tammany Parish*

Tax Collector v. Barnesandnoble.com, 481 F. Supp.2d 575, 582 (E.D. La. 2007).

Online commerce is also giving rise to new kinds of activities that have created similar questions not clearly addressed by the physical presence standard. For example, online sellers may use links on the websites of in-state organizations and pay the organizations a commission for any sales consummated through those links. Laws imposing a sales-collection obligation in these circumstances have been challenged in state courts on the grounds that the practices do not create the kind of physical presence required by *Quill*. *See, e.g., Overstock.com, Inc. v. New York State Dep't of Taxation & Fin*, 987 N.E.2d 621 (N.Y. 2013), *cert. denied*, 134 S.Ct. 682 (2013); and similarly, *Travelocity.com LP v. Wyoming Dep't of Revenue*, 329 P.3d 131 (Wy. 2014).

Finally, the uncertain nature of the physical presence standard can, at times, cause sellers to incur tax collection obligations before they are aware or can manage to respond and begin to collect the tax. The Commission, through its Multistate Voluntary Disclosure Program, provides a kind of "relief valve" in these situations.[5] Businesses that discover they owe unreported taxes in multiple states, due to activities that occurred in the past, can work through the Commission to reach voluntary disclosure agreements with those states and receive relief from penalties and interest, as well as some limita-

---

[5] See a description of the Nexus Program on the Commission's website at: http://www.mtc.gov/Nexus-Program/Multistate-Voluntary-Disclosure-Program.

tion of their back-period liabilities. The states participating in this program have recently considered whether an online marketplace offering the products of a third-party seller creates nexus for that seller in the states where the marketplace provider stores the seller's inventory. The consensus of the program states is that the third-party sellers have met the physical presence standard in those circumstances and should be collecting tax. But the nexus program states also recognized that many of these sellers failed to anticipate this circumstance and have not charged or collected tax from their customers. Therefore, the states authorized the Commission to provide a special one-time opportunity for these sellers to voluntarily come forward and receive relief, not only from penalties and interest, but from most back-period taxes.

All these examples demonstrate that the physical presence standard lacks the necessary content—other than what courts may be able to project onto it—to produce reliably consistent or predictable results, necessary for both states and taxpayers to have certainty. If it cannot faithfully serve this small purpose, it certainly cannot hope to serve the greater one, and reliably distinguish permissible from impermissible burdens in an interstate marketplace where, increasingly, physical presence simply does not matter.

C. If the physical presence rule has now proven unworkable as a nexus standard, then it cannot be defended under the doctrine of *stare decisis*, nor can this issue, so critical to state sovereignty, simply be deferred to Congress to correct.

If a rule has become unworkable, this Court has never hesitated to overturn it. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In *Seminole Tribe of Florida v. Florida*, this Court summarized the principle of *stare decisis*, and the interests that it serves, viz., "the evenhanded, predictable, and consistent development of legal principles, ... reliance on judicial decisions, and ... the actual and perceived integrity of the judicial process." 517 U.S. 44, 63 (1996)(citing *Payne* at 827). *Stare decisis* is a principle of policy and not an inexorable command. *Id.*

When appropriate, however, the Court may defer to Congress to correct any errors, assuming Congress has the power to act. *Id.* Of course, the *Quill* Court not only recognized the possibility of congressional action to alter the standard it affirmed there, but conceded that such action might be necessary to properly weigh the applicable burdens in this area. *Quill* at 318. And the concurring opinion in *Quill* went even further, expressing an expectation that Congress could change the rule of *Bellas Hess* "by simply saying so." *Quill* at 320 (Scalia, J., concurring).

But of course, it's not quite that simple. While the Court may find that there is "wisdom and valor"

in respecting the judgments of Congress, *Quill* at 318-319, Congress, itself, may have "a strong and proper tendency to trust the courts to correct their own errors." *Cleveland v. U.S.*, 329 U.S. 14, 22-23 (1946) (Rutledge, J. concurring). Congress may also fail to take action to repudiate or correct a decision of the Court for a host of reasons, including the sheer pressure of other and more important business. *Id.* Imputing any meaning to the silence of Congress is especially fraught where the Court's decisions have taken "vacillating and contradictory courses," which, as Justice Rutledge notes, is particularly true of its dormant commerce clause cases. *Id.*

The majority in *Quill* acknowledged the physical presence standard to be "artificial at its edges," *Quill* at 315, but it did not conclude that the standard had become unworkable, at least in the context of mail-order sellers in the period between *Bellas Hess* and *Quill*. Indeed, as the opinion in *Quill* demonstrates, the Court's view was quite the opposite. We are confident that if the Court had serious doubts as to whether the physical presence standard could function as a general nexus standard, it would not have affirmed its prior ruling in *Bellas Hess* and simply depended on Congress to fix it. If, as we contend, *Quill's* standard has proven so unreliable that it impinges on state sovereign authority to impose permissible tax collection burdens, then failure of this Court to act effectively leaves the states without an adequate remedy.

One additional observation is important here. Considerations in favor of *stare decisis* have been found particularly compelling in cases involving

property and contract rights, where reliance interests are involved. *Payne* at 828. No doubt this also motivated the *Quill* Court to retain the rule of *Bellas Hess*. As we discuss in Section II below, however, if the Court were to conclude that the physical presence standard has become unworkable, it would be appropriate to give that ruling prospective effect, which would also protect any reliance interests of sellers.

II. While the Court has determined that its rulings should generally apply retroactively, if it now finds that *Quill's* standard has become unworkable as a general nexus standard, it may take this case to overrule *Quill* and apply this ruling prospectively.

Quill came before the Court at the very same time when it was rethinking whether its rulings may ever be given prospective effect. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Virginia Dep't of Taxation*, 501 U.S. 1247 (1991) (*Harper I*); and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (*Harper II*). Ultimately, while the Court was split, a plurality agreed that if a ruling was to be applied to the parties in the case, then it should also be applied retroactively, even where it overturns existing precedent or implicates certain reliance interests. *Harper II* at 97. Here, however, South Dakota does not seek any form of retroactive relief. Nor would the state legislation in question provide for any.

Moreover, in *Quill*, North Dakota did not contend that the physical presence standard had be-

come fundamentally unworkable. *See Quill* at 303–04 (noting that the state supreme court had based its decision to subject Quill to a tax collection obligation on "wholesale changes" in the economy and the law, including the remarkable growth of the mail-order industry, changes in technology, and the Court's ruling in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). Nor did the majority in *Quill* conclude that the standard had become unworkable in the traditional mail-order context. But the petition here raises a different question in our view: Whether the physical presence standard can continue to function as a general nexus standard despite growing evidence that it can neither distinguish impermissible burdens, nor provide predictable, consistent results. If the Court overrules *Quill* because it now finds the physical presence standard to be unworkable for these purposes, it would simply be inconsistent for it to apply that ruling retroactively to periods prior to the making of such a determination.

III. A sales threshold standard, like the one enacted by South Dakota, represents a fairer, more workable alternative to the physical presence standard, and, to the extent the Court deems it necessary, it can provide further guidance to the states for adopting and applying such standards.

A sales threshold standard is an example of the type of standard that not only draws a brighter line but, when fully implemented, is likely to lead to fairer and more workable results than the physical presence standard itself can now achieve. It also appears to be the obvious alternative—as evidenced by

the adoption or proposal of similar kinds of thresholds in other states. *See* Petition for Writ of Certiorari at 8–11.

That said, we agree with the *Quill* Court that all bright-line tests are artificial at their edges—and threshold tests will be no exception. But as discussed above, the physical presence standard suffers from flaws that the threshold standard mitigates. The basis for the threshold standard, the amount of sales into a state, is a factor tending to directly affect the relative burden of complying with that state's tax collection obligations. Also, threshold standards set at a reasonable level will likely exclude many smaller remote sellers, for whom the relative burden of tax collection would be higher.

Nevertheless, we anticipate certain criticisms of the sales threshold standard, and we address the chief criticisms briefly here. One possible criticism is that statutory thresholds may require more specific guidance to allow them to be fairly and consistently implemented and applied. The fact that this needed guidance does not currently exist, however, is not a function of inherent inability to generate that guidance, but only of the fact that the states are still bound by the physical presence standard and have not had the opportunity to develop such guidance. A second possible criticism is that, since the sales threshold standard would only apply to sellers who lack physical presence, the practical difficulties inherent in applying that standard might continue to affect the determination of nexus. But, by demoting physical presence to a purely subordinate role in the determination of nexus, the need to push the stand-

ard to its inherently artificial limits is substantially mitigated. A third possible criticism is that a diversity of state thresholds might create somewhat more complexity than a single standard. Assuming that no state's threshold is impermissibly small, however, it is hardly possible to accuse a state of burdening interstate commerce simply because it chooses to impose a threshold higher than the minimum, even if it is different than other states. Finally, a sales threshold, strictly interpreted and applied, might potentially violate due process. But this is true of the physical presence standard as well. Therefore we assume that state administrators and state courts will interpret and apply such thresholds consistent with due process requirements.

In addition, we trust that the Court is capable of providing any needed guidance on these or other potential issues with a sales threshold standard, if it grants South Dakota's petition for certiorari.

CONCLUSION

As the Commission's own history demonstrates, if the Court now determines that *Bellas Hess* and *Quill* should be overturned, it would not be the first of its dormant commerce clause decisions to meet that fate. Nor would it be the first time the Court moved away from a formalist tax nexus rule toward more general principles, nor the first time that it permitted the exercise of state tax jurisdiction within an area previously considered constitutionally off-limits. *See Quill* at 309. And, as the history of the Commission also demonstrates, while these shifts may be met with predictions of the substantial

damage state tax burdens may cause, these predictions have failed to materialize. So while the Court has, on occasion, temporarily reverted to formalist thinking, it has never found it necessary to reimpose substantial limitations on state tax nexus once removed.

In *Quill*, the Court recognized that "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government," meaning the future judgments of Congress. If the Court now concludes that the physical presence standard should be overturned, and that new rules must be developed to take its place, it need only exercise this same wisdom and valor in favor of the states' ability to accomplish that task.

Respectfully submitted,

Gregory S. Matson
Executive Director
Helen Hecht*
General Counsel
*Counsel of Record
Lila Disque
Sheldon H. Laskin
Bruce Fort
Richard Cram
Counsel

Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300

hhecht@mtc.gov

Counsel for *Amicus Curiae*
Multistate Tax Commission
November 2, 2017

RECORD AND BRIEF

FILED
OCT 2 3 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC.,

AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NEIL J. KUENN
Counsel of Record
GEORGE W. KEELEY
KEELEY, KUENN & REID
200 S. Wacker Drive
Suite 3100
Chicago, IL 60606
(312) 782-1829
nkuenn@kkrlaw.com

Counsel for Amicus Curiae National Association of Wholesaler-Distributors

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D C 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

QUILL UNFAIRLY HARMS BRICK-AND-MORTAR WHOLESALER-DISTRIBUTORS, NOT JUST RETAILERS. 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Page

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 6

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) 3, 6

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 3

Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.,
386 U.S. 753 (1967) 2, 4, 5, 7

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Statutes

S.D. Codified Laws §10-45-1(10) 4

Other Authorities

Andy Hoar with Martin Gill, Susan Wu, Jacob Milender and Rachel Birrell, *B2B eCommerce: A Trillion Dollars*

for the Taking, Forrester Research, Inc. (July 26, 2016) 6

Guy Blissett, *Facing the Forces of Change: Reimagining Distribution in* a Connected World, NAW Institute for Distribution Excellence, in cooperation with IBM Corporation (2013) 5

Paul St. Germain, Facing the Forces of Change: *Navigating the Seas of Disruption,* NAW Institute for Distribution Excellence, in cooperation with IBM Corporation (2016) 6

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Wholesaler-Distributors (NAW) is a nonprofit trade association that serves as the national voice of wholesale distribution. NAW members consist of direct firm members engaged in the wholesale and distribution trades of every sort of nondurable and durable products, from candy to cranes, sold to businesses and consumers.

Wholesaler-distributors act as a critical link in the supply chain, linking manufacturers and suppliers of consumer and industrial products and services to retailers, resellers, dealers, contractors and other end user customers. The wholesale distribution channel provides valued marketing, sales, local inventory, transportation and fulfillment services that enable manufacturers to meet end user demand for timely product availability, installation, repair and maintenance. NAW is comprised of wholesaler-distributor enterprises of all sizes, as well as national, regional, state and local line-of-trade associations spanning the $5.6 trillion wholesale distribution industry.

The wholesale distribution industry employs an estimated 5 million men and women throughout the

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that no counsel for any party authored this brief in whole or in part, and that no person other than *amicus curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the intention of *amicus* to file this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

United States. There are approximately 395,000 wholesaler-distributor enterprises with places of business in all 50 states and the District of Columbia.

This case is of interest, and importance, to NAW because the state sales taxation issue affects *wholesaler-distributors* – as well as retailers. In fact, any business that makes a sale at retail under the various state tax laws has a stake in the outcome of this case.

NAW member companies are victims of a state sales and use tax regime that effectively exempts remote internet sellers (i.e., sellers lacking a physical presence in the state) from the requirements imposed on local brick-and-mortar wholesaler-distributors to collect and remit locally-applicable sales tax. States cannot compel the collection and remittance of applicable sales tax on remote internet sellers as a result of decisions of this Court in *Nat'l. Bellas Hess v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As a consequence, NAW member companies who have a distribution center, a sales office, a branch office, make deliveries in a state, or have some other form of physical presence in a state are forced to operate at a clear and substantial economic disadvantage vis-a-vis remote internet sellers competing in the same markets. This disadvantage results in lost sales revenue and hampers the ability of locally-present wholesaler-distributors to grow their businesses, invest in the community, and produce in-state employment opportunities.

SUMMARY OF ARGUMENT

Quill's detrimental effects on brick-and-mortar wholesaler-distributors, its basic unfairness, and its questionable Constitutional underpinning, provide ample cause to grant certiorari.

As Justice Gorsuch recognized, out-of-state internet sellers "don't seek comparable treatment to their in-state brick-and mortar rivals" when they dodge sales tax collection obligations; instead they use *Quill* as a weapon to "seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016).

This "tax shelter" is substantial. According to The Tax Foundation, state sales tax rates in 2017 range from 2.9 percent to 7.25 percent of gross receipts. In addition, the local sales tax rates in the thirty-eight states that impose them range from .07 percent to 5.01 percent.[2]

The time has come, and this is the appropriate case, to answer Justice Kennedy's urging that the legal system "find an appropriate case for this Court to reexamine" the *Quill* holding. *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

---

[2] https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017/

ARGUMENT

QUILL UNFAIRLY HARMS BRICK-AND-MORTAR WHOLESALER-DISTRIBUTORS, NOT JUST RETAILERS

In its certiorari petition, South Dakota asserts the "unfairness [of *Quill*] to brick-and-mortar retailers is itself a reason to grant certiorari." (Petition, p. 15). The unfairness is not limited to retailers. Wholesaler-distributors and other resellers making taxable "sales at retail" under state tax laws[3] are also victims of the same unfairness as their retailer brethren.

Twenty-five years ago, this Court in *Quill* cemented a barrier constructed 25 years before that (in 1967 – before fax machines were commercially available) in *Bellas Hess*, that bars a state from requiring sellers to collect sales taxes on sales into the state unless the seller is "physically present" there. Despite the efforts over the years since by states to address this problem, made manifest to taxing jurisdictions suffering the collective loss of billions of dollars in revenues, this barrier, constructed and fortified in bygone economic and technological eras, remains in place today.

It is an understatement to say that the commercial landscape has evolved substantially over the quarter-century since this Court decided *Quill* and considerably more so in the 50 years that has elapsed since

---

[3] In South Dakota, a "sale at retail" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent." S.D. Codified Laws §10-45-1(10).

Bellas Hess. Initially, commercial interest in state taxation of interstate sales was pretty well confined to the retail sector as mail-order businesses selling to consumers entered prominence. More recently, the internet has exploded as a platform for e-commerce in both the business-to-business (B2B) space where wholesaler-distributors are primarily engaged, in addition to business-to-consumer (B2C) markets. This market distinction blurs when the wholesaler-distributor makes a taxable sale at retail to a commercial, industrial, or institutional end-user (where the marketplace effects realized by wholesaler-distributors and retailers intersect).

According to the 2013 study of trends in the wholesale distribution industry conducted by the NAW Institute for Distribution Excellence (NAW Institute)[4] in cooperation with IBM, titled *Facing the Forces of Change: Reimagining Distribution in a Connected World,* in the same way that the shift toward e-commerce is "rapidly transforming the retail landscape ... e-commerce will now continue to transform wholesale distribution (p. 32) ... by 2017, a full 92% of distributors surveyed will offer e-commerce (p. 34) ... On average, online orders make up 9% of distributor revenues today, but that proportion is expected to surge to 21% by 2017, an increase of 130%. (p. 37)."

The competitive advantage enjoyed by remote internet sellers has and will continue to take an increasing and unfair toll on community-based brick-

[4] The NAW Institute for Distribution Excellence is the research and education arm of the National Association of Wholesaler-Distributors.

and-mortar wholesaler-distributors as e-commerce in B2B markets continues to grow, as has been forecasted. The 2016 NAW Institute/IBM report titled *Facing the Forces of Change: Navigating the Seas of Disruption* cites a report by Forrester Research, Inc., forecasting that U.S. B2B e-commerce would reach $1.3 trillion and account for 12% of all B2B sales by 2020.[5]

Justice Kennedy correctly noted that the 1992 *Quill* decision was "questionable even when decided." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. at 1135. NAW submits *Quill* is inconsistent with *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). There is no logical basis why, under the U.S. Constitution, state sales tax collection needs a unique "nexus" standard that is different from the general nexus standard announced in *Complete Auto* applicable to state taxes on non-resident businesses. *Complete Auto* permits state taxes that are (1) "applied *to an activity* with a substantial nexus with the taxing State," (2) "fairly apportioned," (3) "not discrimina[tory]" and (4) "fairly related to the services provided by the State." *Id.* at 279 (emphasis added).

The nexus requirement in *Complete Auto* is basically an *economic* nexus. It does not turn on a company's physical presence in a State – it is the nexus between the taxed activity and the taxing State that is

---

[5] Andy Hoar with Martin Gill, Susan Wu, Jacob Milender and Rachel Birrell, *B2B eCommerce: A Trillion Dollars for the Taking*, Forrester Research, Inc. (July 26, 2016). https://www.forrester.com/report/B2B+eCommerce+A+Trillion+Dollars+For+The+Taking/-/ERES82102?objectid=RES82102

constitutionally relevant, not the seller's "physical presence" in the State. The out-of-state seller's activity – making sales to customers in the State and benefiting from the State's market opportunity and protection of its laws – is taxed without discrimination versus in-state sellers. The *Quill* "physical presence" standard is not applied to any other state tax. The Court should retire this aberration.

At the time they were decided, no one could have foreseen the approaching economic evolution or the sweeping long-term effect of *Bellas Hess* and *Quill* on a technologically transformed 21st century economy. But that evolution, that transformation has occurred and will continue. The demands of the "physical presence" rule for the collection and remittance of state sales taxes articulated in *Bellas Hess* and *Quill* no longer fit marketplace realities. It should be discarded, and this case for which South Dakota seeks a Writ of Certiorari offers the Court the opportunity to do so.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

October 23, 2017

Respectfully submitted,

Neil J. Kuenn
Counsel of Record
George W. Keeley
Keeley, Kuenn & Reid
200 S. Wacker Drive
Suite 3100
Chicago, IL 60606
(312) 782-1829
nkuenn@kkrlaw.com

Counsel for Amicus Curiae
National Association of
Wholesaler-Distributors

RECORD AND BRIEF

No. 17-494

Supreme Court, U.S.
FILED
NOV 2 - 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, US CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL AASA: THE SCHOOL SUPERINTENDENTS ASSOCIATION, AND NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS SUPPORTING PETTTIONER

LISA SORONEN
EXECUTIVE DIRECTOR
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St. NW
Suite 515
Washington, DC 20001

*Counsel of Record

TILLMAN J. BRECKENRIDGE*
BAILEY & GLASSER LLP
1054 31st St., NW, Suite 230
Washington, DC 20007
Telephone: 202-463-2101
Facsimile: 202-463-2103
tbreckenridge@baileyglasser.com

Counsel for Amici Curiae

Additional Counsel on Inside Cover

Library of Congress
Law Library

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE
AND SUPREME COURT
CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OF AMICI CURIAE 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *QUILL* HAS RESULTED IN A TIDAL WAVE OF LITIGATION AND CREATED A SEA OF UNCERTAINTY AMONG STATES AS TO HOW TO COLLECT TAXES IN TODAY'S DIGITAL AGE 3

II. THIS CASE IS AN OPTIMAL VEHICLE FOR DECIDING WHETHER *QUILL* SHOULD BE OVERRULED 9

A. The South Dakota legislation challenges *Quill* and *Bellas Hess* in response to Justice Kennedy's invitation 9

B. South Dakota's challenge is in a clean posture, free from any ancillary questions or jurisdictional concerns 10

III. UNTIL IT IS OVERTURNED, *QUILL* WILL CONTINUE TO WREAK HAVOC ON STATE AND LOCAL GOVERNMENT ABILITY TO COLLECT TAXES THAT ARE ALREADY OWED 12

A. Sales and use taxes are a crucial source of revenue for States and local governments 12

B. *Quill* unreasonably hinders the States from collecting owed sales and use taxes. 14

C. The detrimental effect of *Quill* has been, and will continue to be, increasingly exacerbated by the consistent expansion of e-commerce. 18

CONCLUSION 21

APPENDIX: LIST OF AMICI 1a

TABLE OF AUTHORITIES

Cases

Am. Target Advert., Inc. v. *Giani*, 199 F.3d 1241 (10th Cir. 2000), cert. denied, 531 U.S. 811 (2000).....4

Capital One Bank v. *Comm'r of Revenue*, 899 N.E.2d 76 (Mass. 2009), cert. denied, 557 U.S. 919 (2009).....4

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977).....4

Couchot v. *State Lottery Comm'n*, 659 N.E.2d 1225 (Ohio 1996), cert. denied, 519 U.S. 810 (1996).....4

Direct Mktg. Ass'n v. *Brohl*, 135 S. Ct. 1124 (2015).....*passim*

Geoffrey, Inc. v. *S.C. Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), cert. denied, 510 U.S. 992 (1993).....5

KFC Corp. v. *Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010), cert. denied, 565 U.S. 817 (2011).....4

National Bellas Hess, Inc. v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967).....4

Overstock.com, Inc. v. *N.Y. State Dep't of Taxation and Fin.*, 987 N.E.2d 621 (N.Y 2013), cert. denied, 134 S. Ct. 682 (2013).....5

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992).....*passim*

State v. *Wayfair Inc.*, No. 28160, 2017 WL 4051554, at *1 (S.D. Sept. 13, 2017) 11

State v. *Wayfair, Inc.*, 229 F. Supp. 3d 1026 (D.S.D. 2017) 10

Tax Comm'r of State v. *MBNA Am. Bank, N.A.*, 640 S.E.2d 226 (W.Va. 2006), cert. denied sub nom *FIA Card Servs., NA.* v. *Tax Comm'r of West Virginia*, 551 U.S. 1141 (2007) 5

Statutes

S.D. Codified Laws § 10-64-1 (2016) 2, 9

S.D. Codified Laws § 10-64-2 (2016) 9

Other Authorities

Economic Analysis of Tax Revenue from E-Commerce in Ohio, Economics Center 1 (2011), http://www.efairness.org/pdf/economicscenterstudy.pdf 15

Elliott D. Pollack & Company, Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona (2012), https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b34-542c-46ca-b8d6-ce045a849330.pdf 15

Joe Crosby, Liz Malm, and Ryan Maness, *South Dakota* v. *Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017),

https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps 5, 6

Lila Disque & Helen Hecht, *Beyond* Quill *and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163 (2016) 17

Liz Malm, Ryan Maness & Joe Crosby, *Sales Tax Compliance Legislation is Still a Hot Topic at the State (and Federal) Level*, MultiState Insider (May 3, 2017), https://www.multistate.us/blog/sales-tax-compliance-legislation-is-still-a-hot-topic-at-the-state-and-federal-level 8

Lucy Dadayan & Donald J. Boyd, *After Disastrous 2009, States Report Modest Revenue Growth in Early 2010*, The Nelson A. Rockefeller Institute of Government (July 2010), http://www.rockinst.org/pdf/government_finance/state_revenue_report/2010-07-13-SRR_80.pdf 7

Morgan Scarboro, *To What Extent Does Your State Rely on Sales Taxes*? (Apr. 27, 2017), https://taxfoundation.org/sales-taxes-percent-collections/ 14

National Conference of State Legislatures (NCSL) & International Council of Shopping Centers (ICSC), Uncollected Sales & Use Tax from Remote Sales: Revised Figures (March 2017),

http://www.efairness.org/files/Updated%20Sales%20Tax%20Loss%20Report.pdf.....20

National Conference of State Legislatures (NCSL), State Efforts to Collect Remote Sales Taxes (Feb. 2014), http://www.ncsl.org/documents/statefed/MFA_intheStatesFeb2014.pdf 14, 15

No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders Before the H. Comm. On the Judiciary, 115th Cong. (2017) (statement of Sen. Deb Peters (SD) on behalf of NCSL) 16

Quarterly Retail E-Commerce Sales: 2nd Quarter 2017, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Aug. 17, 2017 .....19, 20

U.S. Government Accountability Office, Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain (June 2000), http://www.gao.gov/assets/240/230474.pdf.....16

BRIEF OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of Petitioner, the State of South Dakota, urging that the Court grant review in No. 17-494.

INTEREST OF AMICI

The present amici are organizations representing state and local elected and appointed officials from throughout the United States, up to and including state governors.[1] These organizations regularly file amicus briefs in cases, like this one, raising issues of concern to their members. Additional information on each of the amici is available in the attached appendix.

Amici maintain a vital interest in the rules governing the assessment and collection of sales tax by state and local governments. These revenues fund essential benefits and services provided to the citizens amici represent. Accordingly, amici's previous brief to this Court in *Direct Marketing Association* v. *Brohl* laid out the research regarding the harms caused by *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992).

Amici strongly believe that this Court needs to reconsider *Quill* in order to prevent further harm to state revenues. In 2016, in its petition supporting denial of certiorari in *Direct Marketing Association* v. *Brohl II* amici advised the Court that, in response to

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and were timely notified.

Justice Kennedy's invitation, an appropriate vehicle would be arriving to the Court soon. They write to inform the Court that South Dakota's legislation is the ideal vehicle to reach this important issue and, therefore, urge the Court to grant this petition.

SUMMARY OF ARGUMENT

States and local governments lost an estimated $26 billion in 2015 from uncollected sales and use taxes from out-of-state sellers for one reason: the Supreme Court's decisions in *Quill* and *Bellas Hess* do not allow States to require out-of-state merchants to collect and remit these taxes on sales to consumers within the State unless the out-of-state merchant has a physical presence within the State. The effect of these decisions in today's digital economy, where online sales are a mere click away, is devastating for States and local governments, who depend on these revenues. The decisions also create an unfair disadvantage for traditional brick-and-mortar retailers—businesses that create jobs within the states and localities—which must add five to ten percent to their prices to account for these taxes.

Confronted with the obstacles erected by *Quill*, States have enacted various legislative fixes to attempt to collect the billions of dollars of sales and use taxes owed to them by out-of-state merchants. In 2016, the South Dakota Legislature enacted, and the Governor signed, Senate Bill 106, requiring out-of-state retailers to collect and remit sales and use tax if they annually conduct with South Dakota residents either (1) $100,000 worth of business, or (2) 200 separate transactions. S.D. Codified Laws §§ 10-64-1 *et seq.* (2016).

The South Dakota legislation was designed as a direct response to Justice Kennedy's invitation in *Direct Marketing Association* v. *Brohl* to present "an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Shortly after the law was enacted, South Dakota sought a declaratory judgment in state circuit court to permit enforcement against three out-of-state retailers. After an unsuccessful removal to federal court, the case quickly worked its way through the state courts, with both the state circuit court and the Supreme Court of South Dakota concluding that this Court's precedents in *Quill* and *Bellas Hess* forbid South Dakota from enforcing the legislation against the out-of-state retailers.

South Dakota's carefully tailored legislation arrives before this Court in a clean procedural posture, primed to assist the Court in addressing a single question—whether *Quill* retains constitutional force in the modern digital economy.

ARGUMENT

I. *QUILL* HAS RESULTED IN A TIDAL WAVE OF LITIGATION AND CREATED A SEA OF UNCERTAINTY AMONG STATES AS TO HOW TO COLLECT TAXES IN TODAY'S DIGITAL AGE.

Quill stands as the single greatest obstacle to meaningful sales tax reform in today's digital economy. Decided before the massive expansion in online retail, *Quill* has caused States and local governments to lose billions in annual sales and tax revenue, "inflicting extreme harm and unfairness on the States." *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

In *Quill Corp.* v. *North Dakota*, this Court reaffirmed the prohibition on States levying a sales and use tax on sales by businesses that lack a physical presence within the state. 504 U.S. 298 (1992). The Court openly reconsidered the prohibition and ultimately chose to retain its rule—but did so only to protect the reliance interests that had grown up around the rule. Echoing its prior decision in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), the Court held that physical presence was required to avoid a violation of the "negative" or "dormant" Commerce Clause's substantial nexus requirements. *Quill*, 504 U.S. at 312. However, the Court expressly acknowledged that *Bellas Hess* very well might have been decided differently under "contemporary Commerce Clause jurisprudence" and cases like *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

These holdings have spawned a host of litigation as States have grappled with how to counter the irrational tax advantage *Quill* erected for online retailers who avoid physical presence within any given state. These holdings have also led to countless cases over the last two decades in which State and federal courts have enforced various state taxes that look a lot like—and impose burdens quite similar to—state sales taxes, against out-of-state companies, regardless of *Quill*.[2]

---

[2] *See, e.g.*, *Am. Target Advert., Inc.* v. *Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (2000); *KFC Corp.* v. *Iowa Dep't of Revenue*, 792 N.W.2d 308, 323 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011); *Capital One Bank* v. *Comm'r of Revenue*, 899 N.E.2d 76 (Mass. 2009), *cert. denied*, 557 U.S. 919 (2009); *Couchot* v. *State Lottery Comm'n*, 659 N.E.2d 1225 (Ohio

More specifically, States have resorted to a variety of "Amazon laws" and a hodgepodge of other legislation intended to recoup the massive losses incurred. As of today, over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their State. *See* Joe Crosby, Liz Malm & Ryan Maness, *South Dakota* v. *Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017).[3]

In 2008, New York initiated this trend by enacting its so called "Amazon tax," which Amazon.com and other online retailers challenged in *Overstock.com, Inc.* v. *N.Y. State Dep't of Taxation and Finance*. 987 N.E.2d 621, 622-23 (N.Y 2013), *cert. denied*, 134 S. Ct. 682 (2013); *see also* William L. Fletcher, Jr., Note, *Netflix and* Quill*: Using Access and Consumption to Create a Plan for Taxing the Cloud*, 58 Wm. & Mary L. Rev. 1029, 1046-47 (2017). The New York law was designed to establish the nexus of an out-of-state vendor through its use of in-state, click-through advertisements. *Overstock.com, Inc.*, 987 N.E.2d at 622-23. Online vendors were then required to collect and remit taxes on purchases by New York residents. *Id.* Referring to the vendor's "active in-state solicitation that produce[d] a significant amount of revenue," the New York state courts held that the

---

1996), *cert. denied*, 519 U.S. 810 (1996); *Geoffrey, Inc.* v. *S.C. Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993); *Tax Comm'r of State* v. *MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 232-34 (W.Va. 2006), *cert. denied sub nom. FIA Card Servs., NA.* v. *Tax Comm'r of West Virginia*, 551 U.S. 1141 (2007).

[3] Available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

online retailers failed to prove the statute unconstitutional under the Commerce Clause. *Id.*

After New York, the flood gates opened. By 2011, the following states introduced some type of "Amazon" legislation: Arkansas, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, Rhode Island, South Dakota, Tennessee, Texas, Vermont and Virginia. *See* Sylvia Dion, *Amazon Laws: The New Normal? Internet Sales Tax Law Update*, SalesTaxSupport.com (July 17, 2011).[4] As of today, over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their State. *See* Joe Crosby, Liz Malm & Ryan Maness, *South Dakota* v. *Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017).[5]

In spite of the initial popularity of "Amazon" legislation, studies indicated that these laws failed to generate the anticipated sales tax revenues or to level the playing field between online retailers and brick-and-mortar stores because major online retailers, like Amazon.com, severed their affiliate contracts in States with an "Amazon" law and failed to register as sales tax collectors. *See* Lance Whitney, *Amazon Cuts*

---

4 Available at http://www.salestaxsupport.com/blogs/issues/internet-tax-ecommerce/are-amazon-laws-the-new-normal-an-update-on-internet-sales-tax-laws/.

5 Available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

Affiliate Ties in More States Over Taxes, CNet (June 2011).[6]

Amid a modest recovery from the Great Recession, States continued to witness declining revenue collections. *Quill*, meanwhile, limited States' ability to collect revenue from the simultaneous boom in e-commerce. *See, e.g.*, Todd Haggerty, *"Weakcovery": State General Fund Revenues, Economic Downturns & Recoveries*, Nat'l Conference State Legislatures (Jan. 2013)[7]; Lucy Dadayan & Donald J. Boyd, *After Disastrous 2009, States Report Modest Revenue Growth in Early 2010*, The Nelson A. Rockefeller Institute of Government (July 2010).[8]

As a result, legislatures began considering a range of other tools including, but not limited to, notification and reporting requirements, economic nexus laws, and affiliate nexus laws.[9] In 2017 alone, at least 30

---

6 Available at https://www.cnet.com/news/amazon-cuts-affiliate-ties-in-more-states-over-taxes/.

7 Available at http://www.ncsl.org/research/fiscal-policy/state-revenues-downturns-and-recoveries.aspx.

8 Available at http://www.rockinst.org/pdf/government_finance/state_revenue_report/2010-07-13-SRR_80.pdf.

9 Notification and reporting laws require non-collecting retailers to provide annual reports to buyers which notify buyers of potential tax liability. These laws may also require the remote seller report to the state annual data regarding total purchases. Economic nexus laws create a tax obligation for remote retailers that conduct a substantial amount of business activity in the state (e.g., South Dakota's creates a tax obligation for retailers that conduct $100,000 worth of business or 200 separate transactions). Affiliate (related party) nexus laws attribute nexus to a seller based on the physical presence of an affiliate in the state (e.g., a related corporate entity) or the activities of another party in the state, such as a website in the state

States proposed at least one of these types of legislation. *See, e.g.*, Liz Malm, Ryan Maness & Joe Crosby, *Sales Tax Compliance Legislation is Still a Hot Topic at the State (and Federal) Level*, MultiState Insider (May 3, 2017).[10]

While these laws have had varying levels of success, none apart from an economic nexus law of the kind that South Dakota enacted, could effectively captures the rightful share of current taxes due States by online retailers who generate large revenues through their business activity in a particular State. Contrary to the argument posited by many retailers, overturning *Quill* does not lead to the imposition of a new tax. Rather, *Quill* prevents States from effectively collecting a tax that they are already owed. As such, States have realized that the proper path forward in this new digital economy is not a challenge to *Quill* at the margins, but a direct challenge to the physical presence requirement that *Quill* demands. In March 2015, Justice Kennedy echoed this sentiment, writing: "Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. . . . The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Direct Mktg. Ass'n*, 135 S. Ct. 1124, 1134-35 (Kennedy, J., concurring).

---

directing sales to a remote seller. See Joe Crosby, Liz Malm & Ryan Maness, South Dakota v. Wayfair: Three Maps, MultiState Insider (Oct. 4, 2017), available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

10 Available at https://www.multistate.us/blog/sales-tax-compliance-legislation-is-still-a-hot-topic-at-the-state-and-federal-level

South Dakota has answered the call and crafted tailored legislation that addresses *Quill* directly.

II. THIS CASE IS AN OPTIMAL VEHICLE FOR DECIDING WHETHER *QUILL* SHOULD BE OVERRULED.

A. The South Dakota legislation challenges *Quill* and *Bellas Hess* in response to Justice Kennedy's invitation.

About a year after Justice Kennedy invited States to find vehicles for *Quill*'s reconsideration, the South Dakota legislature passed, and the governor signed, Senate Bill 106, "An Act to provide for the collection of sales taxes from certain remote sellers." S.D. Codified Laws § 10-64-1 (2016). The Act, which took effect May 1, 2016, requires out-of-state retailers to collect and remit sales tax, as though they had a physical presence in South Dakota, provided they conduct $100,000 worth of business or 200 separate transactions annually with South Dakota citizens. S.D. Codified Laws § 10-64-2 (2016). It is not retroactive, and applies only to future sales. *Id.*

The Act itself recognizes that the test of "substantial nexus" it imposes does not match the "physical presence" requirement this Court mandated in *Quill* and *Bellas Hess*. The Act accordingly facilitated the creation of this case to create a clean vehicle through which the Court could consider whether the outdated physical presence rule still applies to the modern challenges of Internet retail. The Act's unique structure not only answered Justice Kennedy's call for expedition but also explicitly created a cause of action that facilitated its speedy arrival before this Court.

Notably, South Dakota's initial complaint that ultimately led to this petition for a writ of certiorari began with the following statement: "The State—through this declaratory judgment action—seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill* . . . and ultimately seeks a decision from the United States Supreme Court to that effect in this case." Compl. at 1-2, *State v. Wayfair, Inc.*, 229 F. Supp. 3d 1026, 1028 (D.S.D. 2017).

The South Dakota law frames the problems created by *Quill* with precision, and indicates that the time for review is now.

B. South Dakota's challenge is in a clean posture, free from any ancillary questions or jurisdictional concerns.

Unlike other cases that have sought certiorari on the issue of *Quill*'s viability, this case cleanly presents the concrete question of whether a particular company with a particular business model can lawfully be required to collect a particular state's sales tax under the dormant Commerce Clause. There are no tangential questions that distract from this primary inquiry.

There are no material issues of fact. The parties have agreed that each seller had a principal place of business outside of South Dakota and each lacked a physical presence in the State. The parties have also agreed that in the previous calendar year, each seller had gross revenue from the sale of tangible personal

property in South Dakota in excess of $100,000 and/or sold tangible personal property in the state in 200 or more separate transactions. Lastly, the parties agreed that none of the sellers were registered to collect South Dakota sales tax. *See State* v. *Wayfair Inc.*, No. 28160, 2017 WL 4051554, at *14 (S.D. Sept. 13, 2017).

There are no ancillary issues. The parties have agreed that the only determinative issue is whether *Quill* retains its force in the modern digital economy. In the state actions below, the State even conceded that summary judgment was appropriate against it on that issue because only this Court has the power to decide the continuing force of *Quill*. The state circuit court and the state supreme court similarly agreed that the only issue on which this case turns is *Quill*'s viability in this brave new world of prolific e-commerce. Notably, South Dakota does not have income tax and, thus, relies on sales tax for its state revenue. This unique feature of the South Dakota case further allows the Court to clearly and fully address the primary *Quill* issue.

There are no jurisdictional issues. South Dakota's initial complaint was filed in state circuit court. The defendant retailers sought to remove the State's action to the United States District Court for South Dakota on the basis of federal question jurisdiction. However, the District Court rejected removal and remanded the case to the South Dakota circuit court in January 2017. The state circuit granted the defendants' motion for summary judgment based on this Court's precedent in *Quill*. The state supreme court followed suit, affirming the circuit court's application of *Quill* based on the facts of this case.

Furthermore, to promote this Court's ability to quickly determine *Quill*s vitality free from any confounding issues and to protect Defendants, who face a difficult compliance decision (if they collect the tax, they have to remit it; if they don't, they may be personally liable for it), the Legislature provided an automatic injunction against enforcement of the Act until completion of any litigation.

Lastly, because this case is free from tangential issues or jurisdictional concerns, this case guarantees adequate adversarial presentation. The sole issue dividing the parties is the applicability of *Quill* in the modern economy. As a result, this important issue would receive the full and undiluted briefing it deserves.

The absence of any other complicating issues and jurisdictional concerns makes this case the ideal candidate to resolve the *Quill* quagmire.

III. UNTIL IT IS OVERTURNED, *QUILL* WILL CONTINUE TO WREAK HAVOC ON STATE AND LOCAL GOVERNMENTS' ABILITY TO COLLECT TAXES THAT ARE ALREADY OWED.

A. Sales and use taxes are a crucial source of revenue for States and local governments.

Sales and use taxes are essential to State and local government revenue streams. "Sales tax" refers to a tax assessed on the sale of a product at the point of sale. It is typically collected and then remitted to the State by the merchant. Because our federal system does not allow a State to impose tax on a sale in which the seller sits in another State, States need an alternate way to capture the tax revenue from sales

made to its residents from out-of-state sellers. Most States have approached this issue by enacting a "use tax"—a tax on consumers of a product or service that is used, consumed, or stored in the taxing State. The two taxes are mutually exclusive: a use tax is not assessed on transactions where a sales tax has already been collected and remitted by the seller to the State. But, to fully capture revenue from sales of products purchased or used in a state, the State must be permitted to impose and collect both sales and use taxes.

Quill mandates that a remote, out-of-state seller must have a physical nexus in a State before the State can require the seller to collect sales or use taxes. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 315-16 (1992). The concrete result of this is that because States cannot rely on collection and remittance from the out-of-state sellers, the burden falls to consumers to report their own out-of-state purchases and to remit the corresponding taxes. This results in a de facto "honor system", where the State's ability to collect owed taxes depends entirely on individuals who are often unaware of this responsibility. As a result, although it sounds reasonable in theory, the use tax is an ineffective alternative in practice because most States are unable to collect the use taxes they are owed.

For most States, sales taxes account for approximately a third of all revenues. *See* National Conference of State Legislatures (NCSL), State Efforts to Collect Remote Sales Taxes (Feb. 2014)

(hereinafter NCSL, State Efforts to Collect).[11] In some States, the reliance is even more profound. South Dakota, for example, depends on the sales tax for over 40 percent of total tax collections. *See* Morgan Scarboro, *To What Extent Does Your State Rely on Sales Taxes*? (Apr. 27, 2017).[12] Washington is the most heavily reliant, relying on sales tax for over 45 percent of total tax collection. *Id.* The States' current inability to collect use taxes from remote sales therefore cuts off a vital source of support for State services related to public safety, infrastructure, education, and other government services. To demonstrate, an NCSL survey of state legislative fiscal officers found that States were forced to endure significant program reductions in order to close a cumulative $527.7 billion budget gap between FY 2008-2013. NCSL, State Efforts to Collect. Effective collection of these owed taxes is imperative for States and local governments to be able to provide fundamental services and benefits demanded by their residents.

B. *Quill* unreasonably hinders the States from collecting owed sales and use taxes.

Sales and use taxes typically range from five to ten percent. *See, e.g.*, Scott Drenkard & Nicole Kaeding, *State and Local Sales Tax Rates in 2016*, Tax Foundation.[13] The two taxes, working in tandem,

---

11 Available at http://www.ncsl.org/documents/statefed/MFA_intheStatesFeb2014.pdf.

12 Available at https://taxfoundation.org/sales-taxes-percent-collections/.

13 Available at https://taxfoundation.org/state-and-local-sales-tax-rates-2016/.

would efficiently capture revenue from sales on tangible personal property purchased in a given jurisdiction from both in-state retailers (through the sales tax) and remote retailers (through the use tax).

The practical effect of *Quill* is that States are typically unable to require remote sellers to collect and remit use taxes. This taxation collection inequity leads to a distinct disadvantage for the "brick-and-mortar" stores located within the State. Remote sellers can afford to set their prices lower to account for the fact that the State cannot force them to collect and remit a use tax. Local economies and jobs suffer as a result. In-state merchants, on the other hand, are still required to collect and remit sales tax.

In addition to the unfair marketplace advantage afforded out-of-state retailers under *Quill*, States and local governments also suffer from depressed economic growth. In **Arizona**, for example, a study estimated that the lost impact of e-commerce on the Arizona economy "could grow to as much as 8,679 jobs, $302.5 million in wages, and $841.1 million in economic activity" by 2015. *See* Elliott D. Pollack & Company, Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona i (2012).[14] Another study found that **Ohio** suffered a revenue shortfall of more than $200 million as a result of sales and use tax non-payment. *See* Economic Analysis of Tax Revenue from E-Commerce in Ohio, Economics Center 1

---

14 Available at https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b34-542c-46ca-b8d6-ce045a849330.pdf.

(2011).[15] The Ohio study further noted that, based on 2011 data, 11,000 direct retail jobs could be recaptured if tax parity were achieved between store retail and online retail. *Id.* In discussing the impact this has on local economies, the study also identified a decrease in commercial rent revenues as a secondary impact of the local stores' loss of revenue; this decrease in commercial rent revenue represented a $120 million decrease in property value. *Id.* The inability to collect owed use taxes thus not only results in a direct revenue loss; it also further impedes States abilities to rely on other sources of revenue because property tax revenue drops when brick-and-mortar stores close due to depressed sales.

Importantly, *Quill* prevents States from effectively collecting a tax that they are already owed. *See No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders Before the H. Comm. On the Judiciary*, 115th Cong. (2017) (statement of Sen. Deb Peters (SD) on behalf of NCSL) ("Remember, this is not a new tax, it is a due tax."). If the out-of-state retailers do not collect and remit use taxes, States are then forced to rely on its residents to voluntarily self-report and pay use taxes on their out-of-state purchases. Unsurprisingly, this scheme does not result in high levels of compliance. Use tax compliance by individual purchasers has been estimated to be somewhere between zero and five percent. *See* U.S. Government Accountability Office, Sales Taxes: Electronic Commerce Growth Presents Challenges;

---

15 Available at http://www.efairness.org/pdf/economicscenter-study.pdf.

Revenue Losses Are Uncertain (June 2000).[16] Relying on residents to (1) be aware of and understand how the use tax laws work, (2) track out-of-state purchases, and (3) note any purchases where the retailer did not collect sales tax so that the resident can voluntarily self-report and pay a use tax is an ineffective and unrealistic collection plan. *See, e.g.*, Lila Disque & Helen Hecht, *Beyond* Quill *and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1179-80 (2016) (observing that many in-state consumers are "unaware of the reporting requirement and have failed to keep records of their purchases" and noting efforts made by States to simplify use tax reporting). However, this plan, with its zero to five percent compliance rate, is what States have been forced to accept under *Quill*.

As the amicus brief for the Streamlined Sales Tax Governing Board explains, the majority of states have joined the Streamline Sales and Use Tax Agreement. This agreement has made calculating taxes owed simple—for any seller whether it has an in-state physical presence or not. Among many other things, this agreement provides sellers with a database of tax rates for all jurisdictions levying taxes and relieves sellers from liability if there are errors in the database. So as a practical matter, the Streamline Sales and Use Tax Agreement has abated the undue burden concerns facing out-of-state sellers in all state where it has been adopted. While states have done the hard work of simplifying their tax systems and making collection easy, their work makes little

---

[16] Available at http://www.gao.gov/assets/240/230474.pdf.

difference as long as *Quill* remains on the books and out-of-state sellers don't have to collect use tax no matter how easy states have made doing so.

C. The detrimental effect of *Quill* has been, and will continue to be, increasingly exacerbated by the consistent expansion of e-commerce.

Remote sales (largely consisting of orders made over the phone, through the mail, and online) have increased considerably over the past several decades. In the year *Quill* was decided, e-commerce did not even exist; the first legitimate online sales transaction was not completed until 1994. *See* Marissa Fessenden, *What Was the First Thing Sold on the Internet?*, Smithsonian.com (Nov. 30, 2015).[17] Today, online shopping is rampant; about 190 million U.S. consumers were expected to shop online in 2016. Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online* (June 8, 2016).[18]

Over twenty years after *Quill* was decided, Justice Kennedy issued a concurring opinion in *Direct Marketing Association* v. *Brohl* calling the decision "questionable even when decided" and noting that the decision "harms States to a degree far greater than could have been anticipated earlier." 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Justice Kennedy further called for a reevaluation of the Court's holding in *Quill*, observing that "[t]here is a powerful case to be made that a retailer doing

---

17 Available at https://www.smithsonianmag.com/smart-news/what-was-first-thing-sold-internet-180957414/.

18 Available at http://fortune.com/2016/06/08/online-shopping-increases/.

extensive business within a State has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet." *Id.* As Justice Kennedy predicted, the strength of this argument has increased with time, as the prevalence of remote sales has continued to increase. Similarly, then-Judge Gorsuch noted in his concurrence on remand to the Tenth Circuit that "*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Direct Mktg. Ass'n* v. *Brohl*, 814 at 1151 (Gorsuch, J., concurring). The drastic expansion of e-commerce over the past two decades has indicated that *Bellas Hess* and *Quill* will not wash away on their own; their damaging effects will continue to harm States until they are overturned.

The expansion of e-commerce has shown no signs of slowing down over the course of 2017. The Census Bureau of the Department of Commerce reported that an estimated $111.5 billion in U.S. retail e-commerce sales were conducted in the second quarter of 2017. *Quarterly Retail E-Commerce Sales: 2nd Quarter 2017*, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Aug. 17, 2017, at 1.[19] This accounted for 8.2 percent of total sales, and it represented a 4.8 percent increase in e-commerce sales from the first quarter of 2017. During this time period, total retail sales increased by only 0.5 percent. Further, the $111.5 billion in second quarter e-

---

[19] Available at https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

commerce sales represented a substantial 16.2 percent increase from the second quarter of 2016, compared to a 4.1 percent increase in total retail sales over the same period.[20] E-commerce sales are not only rapidly expanding; they are expanding at almost four-times the rate of total retail sales. It is estimated that they will account for 17 percent of total U.S. retail sales within the next five years. *See* Matt Lindner, *E-Commerce is Expected to Grow to 17% of US Retail Sales by 2022* (Aug. 9, 2017).[21]

The effect of the States' inability to collect taxes that are owed on these sales is impossible to overstate. In 2015, for example, uncollected U.S. sales and use taxes from remote sales were estimated to be almost $26 billion. Of this $26 billion, over $17 billion uncollected taxes were projected to be from electronic sales. National Conference of State Legis-latures (NCSL) & International Council of Shopping Centers (ICSC), Uncollected Sales & Use Tax from Remote Sales: Revised Figures.[22]

The fundamental problem that *Quill* and *Bellas Hess* imposes on the States remains the same: States are unable to collect owed taxes, and their revenue streams suffer as a result. As Justice Kennedy has

---

20 Quarterly Retail E-Commerce Sales: 2nd Quarter 2017, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Aug. 17, 2017, at 1 (available at https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf). The estimated $111.5 billion in U.S. retail e-commerce sales was adjusted for seasonal variation, but it was not adjusted for price changes.

21 Available at https://www.digitalcommerce360.com/2017/08/09/e-commerce-grow-17-us-retail-sales-2022/.

22 Available at March 2017), http://www.efairness.org/files/Updated%20Sales%20Tax%20Loss%20Report.pdf.

highlighted, the cause grows "more urgent" with time. *Brohl*, 135 S. Ct. at 1135 (Kennedy, J., concurring). The detrimental effects will continue to grow alongside the growth of e-commerce.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

LISA SORONEN
EXECUTIVE DIRECTOR
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St. NW
Suite 515
Washington, DC 20001

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE AND
SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

TILLMAN J. BRECKENRIDGE*
RUSSELL SOLLOWAY
BAILEY & GLASSER LLP
1054 31st St., NW, Suite 230
Washington, DC 20007
Telephone: 202-463-2101
Facsimile: 202-463-2103
tbreckenridge@baileyglasser.com

*Counsel of Record

Counsel for Amici Curiae

APPENDIX

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professsionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

AASA, the School Superintendents Association, advocates for the highest quality public education for all students, and develops and supports school system leaders. Founded in 1865, AASA is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders.

The National Association of Elementary School Principals (NAESP), founded in 1921, is a professional organization serving elementary and middle school principals and other education leaders throughout the

United States, Canada, and overseas. NAESP advocates for the support principals need to be successful 21st century leaders—to achieve the highest results for children, families, and communities. And, we support the continual development of our members—principals in many different stages of their careers—through benefits, and awards. All of our activities are designed to help principals and learning communities achieve desired results for every child. The mission of the National Association of Elementary School Principals (NAESP) is to lead in the advocacy and support for elementary and middle level principals and other education leaders in their commitment for all children.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 1 - 2017
OFFICE OF THE CLERK

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SCOTT A. SINDER
Counsel of Record
DOUGLAS KANTOR
KATE JENSEN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
ssinder@steptoe.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Sales Tax Fairness is an Issue of Vital Importance 5

A. Interstate Commerce has Dramatically Changed since 1992 6

B. E-Commerce and the Tax Rules Applicable to It Impact the Entire Retail Sector and Its Consumer Base 8

C. Businesses Are at Risk of Significant Financial Loss Due to New State Tax Laws and Varying Interpretations of the Physical Presence Requirement 12

II. The Burden on Retailers to Comply with State Sales and Use Tax Requirements, Even in States Where They Do Not Have a Physical Presence, is Minimal 16

A. Businesses of All Sizes Already Engage in Dynamic Communications and Calculations with Respect to Internet Sales Transactions 16

B. Sales and Use Tax Compliance Resources are Readily Available and Affordable for Businesses of All Sizes 18

1. Software resources 19
2. Marketplace resources 22
3. Payment service provider resources 24
CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

State Cases

Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services,
38 A.3d 1183 (Conn.), *cert. denied*, 568 U.S. 940 (2012) 12, 13, 14

Scholastic Book Clubs, Inc. v. Michigan,
567 N.W.2d 692 (Mich. Ct. App. 1997) 15

Other Authorities

2017 Top 50 E-Retailers Chart, National Retail Federation, https://nrf.com/2017-top-50-e-retailers-chart (last visited Oct. 30, 2017) 7

About Us, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=About-Us (last visited Oct. 30, 2017) 22

Amazon accounts for 43% of US online retail sales, Business Insider (Feb. 3, 2017), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2 23

AvaTax Pricing, Avalara, https://www.avalara.com/products/sales-and-use-tax/avatax-pricing/ (last visited Oct. 30, 2017) 20

Deborah Weinswig, *Fung Global Retail & Technology, Analyst Opinion: Why E-Commerce Is Not "Just 10%" of Retail Sales*, Fun Global Retail & Tech, 2 (July 22, 2017), https://www.fungglobalretailtech.com/research/analyst-opinion-e-commerce-not-just-10-retail-sales/ 7

Guide to Sales Tax Collection in Amazon, Avalara, https://trustfile.avalara.com/guides/amazon/setting-up-amazon-sales-tax-collection/ (last visited Oct. 30, 2017 23

Joe Crosby et al., *South Dakota v Wayfair: Three Maps*, Multistate (Oct. 4, 2017), https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps 11

Jonathan Camhi, *Walmart's online sales soar*, Business Insider (May 19, 2017), http://www.businessinsider.com/walmarts-online-sales-soar-2017-5 6

Kayla Webley, *A Brief History of Online Shopping*, Time (July 16, 2010), content.time.com/time/business/article/0,8599,2004089,00.html (citing an online pizza order in 1994 as one of the first known Internet purchases) 6

Many Small Businesses Don't Have or Need a Website, Sure Payroll- The Payroll Blog (May 24, 2017), https://www.surepayroll.com/resources/blog/may-2016-scorecard 16

Mary Girsch-Bock, *2016 Review of Avalara AvaTax*, CPA Practice Advisor (13 June 2016), www.cpapracticeadvisor.com/review/12211385/2016-review-of-avalara-avatax 20

Matt Lindner, *Wal-Mart's Online Sales Grow 29% in Q4*, Digital Commerce 360 (Feb. 21, 2017), www.digitalcommerce360.com/2017/02/21/wal-marts-online-sales-grow-29-q4/ 7

Microsoft (@Microsoft), *Global internet traffic*, Twitter (May 10, 2017 8:07 AM), https://twitter.com/microsoft/status/862323182916616194?lang=en 6

Phil Wahba, *Amazon Will Make Up 50% of All U.S. E-Commerce by 2021*, Fortune (Apr. 10, 2017), http://fortune.com/2017/04/10/amazon-retail/ 23

Pricing, TaxJar, https://www.taxjar.com/pricing/ (last visited Oct. 10, 2017) 21

Sales and Use Tax, Avalara, https://www.avalara.com/products/sales-and-use-tax/ (last visited Oct. 30, 2017) 20

Sales Tax, Ebay, http://pages.ebay.com/help/sell/contextual/inframe/sales-tax.html (last visited Oct.30, 2017) 24

Sales Tax Guide for PayPal Users, TaxJar, https://www.taxjar.com/guides/sales-tax-guide-for-paypal/#collecting-sales-tax-from-buyers (last updated Dec. 14, 2016) 24

Set up Tax Collection Services, Amazon, https://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=201721890 (last visited Oct. 30, 2017) 23

State Info, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=state-info (last visited Oct. 30, 2017) 22

Streamlined Sales Tax, Avalara, https://www.avalara.com/learn/whitepapers/streamlined-sales-tax/ (last visited Oct.30, 2017) 22

Total Active Registered Accounts, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=regiatration_3 (last updated Sep. 20, 2017) 22

Total number of Websites, Internet Live Stats, http://www.internetlivestats.com/total-number-of-websites/ (last visited Oct. 30, 2017) 6

Welcome, Tax Cloud, https://taxcloud.net/#Welcome 20

INTEREST OF *AMICUS CURIAE*[1]

The National Retail Federation (NRF) is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes all types of retailers, including brick-and-mortar-only sellers, Internet-only sellers, and those that do both. NRF represents retailers of all sizes within these different channels of sale.

Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. U.S. members of NRF include discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, and chain restaurants. As the association representing the interests of such varied businesses in this vital industry, NRF advocates for fairness and opportunity for *all* sectors of retail.

Sales and use tax fairness has been a priority policy issue for NRF for over fifteen years because it is vitally important to all of its members. The current tax system favors online retailers over brick-and-mortar businesses, and undermines fair and open competition in the marketplace. This

---

[1] Petitioner and Respondents have consented to the filing of this brief in blanket consents that have been lodged with the Clerk, and counsel of record for all parties received timely notice of the National Retail Federation's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

particularly impacts small businesses, which represent the overwhelming majority (over 98%) of retailers. It also has negative consequences for communities that depend on tax revenue to fund government operations and services.

NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government. As the industry umbrella group, NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues that are important to the retail industry.

Discriminatory sales and use tax treatment between channels of sale is harming the entire retail sector. NRF believes it is time for this Court to allow the states to address and reform their current tax systems to prevent further erosion of robust and fair competition among America's retailers.

SUMMARY OF ARGUMENT

The Court should grant South Dakota's petition for a writ of certiorari because today's interstate commerce and the technological resources available to businesses look nothing like they did in 1992 when *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), was decided. *Quill* is preventing free and fair competition among retailers, which is harming all businesses in the industry. Rather than protecting out-of-state retailers from overly burdensome state sales and use tax collection requirements, *Quill's* physical presence test operates as an unfair advantage for online businesses vis-à-vis brick-and-mortar stores. Because of e-commerce's dramatic

expansion, this discrepancy in tax treatment has become an issue of vital importance for all retailers.

Although sales and use taxes are applied to the item sold and are paid by the consumer, not the retailer, the existing tax system directly impacts businesses (by, for instance, driving consumers from one channel of sale to another because of price advantages based on remote sellers not having to collect sales and use taxes from many customers).

Even remote retailers that may benefit from *Quill* (i.e., through a competitive pricing advantage by not collecting sales tax for many of their sales) are facing significant uncertainty and risk under the current legal framework. Several states have changed their nexus standards from physical presence to economic presence in order to require more out-of-state retailers to collect sales and use taxes, and state courts are adopting varying—sometimes expansive—interpretations of *Quill's* physical presence requirement. If a business does not collect sales and use taxes on its sales and the state later determines that the business was wrong in its interpretation of the state's taxation requirements, the *retailer*—usually having no ability to collect the tax from customers after the fact—may owe substantial back taxes and face serious penalties.

It is time to reconsider *Quill's* physical presence requirement, which no longer makes sense in our increasingly Internet-based economy. Online retailers of all sizes already are performing dynamic calculations based on consumers' locations at online points of sale, including calculating delivery availability and fees, and voluntarily collecting state

and local taxes. There are numerous accessible and affordable resources available to businesses, large and small, to perform these functions. The burdens associated with state sales tax collection in the mail-order catalogue context simply are not present in today's Internet sales environment.

The same technology developments that have blurred physical boundaries in commerce and elevated the importance of sales and use tax fairness for all businesses have provided the tools necessary for retailers of all sizes, regardless of actual physical location, to play by the same taxation rules with minimal burden. The rationales for the physical presence requirement simply are no longer supported by the realities of e-retail.

For the foregoing reasons, the Court should grant South Dakota's petition and reconsider *Quill*.

ARGUMENT

I. SALES TAX FAIRNESS IS AN ISSUE OF VITAL IMPORTANCE

There are compelling reasons for the Court to grant South Dakota's petition for a writ of certiorari. State courts—here, the Supreme Court of South Dakota—are deciding an important question of federal law amidst doubts regarding the continued relevance of *Quill* and its progeny. While technological developments have changed interstate commerce since *Quill* was decided in 1992 and generated uncertainty in this area of law, the U.S. courts of appeals and state courts of last resort are bound to follow *Quill*, making it all but impossible for there to be a split among lower courts.

But there is no question that this case fits well within the confines of Supreme Court Rule 10(c). Here, the South Dakota Supreme Court has decided that South Dakota's tax law must be struck down based on *Quill*. As explained below, the ability of South Dakota and other states to require that remote sellers collect sales and use taxes on sales into their jurisdictions is of vital importance not only to the states themselves, but also to companies in all channels of the retail industry. Given the changing interstate commerce landscape and states' efforts to modernize their tax laws to keep pace with those changes, the parameters of *Quill's* physical presence requirement are uncertain. Only this Court can settle these questions and provide certainty to the states and the retail industry.

A. Interstate Commerce has Dramatically Changed since 1992

Thanks to the Internet, the volume and nature of interstate commerce today look nothing like they did when the Court decided *Quill*. Indeed, the first known online retail sales trace back only as far as 1994.[2] In 1992, there were approximately ten websites on the Internet; today, there are more than one billion.[3] And global Internet traffic has exploded from 100 gigabytes (GB)[4] per day in 1992 to, now, over 20,000 GB per *second*.[5]

With this tremendous growth in Internet usage, e-commerce has come to play a major role in interstate commerce. In 1992, online giant Amazon did not exist. Now the country's e-commerce leader, Amazon did over $90 billion in online sales in 2016,[6]

---

[2] *See, e.g.*, Kayla Webley, *A Brief History of Online Shopping*, Time (July 16, 2010), content.time.com/time/business/article/0,8599,2004089,00.html (citing an online pizza order in 1994 as one of the first known Internet purchases).

[3] *Total number of Websites*, Internet Live Stats, http://www.internetlivestats.com/total-number-of-websites/ (last visited Oct. 30, 2017).

[4] One byte is one typed character. A gigabyte is about a billion bytes.

[5] Microsoft (@Microsoft), *Global internet traffic*, Twitter (May 10, 2017 8:07 AM), https://twitter.com/microsoft/status/862323182916616194?lang=en.

[6] Jonathan Camhi, *Walmart's online sales soar*, Business Insider (May 19, 2017), http://www.businessinsider.com/walmarts-online-sales-soar-2017-5.

up from $79.2 billion in 2015.[7] Wal-Mart—perhaps better known for its brick and mortar presence—did an estimated $13.7 billion in online sales in 2015[8] and between $15 billion and $16 billion in 2016.[9]

As a piece of the overall retail sales economy, the e-commerce channel is booming. According to one estimate, 14.6 percent of all non-food retail sales in the U.S. were made online in 2016.[10] Estimates of online sales are even higher for some retail categories (27.5 percent for consumer electronics and 15.5 percent for apparel and footwear).[11]

The way in which people and goods move in commerce has changed dramatically. Consumers and goods are mobile and physical presence simply matters less in retail transactions. Consumers can and do access virtually anything they want (e.g., diapers, groceries, furniture, bedding, personal care products, etc.) from a computer or smart phone—even while they themselves are on the move—and businesses have adapted their sales and delivery

---

[7] *2017 Top 50 E-Retailers Chart*, National Retail Federation, https://nrf.com/2017-top-50-e-retailers-chart (last visited Oct. 30, 2017).

[8] *Id.*

[9] Matt Lindner, *Wal-Mart's Online Sales Grow 29% in Q4*, Digital Commerce 360 (Feb. 21, 2017), www.digitalcommerce360.com/2017/02/21/wal-marts-online-sales-grow-29-q4/.

[10] Deborah Weinswig, *Fung Global Retail & Technology, Analyst Opinion: Why E-Commerce Is Not "Just 10%" of Retail Sales*, Fun Global Retail & Tech, 2 (July 22, 2017), https://www.fungglobalretailtech.com/research/analyst-opinion-e-commerce-not-just-10-retail-sales/.

[11] *Id.* at 3.

models to provide consumers nationwide what they want, when and how they want it.

For example, a consumer who lives in South Dakota can order goods to be delivered to her home from a retailer based in Seattle while riding a train between Washington, DC and New York with different aspects of the transaction—from the selection of goods to final payment—occurring in different states along the train's route. In fact, transactions like this one play out many times every day. Some Internet retailers have physical locations in every state, while others have almost no physical presence at all, but the reality is that retailers' physical locations are of little to no import in the common commercial scenario described above.

It is time for the law to reflect these dramatic changes to the commercial world in which we live and allow states to modernize their tax regimes to reflect these realities. Given technology's functional blurring of boundaries on maps, a nexus based on actual physical presence is no longer an appropriate measure for whether a state should be able to require collection of sales and use taxes owed.

B. E-Commerce and the Tax Rules Applicable to It Impact the Entire Retail Sector and Its Consumer Base

Retailers calculate and collect consumption taxes on sales in their physical stores in the 45 states that impose such taxes. Retailers then remit those tax amounts to the states. But the legal onus of these taxes falls on the consumers making the purchases. One problem, however, is that if the retailer does not

collect and remit the taxes, it is exceedingly difficult for states to later collect the taxes owed directly from individual consumers—the information to do it typically does not exist and the costs of collection are very high.

Ultimately, then, if retailers do not collect and remit the taxes owed by customers, the vast majority of those customers do not ever pay the taxes due on their purchases. This is one of the many factors fueling growth in Internet sales to the detriment of brick-and-mortar retailers—the draw, practically speaking, of state tax-free shopping.

And of course, consumers have countless online shopping options at their fingertips twenty-four hours a day, seven days a week. Buying and receiving goods has never been more convenient; a consumer can pick up a cell phone, click a few buttons, pay with a stored payment method, and find her items on her doorstep tomorrow.

Retailers are accustomed to operating in a fiercely competitive environment and evolving to meet changes in consumer demands and expectations. They can only successfully do so, however, when competition is fair and all players are bound by the same rules. The current state tax system does not promote fair competition; in fact, it undermines it by arbitrarily tilting the playing field toward some retailers.

Main Street retailers in the 45 states with a sales tax are required by law to collect tax on virtually all of their sales. The same applies to online merchants selling to customers in states in which they happen

to have physical locations. But with the continuing growth of the Internet, local stores face increasing competition from large out-of-state online sellers who easily undercut them on pricing for the simple reason that they need not collect sales tax from many of their customers.

The current sales and use tax system creates an unlevel playing field for sellers. It unfairly favors remote online retailers — who are not and currently cannot be required to collect state tax on most sales—to the detriment of local brick-and-mortar merchants. Even among online sellers, the current tax system favors some over others, undercutting online sellers that choose to also operate physical stores or distribution centers, and favoring online sellers that do not have those (or as many) physical locations. With sales and use tax rates amounting to 10 percent in some areas of the country, Main Street retailers are seeing increased evidence that their customers are buying online to avoid taxes. Many local retailers report the phenomenon of "showrooming," where consumers come into their stores to look at merchandise, and then order it online.

The disparity in sales and use tax rules undermines not only Main Street retailers, but also the communities they support. The billions of dollars in lost tax revenue is badly needed by cash-strapped state and local governments to pay the salaries of essential workers, such as police officers, firefighters, ambulance crews, and schoolteachers. State taxes also pay for road maintenance—including, of course,

the roads by which products purchased online are delivered.

By imposing sales and use tax collection requirements on out-of-state Internet retailers, many states are attempting to level the playing field for all businesses and guard against the harmful effects unequal tax treatment has on retailers and communities. In fact, in recent years, several states have enacted legislation or implemented rules to expand or modify their "economic nexus" framework and trigger state sales and use tax reporting and/or collection requirements for more businesses selling to in-state customers.[12]

Sound business and policy principles favor equalizing sales tax treatment between retailers, particularly in our increasingly Internet-based economy. All businesses, regardless of size or channel of sale, should be afforded the opportunity to compete on a level playing field. Moreover, states should not be prohibited from facilitating a fair tax environment for businesses. While the dormant commerce clause may protect against undo state interference with interstate commerce, it should not be extended so far as to require states to *favor* interstate commerce and out-of-state businesses over local businesses.

---

[12] In addition to South Dakota, states include: Alabama, Indiana, Maine, Minnesota, North Dakota, Oklahoma, Rhode Island, Tennessee, Vermont, Washington, and Wyoming. Joe Crosby et al., *South Dakota v Wayfair: Three Maps*, Multistate (Oct. 4, 2017), https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

C. Businesses Are at Risk of Significant Financial Loss Due to New State Tax Laws and Varying Interpretations of the Physical Presence Requirement

Even businesses that theoretically benefit from the current state sales tax structure are at serious financial risk under the Court's physical presence rule. Although the physical presence requirement has been characterized as a useful "bright-line" rule, its present application is in fact anything but clear.

Take the example of one NRF member with stores in three states and Internet sales of about $60 million across the whole country. As more states adopt "economic nexus" laws (as noted above) and impose sales and use tax requirements on out-of-state retailers based on varying nexus criteria, this business has decided to start collecting sales taxes in the states that have adopted these laws. The risk associated with *not* collecting the taxes, this particular member has determined, is now too great because "physical presence" and "economic nexus" are subject to many different, evolving interpretations. This member fully recognizes, however, that some of its competitors do not believe they are legally subject to these state laws because of *Quill*, and therefore this member may be at a competitive disadvantage.

The Connecticut Supreme Court's decision in *Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services*, 38 A.3d 1183 (Conn.), *cert. denied*, 568 U.S. 940 (2012), is illustrative. There, the court found that school teachers participating in the well-known Scholastic Book program, by "bringing the

plaintiff's products to the attention of the students" and "providing them with the means to order, pay for and receive delivery of those products," *clearly* served as the "substantial nexus" required under *Quill* and subjected plaintiff to the state's tax requirements. 38 A.3d at 1199. The court concluded *Quill's* physical presence test was satisfied, despite the trial court's findings that plaintiff:

> does not own or lease any real estate or personal property in Connecticut. The plaintiff also has no principal place of business, temporary facility, office, telephone number, mailing address or bank accounts in Connecticut. In addition, the plaintiff has no employees, representatives, independent contractors, salesmen, agents, canvassers, solicitors or other personnel in the state. It does not advertise in the local media or engage in direct advertising to Connecticut customers, and has not communicated with residents of Connecticut by means other than mail or Internet from locations outside the state. Moreover, it has never used state or local government services, such as the police or fire departments, and does not, and did not, use Connecticut vendors to design, prepare, print, store or mail catalogs describing its products. The plaintiff has not retained any security interests in any product sold to Connecticut customers and has no franchisees or licensees

> operating in Connecticut. The plaintiff does not conduct credit investigations or collection activities in Connecticut and does not solicit orders by telephone, computer, cable or other communication systems in Connecticut.

38 A.3d at 1185-86 (footnote omitted). The teachers, the court further acknowledged, had no oral or written agreement requiring them to serve as agents or sellers of plaintiff's products and did not receive direct compensation from the plaintiff. 38 A.3d at 1199.

The Connecticut court's broader characterization of *Quill* articulates the level of uncertainty now associated with the physical presence rule. It found that *Quill's* statements regarding the "furthest extension of the state's taxing power was no more than an observation concerning the state of the law at that time." *Id.* Moreover, it stated, *Quill's* language "was not necessarily intended to mean that a substantial nexus between the out-of-state retailer and the state could not be found in other, as of yet undefined, circumstances." *Id.*

Notably, state courts have reached different conclusions on *Quill's* applicability to the Scholastic Books program. For example, the Michigan Court of Appeals, when presented with the same facts as the Connecticut Supreme Court, came out the other way in its *Quill* analysis. The Michigan court concluded that *Quill's* physical presence requirement was not met by Scholastic Books' contact with Michigan teachers, reasoning:

> The teachers are not a sales force that works for plaintiff. Rather, they are analogous to parents who order an item from a mail-order catalog for their children; no one would seriously argue that such parents are a 'sales force' for mail-order vendors. . . . [T]he teachers are primarily plaintiff's customers and are under no control by, and vested with no authority to act on behalf of, plaintiff.

Scholastic Book Clubs, Inc. v. Michigan, 567 N.W.2d 692, 696 (Mich. Ct. App. 1997).

In other words, some courts have performed desperate mental gymnastics to try to avoid the inequitable conclusion that *Quill* would otherwise require, while other courts continue to adhere to a more literal interpretation of actual physical presence. The *Quill* rule can no longer be viewed as clear cut. Of course, if a business does not collect sales tax and a state court subsequently determines that the decision was wrong, the business could be liable for substantial back taxes and penalties. The business has no ability, after the fact, to collect the tax from its customers, so the full amount would come out of the retailer's pocket.

The risk of retailers misapplying the law and facing significant financial consequences is real, particularly with recent legislative action in the states. Some NRF members, therefore, are choosing to voluntarily collect state taxes, even though they do not believe they are technically required to do so under *Quill*. Others still are taking the risk of not

collecting state sales taxes for the majority of their online transactions and, for the moment, have a commensurate pricing advantage over remote sellers who are asking customers to pay the tax. But if they collect the tax, they have a pricing disadvantage compared to competitors that do not collect. In both cases, the need for certainty and a test that comports with the complexities of modern commerce is paramount.

II. THE BURDEN ON RETAILERS TO COMPLY WITH STATE SALES AND USE TAX REQUIREMENTS, EVEN IN STATES WHERE THEY DO NOT HAVE A PHYSICAL PRESENCE, IS MINIMAL

A. Businesses of All Sizes Already Engage in Dynamic Communications and Calculations with Respect to Internet Sales Transactions

Businesses, including the roughly 26% of small businesses that use their own websites to sell their products and services,[13] have adapted to the ever-growing online economy by developing ways to quickly and effectively communicate with, and deliver products to, a customer base spread far and wide. This includes adopting tools to calculate payment totals for online orders based on dynamic criteria (e.g., delivery charges based on location, optional extra charges for faster shipping or gift

---

[13] *Many Small Businesses Don't Have or Need a Website*, Sure Payroll- The Payroll Blog (May 24, 2017), https://www.surepayroll.com/resources/blog/may-2016-scorecard.

wrapping, etc.)—a scenario vastly different from distribution of pre-printed catalogues without such optionality on purchases.

Today, retailers, including small retailers, offer on their websites: 24-hour online chat rooms and other customer support services, a variety of delivery options and prices at the point of purchase, gift wrapping and other customized options for additional fees, the ability to change or cancel an order at any time, and targeted advertising for other, perhaps related products that may appeal to the customer, among other things.

This reality hardly resembles the mail-order catalogue scenario in *Quill*, when pre-printed catalogues of fixed product offerings and prices were sent to households nationwide and customers responded via phone or mail with their selections. At that time, catalogue sellers that had a physical presence, and therefore had to collect sales and use taxes, inserted a complex chart into their catalogues to show tax rates. Customers, in turn, had to do the math themselves to calculate the taxes they owed on their purchases. And, with payments made principally by check, miscalculations or errors on the amount due were relatively difficult to correct.

The task of calculating and collecting state sales taxes from a variety of states clearly would have been more onerous in the pre-Internet context of *Quill*. What was a very static and cumbersome remote sales environment has become one of constant, dynamic interaction between seller and buyer. Contemporary online businesses engage in multiple real-time adjustments and calculations for any given transaction based on a customer's location.

They determine, for instance, shipping timeframes and costs based on customers' addresses and selected preferences. They also, for purchases of regulated items such as alcohol, can determine whether it is legal to ship to a particular address, and if so, require appropriate age verification. Businesses also tailor promotions and offers to customers' locales. These functions are part and parcel of doing business on the Internet. Calculation and collection of state sales and use taxes is no different in terms of operational feasibility or burden on Internet retailers.

B. Sales and Use Tax Compliance Resources are Readily Available and Affordable for Businesses of All Sizes

Businesses have several resources to help them calculate and collect state sales and use taxes on Internet purchases. Software providers, online marketplaces that provide sales platforms for other businesses' goods (e.g., Amazon, Ebay, Etsy), and payment service providers all offer affordable—sometimes free—state sales and use tax tools for retailers of all sizes. Because these resources are automated, they are easily integrated with retailers' existing online sales platforms. And as businesses grow to reach customers in more states, there often is no additional cost to expand these capabilities to cover those additional jurisdictions.

NRF's small business members report that the burden associated with calculating and collecting sales taxes, regardless of whether they do or do not have a physical presence in the state into which they are selling, is modest. Some small business owners

who voluntarily collect taxes in states where they ship products and handle such collection themselves say they can readily access state tax rates and rules online, and file returns on state websites. As detailed below, plenty of affordable assistance is available for business owners who do not wish to deal with state sales and use tax requirements on their own.

Given the ubiquity of affordable products that help businesses calculate, collect and remit state sales and use taxes, there is little to no burden imposed on remote sellers to trigger Commerce Clause concerns. Indeed, as a Commerce Clause matter, it would be difficult to conclude that the use of one of the many software packages designed to calculate taxes on a multi-state basis is any more burdensome than the use of a software package in a brick-and-mortar setting designed to calculate taxes in one state. Technology simply has eroded these distinctions.

1. Software resources

Several software providers offer automated state sales tax calculation, collection, remittance, and reporting tools. TaxCloud, for instance, is a free product that calculates sales tax for every tax jurisdiction (e.g., states and localities) in the United States based on a customer's address, and continuously updates its program to reflect changes in tax exemptions, rates, and holidays.[14] TaxCloud is compatible with over 85 e-commerce platforms

[14] *Welcome*, Tax Cloud, https://taxcloud.net/#Welcome.

(software programs that allow retailers to manage and run their online business).[15]

Another example, Avalara, Inc.'s AvaTax, provides a Cloud-based product which offers anytime-anywhere access to calculate, validate, and remit sales taxes based on continuously updated tax rates, boundaries for over 12,000 tax jurisdictions, and tax rules for millions of products and services.[16] Avalara's product is affordable for businesses of all sizes—starting at $50 per year for small businesses—with scaled pricing based on number of office systems to connect, sales transactions per month, and jurisdictions in which tax is being collected.[17] This tax compliance tool offers integration with over 500 sales software platforms (for brick and mortar and e-commerce systems).[18]

TaxJar offers a product that goes beyond calculation and collection of taxes and assists with state tax reporting and filing for multi-channel online sellers (businesses, for instance, that sell on Amazon or Wal-Mart, as well as their own website).[19] Businesses can connect all of their online carts to

---

[15] *Id.*

[16] *Sales and Use Tax*, Avalara, https://www.avalara.com/products/sales-and-use-tax/ (last visited Oct. 30, 2017).

[17] *AvaTax Pricing*, Avalara, https://www.avalara.com/products/sales-and-use-tax/avatax-pricing/ (last visited Oct. 30, 2017).

[18] Mary Girsch-Bock, *2016 Review of Avalara AvaTax*, CPA Practice Advisor (13 June 2016), www.cpapracticeadvisor.com/review/12211385/2016-review-of-avalara-avatax.

[19] *Pricing*, TaxJar, https://www.taxjar.com/pricing/ (last visited Oct. 10, 2017).

TaxJar one time and the service will download the requisite data to prepare state filings on a monthly, quarterly, or annual basis, depending on how the business is required to file.[20] Again, the service is affordable for businesses of all sizes, beginning at $19 per month (for up to 1,000 transactions), going up to $99 per month for up to 10,000 transactions, and with increased sliding-scale fees up to unlimited transactions.[21]

The examples above represent a few of the commercial options available to businesses today. Many other state sales tax compliance programs exist, including: CCH SureTax and Sales Tax Office from Wolters Kluwer, Vertex SMB, BNA Sales & Use Tax Rates and Forms, and Thomson Reuters ONESOURCE Indirect Tax.

Additionally, free software resources are available from public sources to help businesses comply with state sales tax requirements. The Streamlined Sales Tax (SST) Governing Board, for example, is spearheading an initiative to standardize tax regimes (rates, definitions, exemptions, etc.) across states in order to simplify administration of state sales and use taxes.[22] This endeavor, with twenty-three states fully participating, is itself an important step toward easing state tax-related burdens on Internet sellers.[23] As an added benefit, companies

---

[20] *Id.*

[21] *Id.*

[22] *About Us*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=About-Us (last visited Oct. 30, 2017).

[23] States that are full members of the Streamlined Sales and Use Tax Agreement through laws, rules, regulations and

that voluntarily collect taxes in participating SST states can register through the SST Registration System to receive, free of charge: sales tax administration software, a single identification number to file in participating states, uniform filing forms and exemption certificates, tax boundary and rules information, and updates on rules changes.[24] Currently, there are 3,687 sellers registered with the SST program.[25]

2. Marketplace resources

Online marketplaces, such as Amazon, Ebay, and Wal-Mart, have designed their websites to allow for sales of other businesses' goods. This is an easy and common way for smaller businesses to sell online without having to build and maintain their own websites. It also allows small retailers to benefit

---

policies include: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *State Info*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=state-info (last visited Oct. 30, 2017).

[24] *Streamlined Sales Tax*, Avalara, https://www.avalara.com/learn/whitepapers/streamlined-sales-tax/ (last visited Oct.30, 2017).

[25] *Total Active Registered Accounts*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=regiatration_3 (last updated Sep. 20, 2017).

from the brand power of large online companies that are trusted by consumers.

Amazon, Ebay, and Wal-Mart all have infrastructure to help businesses of all sizes that sell through their websites comply with state sales and use tax requirements. Amazon, which alone accounts for an estimated 34 to 43 percent[26] of U.S. online retail sales today and an expected 50 percent by 2021 (including sales from its own inventory and third-party sales on its marketplace),[27] now collects state sales tax on transactions from its own inventory and allows third-party sellers using its marketplace to opt into its automated sales tax collection service.[28]

Similarly, Ebay—another e-commerce giant that sells only third-party products (i.e., does not have its own product inventory) and did $20.5 billion in gross merchandise volume in the third quarter of 2017—allows sellers on its marketplace to automatically

---

[26] Estimates likely vary because Amazon does not release data specific to its third-party marketplace sales, and thus the estimates are based on secondary sources.

[27] *Amazon accounts for 43% of US online retail sales*, Business Insider (Feb. 3, 2017), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2; *see also* Phil Wahba, *Amazon Will Make Up 50% of All U.S. E-Commerce by 2021*, Fortune (Apr. 10, 2017), http://fortune.com/2017/04/10/amazon-retail/.

[28] *Guide to Sales Tax Collection in Amazon*, Avalara, https://trustfile.avalara.com/guides/amazon/setting-up-amazon-sales-tax-collection/ (last visited Oct. 30, 2017); *Set up Tax Collection Services*, Amazon, https://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=201721890 (last visited Oct. 30, 2017).

calculate sales taxes based on shipping addresses.[29] And Wal-Mart, which allows third-party sellers to customize state sales tax preferences in their account settings, has partnered with TaxJar to offer (for a separate fee) its sellers help with state tax filing and reporting.

3. Payment service provider resources

Finally, payment service providers offer yet another avenue for state sales tax administration assistance. PayPal, for example, allows businesses that use its payment platform to set—in their business account preferences—different sales tax rates to be applied to purchases based on zip code.[30] Although the service does not perform the sales tax calculation for businesses, it is compatible with available software options like TaxJar (which would help with calculation, collection, filing, etc.).

* * *

The bottom line is that the technological revolution that has so dramatically elevated the importance of the legal framework for tax on remote sales has also created a host of tools that make the standard in *Quill* an unnecessary anachronism. The

---

[29] *Sales Tax*, Ebay, http://pages.ebay.com/help/sell/contextual/inframe/sales-tax.html (last visited Oct.30, 2017).

[30] *Sales Tax Guide for PayPal Users*, TaxJar, https://www.taxjar.com/guides/sales-tax-guide-for-paypal/#collecting-sales-tax-from-buyers (last updated Dec. 14, 2016).

tools available and being used in large numbers of transactions today allow sales tax calculations to happen during the purchase process so that the final prices displayed to consumers when they select their payment already include the appropriate tax amounts. These tools are in widespread use today and work well for the many retailers that are already collecting sales taxes for their online sales. The ability to collect these taxes online has nothing to do with the physical locations that a given business may or may not have, which demonstrates that the time is right to reconsider *Quill*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT A. SINDER
Counsel of Record
DOUGLAS KANTOR
KATE JENSEN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
ssinder@steptoe.com

November 1, 2017

Counsel for Amicus Curiae

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

KENNETH D. SALOMON
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900

DUDLEY W. VON HOLT
THOMPSON COBURN LLP
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000

WARREN L. DEAN, JR.
Counsel of Record
KATHLEEN E. KRAFT
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900
wdean@thompsoncoburn.com

Counsel for Amicus Curiae

December 7, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THIS CASE'S FAILURE TO CONSIDER DUE PROCESS CONCERNS AND ITS NARROW RECORD RENDER IT AN INAPPROPRIATE VEHICLE FOR ABROGATING *QUILL*	4
A. This Case Lacks Consideration Of Due Process, Thus Stymieing This Court's Ability To Reconsider *Quill* In The Context Of This Case	4
B. South Dakota's "Fast Track" Process Makes This A Problematic Vehicle For Broad-Based Review Of *Quill*	8
II. EVEN WERE THIS COURT TO RECONSIDER *QUILL* ON COMMERCE CLAUSE GROUNDS ALONE, DOING SO IN THE CONTEXT OF THIS CASE WOULD PLACE THE COURT IN A POSITION OF LEGISLATIVE RULE-MAKING FOR DECADES TO COME	10
A. *Quill* Firmly Established That Proper Reconsideration Of *Quill*'s Bright-Line Standard For Sales And Use Taxes Lies With Congress	10

TABLE OF CONTENTS—Continued

Page

B. Denial Of Certiorari Would Permit Congress To Continue Its Efforts To Establish A Legislative Standard For Remote Sales Tax Collection 11

C. Denial Of Certiorari Would Maintain Well-Settled Expectations Of Sellers Nationwide While Congress Crafts A Comprehensive Legislative Solution ... 13

III. *QUILL*'S BRIGHT-LINE TEST HAS CONTINUING VITALITY IN TODAY'S INCREASINGLY COMPLEX SALES AND USE TAX ENVIRONMENT 14

IV. RECONSIDERING *QUILL* HAS IMPLICATIONS BEYOND THE PARTICULAR APPROACH CHAMPIONED BY SOUTH DAKOTA AND EVEN BEYOND THE ISSUE OF REMOTE SALES TAX COLLECTION 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page(s)

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 7

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 11

Flood v. Kuhn,
407 U.S. 258 (1972) 12

Gordon v. Holder,
826 F. Supp. 2d 279 (D.D.C. 2011), *aff'd*,
721 F.3d 638 (D.C. Cir. 2013) 7

Int'l Harvester Co. v. Dep't of Tres.,
322 U.S. 340 (1944) 5

Miller Bros. Co. v. Maryland,
347 U.S. 340 (1954) 5

Prudential Ins. Co. v. Benjamin,
328 U.S. 408 (1946) 10

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

State v. Quill Corp.,
470 N.W.2d 203 (N.D. 1991),
rev'd, *Quill Corp. v. North Dakota*,
504 U.S. 298 (1992) 14-15

State v. Wayfair Inc.,
901 N.W.2d 754 (S.D. 2017) 5-6

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 3 ..... *passim*

U.S. CONST. amend. XIV, § 1 ..... *passim*

TABLE OF AUTHORITIES—Continued

STATUTES Page(s)

S.D. CODIFIED LAWS § 10-45 (2017) 18

LEGISLATIVE MATERIALS

Marketplace Fairness Act, S. 976, 115th Cong. (2017) 12

No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017)..... 12

No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders: Hearing on H.R. 2887 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 115th Cong. (2017)..... 12

Remote Transactions Parity Act, H.R. 2193, 115th Cong. (2017)..... 11

S.B. 106, 91st Legis. Assemb. (S.D. 2016)... 5, 6, 8

OTHER MATERIALS

Alex Ebert, *Ohio "Cookie Nexus" for Online Sales Tax Likely to Crumble*, BNA News (July 12, 2017), https://www.bna.com/ohio-cookie-nexus-n73014461659/..... 14

Allison Enright, *Lawmakers Queue Up a Simplified Online Sales Tax Bill,* Digital Commerce 360 (Aug. 25, 2016), https://www.digitalcommerce360.com/2016/08/25/lawmakers-queue-simplified-online-sales -tax-bill/..... 12

TABLE OF AUTHORITIES—Continued

Page(s)

Barbara Thau, *Five Signs that Stores (Not E-Commerce) Are the Future Of Retail*, Forbes (June 27, 2017, 1:05 PM), https://www.forbes.com/sites/barbarathau/2017/06/27/five-signs-that-stores-not-online-shopping-are-the-future-of-retail/#aec81214641c 15

Elizabeth Shell, *California Humane Chicken Law Ruffles Feathers in Other States*, PBS News Hour (Mar. 7, 2014, 6:29 PM), https://www.pbs.org/newshour/nation/california-chickens 18

Jaimy Ford, *Tracking Sales Tax Rates Across Thousands of Jurisdictions*, Avalara (June 25, 2015), https://www1.avalara.com/trustfile/en/blog/tracking-sales-tax-rates-across-thousands-of-jurisdictions.html 11, 16

Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TruST (Sep. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf 17

Michael A. Jacobs, et al., *Massachusetts to Move Forward With New "Cookie" Nexus Regulation Effective October 1*, Reed Smith Client Alerts (Sep. 15, 2017), https://www.reedsmith.com/en/perspectives/2017/09/ma-to-move-forward-with-new-cookie-nexus-regulation-effective-october-1 13-14

TABLE OF AUTHORITIES—Continued

Page(s)

NYU Stern School of Business, Operating and Net Margins by Industry (Jan. 2017), http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html 17

State of Washington Department of Revenue, Sales of Ice Cream Cakes and Similar Items, https://www.revenue.wi.gov/Pages/TaxPro/news-2010-101108c.aspx (last visited Dec. 6, 2017) 16

Stefany Zaroban, *US e-Commerce Sales Grow 15.6% in 2016*, Digital Commerce 360 (Feb. 17, 2017), https://www.digitalcommerce360.com/2017/02/17/us-e-commerce-sales-grow-156-2016/ 13

Steven Malanga, *The State Tax Grab*, City Journal (Winter 2014), https://www.city-journal.org/html/state-tax-grab-13628.html 18

U.S. Census Bureau, CB17-182, Quarterly Retail E-Commerce Sales: 3rd Quarter 2017 (Nov. 17, 2017), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf 15

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, Amicus National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

NTUF has worked extensively to analyze and provide testimony about the central questions contemplated by this case, including the launch of a project called the "Interstate Commerce Initiative" to explore the policy implications of extraterritorial actions by States. A decision by this Court abrogating *Quill*—the result urged by Petitioner—will have widespread impacts on taxpayers, tax administration, and ongoing legislative and judicial disputes at both the state and federal levels. For these reasons and others, NTUF has an institutional interest in the Court's actions in this case.

SUMMARY OF ARGUMENT

Ostensibly, the Petition asks this Court to consider whether it should abrogate the bright-line physical-presence test it established in *Quill Corp. v. North Dakota*[2] for the purpose of satisfying the requisite substantial nexus test under the Commerce Clause for

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than the NTUF or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. On October 16, 2017 and October 19, 2017, respectively, Petitioner and Respondents gave blanket consent to amicus briefs. These blanket consents were docketed more than 10 days before the due date of this brief.

[2] 504 U.S. 298 (1992).

the collection of sales and use taxes from out-of-state sellers. Petitioner effectively concedes that a bright line is necessary, but it proposes to substitute its own alternative test based upon newly enacted and very low thresholds established by the South Dakota legislature.

In effect, Petitioner asks the Court to assume that the State may impose on any seller of products, no matter how remote their relation to the State may be, a legal obligation to monitor each and every transaction that leads to a "delivery" within the State for the purpose of ensuring compliance with South Dakota's statutory tests.[3] This obligation apparently attaches regardless of the location or domicile, domestic or foreign, of the seller and even of the purchaser. An Illinois resident may purchase a product in New York for delivery to South Dakota that would trigger this monitoring requirement.

Petitioner also asks the Court to replace *Quill*'s bright-line test with Petitioner's own thresholds for determining when an out-of-state seller has a "substantial nexus" to the taxing jurisdiction without due consideration (or any consideration, for that matter) of whether those same thresholds pass constitutional muster under the Due Process Clause. No finding in the record below supports the assumption that the State's new thresholds, if satisfied, would establish a seller's minimum connections with the State for purposes of satisfying the Due Process Clause of the Constitution.

---

[3] *Amicus* assumes, for the sake of argument only, that a State even has the authority to require all sellers to collect such data in the first place.

In so doing, Petitioner asks this Court to engage in the kind of legislative rulemaking that the Court sought to avoid in *Quill*, and to do it in a vacuum. As the Court observed in *Quill*, these difficult issues necessarily must be resolved by Congress, not the Court. Conversely, a grant of certiorari in this case may very well stymie the work of Congress to craft legislative solutions to these complex, difficult matters of interstate commerce.

There is no pressing need to revisit *Quill* now. Petitioner's claims that time and technological advancement have rendered *Quill*'s interstate commerce protection outdated are overstated. Sales tax complexity has, in many ways, grown worse in the intervening years between the *Quill* ruling and this case. Reportedly, there are more than twice as many taxing jurisdictions as there were when *Quill* was decided in 1992. Multistate efforts to simplify sales tax codes have likewise failed to reach agreement even on matters as basic as uniform standards for sourcing transactions. Software advancements, while significant, ultimately do little to address the biggest driver of sales tax complexity: determining taxability in the first place. Granting certiorari in this case would put at risk Congress's determination thus far that States are unable or unwilling to simplify sales taxes sufficiently to justify the grant of new powers to tax interstate commerce.

Further, maintenance of sellers' well-settled expectations regarding the applicability of state sales and use taxes weighs in favor of denying certiorari. Remote commerce in America today is premised on the common sense standard articulated by this court in *Quill*. Revisiting this standard in the context of this case would likely raise more questions than it could answer

about the morass of state legislation and litigation. While granting certiorari might allow the Court to resolve South Dakota's law and other state laws like it, it would throw into turmoil proceedings in dozens of other States that have pursued different approaches. Denying certiorari, however, would have the effect of reinforcing that Congress is the proper venue for the regulation of interstate commerce, that process matters and the prior decisions of this Court must be adhered to, and that *Quill* remains the law of the land until Congress chooses to legislate a different standard.

The Court should deny certiorari.

ARGUMENT

I. THIS CASE'S FAILURE TO CONSIDER DUE PROCESS CONCERNS AND ITS NARROW RECORD RENDER IT AN INAPPROPRIATE VEHICLE FOR ABROGATING *QUILL*

A. This Case Lacks Consideration Of Due Process, Thus Stymieing This Court's Ability To Reconsider *Quill* In The Context Of This Case

The Constitution limits a State's taxing authority over interstate business through two constraints: the Due Process Clause, U.S. CONST. amend. XIV, § 1, and the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Although "not always sharply separable," these constitutional constraints "differ fundamentally," "reflect different constitutional concerns[,]" and carry with them different congressional authorities.[4] *Quill*, 504 U.S. at 305-

[4] "[W]hile Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, . . . it does not similarly have the

06 (quoting *Int'l Harvester Co. v. Dep't of Tres.*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)). Due Process "concerns the fundamental fairness of governmental activity[,]" *id.* at 312, and requires "some definite link, some minimum connection, between [the] state and the person, property or transaction it seeks to tax[,]" *id.* at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)). On the other hand, whether governmental activity satisfies the dormant Commerce Clause is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.* at 312. As such, the Court has endeavored to approach these constitutional constraints "as if they were separate and distinct, not intermingled." *Id.* at 305-306 (quoting *Int'l Harvester Co.*, 322 U.S. at 353 (Rutledge, J., concurring in part and dissenting in part)).

In *Quill*, the Court separately considered the constitutionality of a North Dakota use tax law, first, under the Due Process Clause and, second, under the Commerce Clause. *See id.* at 306-19. The Court's two-step process was logical – if a State's exercise of authority fails to conform to Due Process, that is the end of the inquiry.

Like *Quill* before it, this case involves a State's application of its taxing statute to out-of-state sellers, and therefore implicates both the Due Process and the Commerce Clauses of the Constitution. The court below decided the unconstitutionality of the South Dakota law (Senate Bill 106) solely on Commerce Clause grounds. *State v. Wayfair Inc.*, 901 N.W.2d 754

---

power to authorize violations of the Due Process Clause." *Quill*, 504 U.S. at 305 (internal citations omitted).

(S.D. 2017). It never addressed whether the State's proposed, and greatly diluted, replacement for *Quill*'s bright-line physical-presence test met the threshold requirements of Due Process. On the record before it, the court below could not consider Due Process. And if the Court grants certiorari, that same record will prevent the Court from deciding whether South Dakota's proposed replacement for *Quill* satisfies both Due Process *and* Commerce Clause concerns.[5]

Even if the record below were developed enough for this Court to address the legitimacy of South Dakota's actions under the Due Process Clause, it is highly questionable that the State's minimum criteria for application of its use tax would pass constitutional muster. The discussion in the Petition focuses on "sales," and in fact, South Dakota's very low-dollar threshold is described in those terms. Pet. Cert. 8. Indeed, the archetypal case, where an in-state purchaser buys products online for delivery to his or her own address is the kind of transaction that immediately comes to mind. But this is not that case. A transaction between

---

[5] Senate Bill 106 sets out two criteria, either of which would trigger an out-of-state seller's obligation to comply with South Dakota's sale tax laws. Those criteria are:

> (1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or
>
> (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

S.B. 106, 91st Legis. Assemb. § 1 (S.D. 2016). The effect is to treat the out-of-state seller as if it "had a physical presence in the state." *See id.*

a purchaser and seller, neither of which is a resident of or located in the State, can be swept up into South Dakota's scheme solely on the basis of a "delivery" by a common carrier to the State. There can be no presumption that such a transaction automatically involves the seller's "purposefully" availing itself of the benefits of the State's economic market for the purpose of asserting taxing jurisdiction over the seller.[6] *See Quill*, 504 U.S. at 315-16; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). It is even conceivable that the State's $100,000 gross revenue threshold could be satisfied by a single sale or transaction. Although a single act may be enough to satisfy due process concerns where that single act "creates a 'substantial connection' with the forum[,]" *Burger King*, 471 U.S. at 475 n.18, a single sale within a State seems too tenuous a connection to satisfy Due Process, *see Gordon v. Holder*, 826 F. Supp. 2d 279, 291 (D.D.C. 2011):

> At this stage in the proceedings, the Court cannot find that each of Gordon's sales establishes the requisite minimum contacts with the states in which he sells his products such that the PACT Act's tax provisions satisfy due process. That is, the Court cannot say that Gordon's business "purposefully avails itself of the benefits of [the] economic market" of the states into which he sells his products or that it "purposefully directed its activities" at residents of these states.

(citing *Quill*, 504 U.S. at 307-08), *aff'd*, 721 F.3d 638 (D.C. Cir. 2013).

---

[6] Indeed, in order to protect itself from such a result, the seller would have to refuse delivery into the State. That, of course, would create a direct restraint on interstate commerce.

B. South Dakota's "Fast Track" Process Makes This A Problematic Vehicle For Broad-Based Review Of *Quill*

The suitability of this case as a vehicle for this Court's reconsideration of *Quill* is suspect also because of the manner in which South Dakota legislated, and then litigated, its way to this Court. Rather than working through its representatives in Congress to advance legislation that would permit broader use taxes on interstate commerce or increasing enforcement of use tax collection from its residents, South Dakota chose to pass legislation that directly conflicted with the restrictions imposed upon it by *Quill*. Senate Bill 106 explicitly acknowledges that this Court's doctrine "prevents states from requiring remote sellers to collect sales tax," recognizes that "the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question," and repeatedly refers to the need for "expeditious review" of litigation that it knew was forthcoming due to the shaky legal foundation upon which the law was built. S.B. 106, 91st Legis. Assemb. (S.D. 2016). Additionally, South Dakota wrote into the bill the mechanics for immediate enforcement in court against "any person," even those who "[do] not have a physical presence in the state" and regardless "whether or not the state initiates any audit or other tax collection procedure," solely on the State's belief that such person may have exceeded gross revenue of $100,000 or 200 transactions for goods delivered to the State. *Id.* at § 1.

South Dakota's race to this Court's front steps has contributed to the infirmities of the case as a broad-based vehicle for review of *Quill*. As discussed in Point I.B above, the breakneck speed at which this case

reached the Court has resulted in a factual record that cannot support the rigorous constitutional analysis that must accompany any reconsideration of *Quill*. And as discussed in Point II below, South Dakota's decision to legislate and litigate, rather than seeking additional taxing authority from Congress, may very well place this Court (and its lower courts) in the position of rendering case-by-case evaluations of constitutional legitimacy every time a State's attempt at taxing remote sellers is challenged. *See Quill*, 504 U.S. at 314-15:

> [T]he bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only on a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach. . . .

Further, simply by granting certiorari, the Court runs the risk of encouraging other States to pursue similarly flawed approaches.

II. EVEN WERE THIS COURT TO RECONSIDER *QUILL* ON COMMERCE CLAUSE GROUNDS ALONE, DOING SO IN THE CONTEXT OF THIS CASE WOULD PLACE THE COURT IN A POSITION OF LEGISLATIVE RULEMAKING FOR DECADES TO COME

A. *Quill* Firmly Established That Proper Reconsideration Of *Quill*'s Bright-Line Standard For Sales And Use Taxes Lies With Congress

In *Quill*, the Court clearly described the Commerce Clause implications of remote sales taxes "not only [as] one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." *Id.* at 318. Congress is the final authority on whether, and to what extent, remote sales taxes burden interstate commerce. *See id.* at 318 (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946)) ("No matter how [the Court] evaluate[s] the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with [the Court's] conclusions."). Further, overturning *Quill*'s bright-line rule in the context of this case may very well (as it could have in *Quill*) "raise thorny questions concerning the retroactive application of [state sales and use] taxes and might trigger substantial unanticipated liability" in other cases. *Id.* at 318 n.10. The same considerations are present here and play an even greater role given the exponential increase in taxing jurisdictions since *Quill* was decided.[7] Then and now, Congress is better

---

[7] In *Quill*, the Court noted with concern the existence of some 6,000 taxing jurisdictions nationwide that would be encouraged to impose tax collection obligations should the Court have decided *Quill* differently. *See Quill*, 504 U.S. at 313 n.6. Today, tax

equipped to resolve the "precise allocation of [the] burdens" resulting from a change to *Quill*'s status quo. *Id.* Congress possesses the "power to protect interstate commerce from intolerable or even undesirable burdens." *Id.* at 318 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637 (1981) (White, J., concurring)). A denial of certiorari in this case would permit Congress the time and space to exercise that power in the context of established legislative process.

B. Denial Of Certiorari Would Permit Congress To Continue Its Efforts To Establish A Legislative Standard For Remote Sales Tax Collection

Declining certiorari would permit Congress the time and space to craft a legislative solution to the remote sales tax collection issues presented in this case. Recent legislation evidences this Congress's awareness of these issues.[8] South Dakota's Member of Congress, Representative Noem, is the lead sponsor of H.R. 2193, the Remote Transactions Parity Act of 2017. Remote Transactions Parity Act, H.R. 2193, 115th Cong. (2017). H.R. 2193 proposes to grant remote sales tax collection powers to every State (including South Dakota) that is a member of the Streamlined Sales and Use Tax Agreement (SSUTA), a multistate effort to simplify sales tax codes, and to States that implement certain minimum simplifications to their tax codes.

---

software provider Avalara touts as a selling point for its service that there are more than 12,000 taxing jurisdictions across the country. Jaimy Ford, *Tracking Sales Tax Rates Across Thousands of Jurisdictions*, Avalara (June 25, 2015), https://www1.avalara.com/trustfile/en/blog/tracking-sales-tax-rates-across-thousands-of-jurisdictions.html (hereinafter, *Tracking Sales Tax Rates*).

[8] In fact, several pieces of legislation introduced this session would effectively resolve the questions at issue in this case.

Similar legislation has been introduced in the U.S. Senate. *See* Marketplace Fairness Act, S. 976, 115th Cong. (2017). Conversely, other recently proposed legislation seeks to codify this Court's decision in *Quill* by establishing a statutory physical-presence standard to govern state attempts at taxing or regulating interstate commerce.[9] *See* No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017); *No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders: Hearing on H.R. 2887 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. (2017).

Although the legislative process may not bring about the exact result sought by South Dakota, it will provide one that balances the positions of all constituent interests, anticipates the growing pains that follow enactment, and provides for the proper allocation of resulting burdens. *See Flood v. Kuhn*, 407 U.S. 258, 279 (1972):

> Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of Congressional action would be known

---

[9] This bill came on the heels of another proposal last year that would have authorized States to tax interstate commerce if they were the origin State for the item and would have established a revenue-sharing arrangement between participating States. Allison Enright, *Lawmakers Queue Up a Simplified Online Sales Tax Bill*, Digital Commerce 360 (Aug. 25, 2016), https://www.digitalcommerce360.com/2016/08/25/lawmakers-queue-simplified-online-sales-tax-bill/.

> long in advance, and effective dates for legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.

(citation omitted) (internal quotation marks omitted).

C. Denial Of Certiorari Would Maintain Well-Settled Expectations Of Sellers Nationwide While Congress Crafts A Comprehensive Legislative Solution

Collectively, more than $400 billion in sales were conducted remotely in the last year, by millions of businesses employing millions of individuals. Stefany Zaroban, *US e-Commerce Sales Grow 15.6% in 2016*, Digital Commerce 360 (Feb. 17, 2017), https://www.digitalcommerce360.com/2017/02/17/us-e-commerce-sales-grow-156-2016/. These businesses rely on *Quill*'s bright-line test to provide certainty as to the jurisdictions in which they must collect taxes. Yet, there is continuing state-level legislation and litigation challenging the *Quill* standard as States actively move to expand the reaches of their taxing jurisdiction. South Dakota's legislation—and its approach—is only one small piece of the changing landscape in which remote sellers now operate, and a ruling in this case may not resolve the constitutionality of other States' creative approaches to "substantial nexus" in the age of e-commerce.[10] As such, declining Petitioner's request

---

[10] The benefit of the *Quill* standard is that it avoids the many variations on "substantial nexus" in the age of e-commerce. For example, a ruling on South Dakota's bill likely would not resolve the constitutionality of "cookie nexus" rules, like those in Massachusetts and Ohio where any business that operates a website that can be visited by residents of the State is construed to have nexus regardless of physical presence or "economic presence." *See* Michael A. Jacobs, et al., *Massachusetts to Move Forward With*

for certiorari is one step this Court could take toward maintaining remote sellers' well-settled expectations while Congress works to craft a comprehensive legislative solution.

III. *QUILL*'S BRIGHT-LINE TEST HAS CONTINUING VITALITY IN TODAY'S INCREASINGLY COMPLEX SALES AND USE TAX ENVIRONMENT

Petitioner's claims that *Quill* is outdated due to the growth of remote retail and the advancement of technology are misplaced. Despite its substantial size and growth, remote retail remains a small fraction of overall retail sales. Technological advancements, meanwhile, have not solved sales tax complexity, much less mitigated it to such a degree that the burden of collecting it is minimal.

South Dakota wouldn't be the first State, or even the first Dakota, to claim that technological revolutions have rendered collection of its desired tax easy for out-of-state sellers. Such an argument should not persuade the Court to grant certiorari or reconsider *Quill*. South Dakota is simply arguing what its one-state-up neighbor argued back in the 1990s.[11] *See*

New "Cookie" Nexus Regulation Effective October 1, Reed Smith Client Alerts (Sep. 15, 2017), https://www.reedsmith.com/en/perspectives/2017/09/ma-to-move-forward-with-new-cookie-nexus-regulation-effective-october-1; Alex Ebert, *Ohio "Cookie Nexus" for Online Sales Tax Likely to Crumble*, BNA News (July 12, 2017), https://www.bna.com/ohio-cookie-nexus-n730144 61659/.

[11] The North Dakota Supreme Court relied on the "burgeoning technological advances of the 1970s and 1980s [that] created revolutionary communications abilities and marketing methods which were undreamed of in 1967[,]" "increased efficiency of toll-free telephone lines, fax orders, and direct computer ordering[,]" and "advances in the parcel delivery industry" to justify its

State v. Quill Corp., 470 N.W.2d 203 (N.D. 1991), *rev'd*, *Quill*, 504 U.S. 298 (1992). Just as toll-free telephones then were not a salve to sales tax complexity, iPads and augmented reality devices today are not a salve to sales tax complexity.

While remote retail has grown substantially since the internet's infancy in the early 1990s, it still remains a small share of the total retail sales picture in America. According to U.S. Census Bureau data, e-commerce sales have averaged less than 8.7 percent of total U.S. retail sales over the past four quarters, meaning that nine in ten purchases are still conducted in brick-and-mortar locations. U.S. Census Bureau, CB17-182, Quarterly Retail E-Commerce Sales: 3rd Quarter 2017 (Nov. 17, 2017), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. Traditional storefront retail remains the dominant model for a variety of reasons. Brick-and-mortar retailers can offer immediate gratification when purchasing an item, in addition to on-site support and service. Additionally, some items like fresh food do not lend themselves well to a remote sales model. Assertions that the *Quill* physical-presence standard is incompatible with a world dominated by e-commerce certainly do not apply in today's market, and are not likely to anytime soon as the retail industry converges on the so-called "brick-and-click" model mixing storefronts and internet sales. Barbara Thau, *Five Signs that Stores (Not E-Commerce) Are the Future Of Retail*, Forbes (June 27, 2017, 1:05 PM), https://www.forbes.com/sites/barbarathau/2017/06/27/five-signs-that-stores-not-online-shopping-are-the-future-of-retail/#aec81214641c.

---

departure from the Court's precedent. *State v. Quill Corp.*, 470 N.W.2d at 208-09.

Meanwhile, sales tax complexity has arguably gotten worse in the years since *Quill* was handed down. In *Quill*, the Court noted that North Dakota's tax "illustrates well how a state tax may unduly burden interstate commerce." *Quill*, 504 U.S. at 313 n.6. Today, there are reportedly more than 12,000 taxing jurisdictions across the country, compared to the mere 6,000 that troubled the Court at the time of *Quill*. Compare *Tracking Sales Tax Rates* with *Quill*, 504 U.S. at 313 n.6.

This complexity simply cannot be solved by software, no matter how much more advanced it is than when *Quill* was decided in 1992. The most difficult part of sales tax compliance, particularly with regard to sellers of non-traditional items not easily classifiable under law, is always done by humans, and sales tax codes have not made their jobs easier in the last 25 years.[12] And even if software was omniscient enough to obviate the need for humans to categorize inventory for taxability, it remains expensive to build, integrate,

---

[12] The reality of sales tax complexity is illustrated well by the dilemma of determining taxability of ice cream cakes in Wisconsin. The Wisconsin Department of Revenue produced a memo of nearly 1,500 words, including ten example scenarios, in an attempt to explain the appropriate tax treatment of ice cream cakes and dessert bars after a change in law effective in 2009. State of Washington Department of Revenue, Sales of Ice Cream Cakes and Similar Items, https://www.revenue.wi.gov/Pages/TaxPro/news-2010-101108c.aspx (last visited Dec. 6, 2017). It explains that a cake or ice cream bar made on site is taxable, while a cake purchased wholesale and sold to a customer is not taxable. However, if an otherwise tax-exempt cake is served to the customer with napkins or other utensils, that renders it taxable as prepared food despite being otherwise indistinct. Meanwhile, a cake with two cake layers and one ice cream layer is tax exempt, but a cake with one cake layer and two ice cream layers is taxable.

and manage, and burdensome to integrate and utilize.[13] For many small retailers, the expense and burden would outweigh the benefit and they would rationally choose not to sell into States with laws like South Dakota's.

Indeed, Petitioner tries to overcome these questions by relying on the asserted simplicity of the SSUTA. That reliance, however, begs the question—Is Petitioner going to ask the Court to rule that *Quill*'s physical-presence requirement can be abrogated only for those States that have adopted the SSUTA? States are not powerless to address the issues of sales tax complexity in a comprehensive way. In fact, the backbone of our economy is a codification of existing commercial law in state statutes (the Uniform Commercial Code, which governs the sales at issue here), not federal legislation. But just as the record of this case is not adequate to address the Due Process implications of South Dakota's legislation, it is equally inadequate to address the modest attempts by States

---

[13] Take as an example an online retailer with annual sales of $5 million nationwide. Data compiled by NYU Stern finds online retailers average profit margins of just 2.97 percent, meaning that such a business only generates net income of $148,500 each year. NYU Stern School of Business, Operating and Net Margins by Industry (Jan. 2017), http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html. This same business would pay roughly $80,000 in software setup and integration costs and incur $57,500 on software maintenance, updates, and fees. Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TruST (Sep. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

thus far to simplify and harmonize their tax administration.[14]

IV. RECONSIDERING *QUILL* HAS IMPLICATIONS BEYOND THE PARTICULAR APPROACH CHAMPIONED BY SOUTH DAKOTA AND EVEN BEYOND THE ISSUE OF REMOTE SALES TAX COLLECTION

It is not just in the realm of sales tax that States are boldly asserting tax authority over non-present businesses and individuals. Nebraska assessed business tax on a trucking company with no employees, no property, no inventory, and no sales in the State simply because the business had admitted its employees had driven through it. Steven Malanga, *The State Tax Grab*, City Journal (Winter 2014), https://www.city-journal.org/html/state-tax-grab-13628.html. Both New York and Connecticut have asserted authority to tax the income of a professor who lives in one State and commutes to the other. *Id.* California has effectively imposed strict regulations on the size of hen cages by denying access to the California market for any producer not meeting its standards, sparking a legal battle with other States. Elizabeth Shell, *California Humane Chicken Law Ruffles Feathers in Other States*, PBS News Hour (Mar. 7, 2014, 6:29 PM), https://www.pbs.org/newshour/nation/california-chickens.

As such, a grant of certiorari and eventual decision in this case has implications far wider than *Quill*, and far wider than tax collection on remote retail sales, no matter how fine a line this Court might try to draw.

---

[14] State tax administration remains highly complex. For example, South Dakota's retail sales and service tax statute has more than 50 exemptions. S.D. CODIFIED LAWS § 10-45 (2017).

This case is not an outgrowth of uncertainty about Court doctrine, or the plain language of the Constitution, or an indifferent Congress. Rather, it is an outgrowth of a strong and growing trend of States asserting a power that they have not had since the days of the failed Articles of Confederation: the power to tax and regulate interstate commerce.

The current landscape of litigation developed despite Congress's and the Court's clear statements about the boundaries of state power. Should this Court grant certiorari, States may very well be emboldened to seize on even the thinnest of assertions to expand their reach. The Court will have to create a new bright line that improves upon *Quill*. With the advancement of technology and the ongoing internet revolution, States have more tools at their disposal than ever before to identify and target individuals and businesses for taxation and regulation and to focus on out-of-state individuals and businesses who lack the political influence and ballot-box resource with which to fight back.

CONCLUSION

For the foregoing reasons, Court should decline Petitioner's request for a grant of certiorari.

Respectfully submitted,

KENNETH D. SALOMON
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900

DUDLEY W. VON HOLT
THOMPSON COBURN LLP
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000

WARREN L. DEAN, JR.
Counsel of Record
KATHLEEN E. KRAFT
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900
wdean@thompsoncoburn.com

Counsel for Amicus Curiae

December 7, 2017

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF NETCHOICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

CARL M. SZABO
NETCHOICE
1401 K Street N.W., Suite 502
Washington, DC 20005
(202) 420-7498

WM. GREGORY TURNER
Counsel of Record
TURNER LAW
1125 L Street, Suite 700
Sacramento, CA 95814
(916) 251-7398
greg@turnersalt.com

Counsel for Amicus Curiae

December 7, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Supreme Court should abrogate *Quill v. North Dakota's* sales-tax-only, physical presence requirement.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	3
I. THE INTERNET SALES TAX DEBATE IS AN ISSUE OF VITAL IMPORTANCE TO MILLIONS OF AMERICANS AND SMALL BUSINESSES	3
II. IT IS AN UNDUE BURDEN FOR RETAILERS TO COMPLY WITH STATE SALES TAX AND USE REQUIREMENTS IN STATES WHERE THEY DO NOT HAVE A PHYSICAL PRESENCE	7
A. South Dakota Has No Factual Record Upon Which to Base an Argument for Overturning *Quill*	7
B. The 'Evolution of the Retail Industry' Has Not Mitigated the Inherent Burdens of Compliance with Multiple Foreign-State Tax and Regulatory Regimes	10
C. South Dakota and Other States Have Not Sufficiently Simplified Tax Collection and Will Impose Undue Burdens on Collecting Businesses	13

TABLE OF CONTENTS—Continued

Page

III. WHETHER TO REQUIRE TAX COLLECTION BY OUT-OF-STATE RETAILERS IS AN ISSUE OF INTERSTATE COMMERCE AND THEREFORE THE CONSTITUTIONAL RESPONSIBILITY OF CONGRESS 15

A. Congress Has the Exclusive Authority to Regulate Interstate Commerce Under Article I 16

B. Congress Is Responsibly Exercising Its Legislative Powers with Respect to Internet Taxation 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES Page(s)

Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir.), *cert. denied*, 137 S. Ct. 591, 196 L. Ed. 2d 473 (2016), and *cert. denied*, 137 S. Ct. 593, 196 L. Ed. 2d 473 (2016) 15

National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967) 4, 6

Quill. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

CONSTITUTION

U.S. CONST. art. I, § 8, cl. 3 ..... 6, 9, 15, 16

U.S. CONST. amend. XIV 6

STATUTES

Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, § 922, Pub. L. No. 114-125 (2016) 17

LEGISLATIVE MATERIALS

Marketplace Fairness Act of 2015, S. 698, 114th Cong., 1st Sess. (2015) 16

Marketplace Fairness Act of 2017, S. 976, 115th Cong., 1st Sess. (2017) 16

No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong., 1st Sess. (2017) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong., 1st Sess. (2015). 16

Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong., 1st Sess. (2017). 16

The Online Sales and Simplification Act of 2016, Discussion Draft, 114t Cong., 2d Sess, (2016), *available at* https://www.mwe.com/~/media/files/thought-leadership/blogs/online-sales-simplification-act-of-2016.pdf? la=en 17

OTHER AUTHORITIES

Avalara, Avalara Resource Center Sales Tax, *available at* https://www.avalara.com/learn/sales-tax/ (last visited Dec. 6, 2017) 2, 9

Brian Resnick, Anthony Kennedy: *The U.S. 'Is Not a Functioning Democracy'*, The Atlantic (Oct. 4, 2013) 18

Larry Kavanagh and Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, September 2013, *available at* http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf 11, 12

Pricewatershousecoopers, *Retail Sales Tax Compliance Costs: A National Estimate* (Apr. 6, 2006) *available at* http://www.netchoice.org/wp-content/uploads/cost-of-collection -study-s stp.pdf ... 11

TABLE OF AUTHORITIES—Continued

Page(s)

Stephanie P., Newbold, and David H. Rosenbloom. *Critical Reflections on Hamiltonian Perspectives on Rule-Making and Legislative Proposal Initiatives by the Chief Executive*, 67.6 Pub. Admin. Rev. 1049 (2007)..... 16

Steven Bercu, *before* U.S. Senate Committee on Commerce, Science & Transportation, hearing on *Marketplace Fairness: Leveling the Playing Field for Small Business* (Aug. 1, 2012)..... 8

INTEREST OF *AMICUS CURIAE*[1]

NetChoice is a trade association of leading e-commerce and online businesses promoting the value, convenience, and choice of the internet. NetChoice has been deeply engaged on internet sales and use tax issues for over a decade and is a founding member of the coalition for True Simplification of Taxation ("TruST"), a group whose association members include the American Catalog Mailers Association, the Direct Marketing Association, and the Electronic Retailing Association. NetChoice's core members are industry leaders in the online commerce economy.

NetChoice strongly believes that this Court should decline the State of South Dakota's petition for a writ of certiorari. NetChoice has an interest in this case because its members, e-commerce businesses both large and small, will be adversely affected if the physical presence standard set forth in *Quill. v. North Dakota*, 504 U.S. 298 (1992), is eliminated. The *Quill* standard, by preventing individual states from impeding commerce among the states, protects citizens of one state from regulation by foreign states.

In the years since *Quill* was decided, technology has improved retail commerce for the customer in many ways. But for the many small businesses whose customers reach them over the internet, the burden of compliance posed by divergent rules and regulations among 46 states and thousands of local jurisdictions

---

[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief and were timely notified.

remains the same. There are still over twelve-thousand sales tax jurisdictions in the U.S.[2] *Quill's physical presence* standard wisely holds that forcing a small business located in one U.S. state to comply with the patchwork of rates and rules across these many jurisdictions, simply because they use the instrumentalities of interstate commerce, would amount to an unreasonable burden. Like all retailers, online merchants collect sales tax in every state where they are physically present. But abandoning *Quill's* standard of directly linking compliance with state and local sales tax collection regulations to the physical presence of retailers would create conditions ripe for abuse. States could use the unequal burden thus imposed on remote commerce to protect local retailers from out-of-state competition. Yet the out-of-state competitors neither benefit from in-state facilities nor impose burdens on local infrastructure.

Quill's physical presence standard has served to protect all businesses that maintain websites from overbearing tax compliance burdens imposed by foreign states where the business has no physical presence. At the same time, *Quill* requires every business, large or small, to collect and report sales tax in the same way in every state where the business does benefit from in-state facilities and does impose burdens on local infrastructure.

NetChoice members comply with the same regulatory demands as so-called brick-and-mortar merchants by paying applicable taxes and complying with regulations in the states they reside in. Abrogating *Quill* would open the door for multiple foreign states

---

[2] *See* Avalara, Avalara Resource Center Sales Tax, *available at* https://www.avalara.com/learn/sales-tax/.

simultaneously to regulate an out-of-state merchant. This disproportionate regulatory burden, particularly on small business, will inherently discriminate in favor of in-state commerce.

For these reasons, NetChoice has a vital interest in whether the Court grants South Dakota's petition.

ARGUMENT

I. THE INTERNET SALES TAX DEBATE IS AN ISSUE OF VITAL IMPORTANCE TO MILLIONS OF AMERICANS AND SMALL BUSINESSES.

The internet sales tax debate is extremely important not only to NetChoice's membership, but also to millions of Americans who rely on the services provided by small businesses across the country. NetChoice is a trade association of businesses and trade associations who seek to promote convenience, choice, and commerce on the internet. Its members include many small providers of e-commerce goods and services, as well as online platforms that bring together buyers and small sellers from around the globe. We know from experience that internet commerce can expand the range of goods sold safely and legally in secondary markets, including when the internet enables these markets to reach across national borders.

The issue of sales and use tax collection on internet commerce impacts *every* small business with an online storefront, marketplace, or sales. That is because, were these small businesses required to comply not only with all of the government regulations where they are located, but also with the regulations of every distant state and its governmental subdivisions in

which it has a customer, many would irrevocably suffer.

The due process standard of purposefully availing oneself of the benefits of doing business in a particular jurisdiction should not be eviscerated for the internet era. Any business making use of a website is accessible by nearly all Americans and billions of citizens of foreign countries. This is not something a small business can opt out of. Imposing discriminatory regulatory burdens on a business simply because it takes web orders violates due process and inherently discriminates against interstate commerce.

The *Quill* standard allows internet start-ups, as well as small and medium-sized online and brick-and-mortar businesses, to exist. It protects them from regulatory burdens that would be both crippling and unfair, and allows them to grow. It provides them with consistency in understanding the tax regulatory framework they must follow.

As the Court noted in *Quill*, "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry."[3] That is even more true today because of the passage of time. E-commerce companies, particularly smaller and medium-sized retailers, rely on *Quill* today amid a tax and regulatory environment that has never been more complicated. At the same time, the *Quill* standard ensures that as online sellers expand their businesses and create physical presence in additional states, they accordingly submit to a broader scope of sales tax collection and regulatory burdens. Today, Amazon – not only the largest internet retailer but the ninth largest retailer of any kind in the United

---

[3] *Quill*, 504 U.S. at 317.

States – accounts for nearly half of all internet retail sales. It already collects sales tax in every U.S. jurisdiction that has such a tax. Wal-Mart, the nation's largest retailer, is the second-fastest growing retailer on the internet. *Quill's physical presence standard* ensures that all of this retail activity is already fully taxed in those states with sales and use taxes.

It is fundamentally at odds with a fair and efficient national marketplace to subject a local retailer, with only one place of business in a single state, to state tax compliance burdens – including the requirement to appear in person to defend a lawsuit brought by tax regulators – in each of the 46 states that have sales taxes. This is especially so if the only reason for the imposition of this enormous burden is the local retailer with only one place of business, engages in commerce via the internet.

A website, even one constructed in an hour by a small business using inexpensive online tools, immediately advertises that small business to the entire world. If a Vermont-based small business, for instance a bookseller, receives an order from a customer in a foreign state, fulfilling the order should not subject it to direct regulation and taxation by that foreign state. The wisdom of this is seen most easily if the customer placing the order is in a far-away country. Selling through a website should not automatically subject every small business to the regulation, taxation, and judicial reach of every foreign jurisdiction.

Because it is virtually impossible for the bookseller in Vermont to have a website that is accessible everywhere *except* a specific jurisdiction – say, South Dakota – it is specious to argue that the bookseller has purposefully availed itself of South Dakota's unique benefits in the way that concept has been developed in

this Court's prior cases. The owner of that small business in Vermont should not be required to refuse all sales via the internet from South Dakota. Likewise, the owner should not be automatically required to comply with complex sales or use tax requirements in a distant state just because it fulfills orders taken via the internet. If South Dakota audits the business or challenges its tax and regulatory filings, the owner should not be compelled to travel to South Dakota to defend herself in judicial and administrative proceedings.

This degree of burden and complexity rises to the level of fundamental unfairness, implicating not only the commerce clause but due process. The Supreme Court in *Quill* effectively has answered these questions correctly.

Bellas Hess created a bright line rule protecting merchants "whose only connection with customers in the [taxing] State is by common carrier or the United States mail."[4] From the standpoint of the interstate commerce clause, there is little meaningful distinction between a merchant who fulfills orders using the mail, telephone, telegraph, or internet. Such merchants are, according to *Quill*, properly "free from state imposed duties to collect sales and use taxes."[5] If this Court were to overrule *Quill*, tens of thousands of small businesses and tens of millions of customers who rely upon their staying in business will be adversely affected.

---

[4] *National Bellas Hess v. Department of Revenue*, 386 U.S. 753, 758 (1967).

[5] *Quill*, 504 U.S. at 315.

II. IT IS AN UNDUE BURDEN FOR RETAILERS TO COMPLY WITH STATE SALES TAX AND USE REQUIREMENTS IN STATES WHERE THEY DO NOT HAVE A PHYSICAL PRESENCE.

A. South Dakota Has No Factual Record Upon Which to Base an Argument for Overturning Quill.

South Dakota has flouted Supreme Court precedent and urged the Court to reward it by ruling in a case that is fact free, by design. Petitioners present no facts regarding the burden (or lack thereof) of multistate sales and use tax collection on interstate commerce. The procedural origins of this case – a contrived and willful challenge to existing Supreme Court precedent by the state – has guaranteed that no evidentiary record exists. What's more, the case presents the legal construct of South Dakota's circumstances when a ruling by this Court would invariably apply to all 50 states. While petitioners freely make unproven assertions about how easy and inexpensive compliance with the rules of thousands of taxing jurisdictions will be, NetChoice's experience reveals a far different understanding of the continuing burdens of nationwide sales tax compliance.

South Dakota's "legal argument" consists largely of its own opinion, without factual evidence to support, that changes in computer technology, streamlined sales and use tax laws, and the evolution of the retail industry have made *Quill* obsolete. To the contrary, it is the experience of NetChoice members that states have neither simplified nor harmonized their sales and use tax rules; that the technology costs of complying with every state's often unique rules will be significant, and potentially fatal for small businesses;

and that the evolution of the retail industry, particularly among the largest participants, is to a model of brick-and-click, validating the wisdom of the *Quill* holding.

There is ample reason to reject petitioner's claims about the simplicity of compliance at face value. During a recent U.S. Senate hearing, a witness whose testimony was supposed to demonstrate the ease of online tax-collection was shown to be charging sales tax at the wrong rate and for the wrong tax jurisdiction.[6]

Quill's test and reasoning have well stood the test of time, and in particular it has well anticipated changes in technology. The reason is that *Quill* addressed a question that remains today: whether requiring faraway vendors to comply with the sales tax collection regimes and rules of every state's different framework has a burdensome effect on interstate commerce.

When *Quill* was decided, there were only 6,000 tax jurisdictions. On this record, the *Quill* Court found that subjecting out-of-state sellers to foreign tax collec-

---

[6] During a U.S. Senate Commerce Committee hearing on the Marketplace Fairness Act, witness Steven Bercu, CEO and Co-owner, BookPeople, Austin, TX, claimed it was easy to collect and remit sales taxes for out-of-state sales. He was shown to be incorrectly collecting sales taxes on purchases, including over-collecting the tax for some sales. U.S. Senate Committee on Commerce, Science & Transportation, *Marketplace Fairness: Leveling the Playing Field for Small Business* (Aug. 1, 2012).

tion and reporting requirements was unduly burdensome.[7] Today that number has ballooned to over 12,000.[8]

Quill protects local businesses from overbearing tax compliance burdens that include "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements . . . a virtual welter of complicated obligations."[9] Such burdens on interstate commerce cannot be imposed without offense to the Commerce Clause, and to Congress' plenary authority to regulate in this area. As discussed fully below, Congress is currently working on alternative legislative approaches, some of which would tolerate increase and some of which would mitigate the burdens of foreign taxation and regulation upon merchants engaged in interstate commerce. For the Supreme Court now to obviate this legislative process in mid-stride, while making its decision upon a record lacking the evidence adduced in the many congressional hearings and debates on which currently contemplated legislation is based, would upend much so-called "dormant" Commerce Clause jurisprudence. Ironically, it would do so in order to upend Supreme Court precedent.

Entangling small businesses in a complicated framework of varying taxes, exemptions, administrative requirements, and audits would be unwise in all events. It is utterly unsupportable in a case lacking any developed factual record.

---

[7] *Quill* 504 U.S. at 313.

[8] *See* Avalara, Avalara Resource Center Sales Tax, *available at* https://www.avalara.com/learn/sales-tax/.

[9] *Quill*, 504 U.S. at 313 n.6.

B. The 'Evolution of the Retail Industry' Has Not Mitigated the Inherent Burdens of Compliance with Multiple Foreign-State Tax and Regulatory Regimes.

Petitioner asserts without proof its opinion that changes in the volume and nature of e-commerce make *Quill* obsolete. This is at odds with the real-world experience of internet businesses.

There are over 12,000 tax jurisdictions in the United States, double the number of tax jurisdictions deemed unduly burdensome in *Quill*.[10] Software has made filing of taxes easier, and software license fees are a small part of the overall costs of compliance, but other costs necessitated by compliance with sales tax payment and reporting obligation in these thousands of state and local jurisdictions have risen. Overall compliance costs remain unduly burdensome on local merchants and on interstate commerce.

These costs include paying computer consultants to integrate new tax software into their existing systems for point-of-sale, web shopping cart, fulfillment, and accounting. Use of new tax software, in turn, requires training for customer support and back-office staff. Also excluded from South Dakota's appraisal of the actual cost burdens is the time and money spent answering customer questions about taxability of items. Businesses will be required to know, for example, the many different sales tax holidays in various remote jurisdictions. Every single business, large or small, will face audit questions from 46 states if *Quill* is

---

[10] *Id.* at 313.

overturned. Businesses will have to pay accountants and computer consultants to address all these issues.

As discussed more fully below, the Streamlined Sales Tax Project ("SSTP") was supposed to organize a uniform simplification of the many different tax rules, definitions, rates, and regulations across the country. It has not done so. Indeed, its own Cost of Collection study[11]—which has since been shown to grossly underestimate the costs[12]—found that the smallest businesses spend 17 cents in compliance for every tax dollar they collect for states. That is vastly more than their large-scale competitors.

Even if "free" tax software worked as advertised, that would help eliminate only two cents of the extra 17 cents in costs.[13] A small business with annual revenues of $1 million would still incur a new cost burden equal to 15 cents on every dollar it collects, for tasks such as:

- Computer consultants to integrate new tax software into their home-grown or customized systems for point-of-sale, web shopping cart, fulfillment, and accounting
- Training customer support and back-office staff

---

[11] Pricewatershousecoopers, *Retail Sales Tax Compliance Costs: A National Estimate* (Apr. 6, 2006) *available at* http://www.netchoice.org/wp-content/uploads/cost-of-collection-study-sstp.pdf.

[12] *See* Larry Kavanagh and Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, September 2013, *available at* http://truesimplification.org/wp-content/uploads/Final_ TruST-COI-Paper-.pdf.

[13] Pricewatershousecoopers at E-4.

- Answering customer questions about entity and use exemptions and sales tax holidays
- Responding to audit demands from 46 states – plus potentially from up to 550 Indian Tribes
- Accountants and IT consultants to help with all of the above

These collection burdens will impose impossibly high costs on small catalog and online businesses.

The most significant of these costs is the expense of integrating tax rate lookup software into the business's in-house information systems. The cost is high not only because the software integration requires specialized skills, but also because it must be done at multiple integration points. In 2013, the True Simplification of Taxation (TruST) coalition commissioned a study to precisely measure both the upfront and ongoing software integration costs.[14] The study examined both catalog and online retailers in the mid-market bracket ($5 million to $50 million in annual sales). The study found that such mid-market online and catalog retailers would have to spend $80,000 to $290,000 in setup and integration costs in order to use the sales tax software discussed by petitioners.

Beyond the average $185,000 initial cost, *every year* these retailers would also have to spend between $57,500 and $260,000 on maintenance, updates,

---

[14] Larry Kavanagh and Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, September 2013, *available at* http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

audits, and service fees charged by tax software providers.

Most mid-market retailers have modified third-party order management and fulfillment software to fit their business processes, or have developed their own software. They use these order management systems for call center order entry, customer service, returns and refund processing, shipping, inventory management, and more. In many cases, these systems also integrate with separate accounting systems. In order to integrate with a CSP [Certified Software Provider], the retailer must make architectural modifications to map to the coding system of the CSP, establish real-time communication, and create error-handling code to process transactions when the real-time service fails to return a valid reply.

South Dakota's claim that the changing e-commerce landscape has made *Quill* obsolete fails to account for any of these factors. In reality, requiring taxation across all 12,000 United States state and local tax jurisdictions would today impose far greater burdens than Quill found unacceptably burdensome, and it would do so for *any* business that fills web orders. The burdens of compliance with multiple foreign-state tax and regulatory regimes inherently hinder interstate commerce.

C. South Dakota and Other States Have Not Sufficiently Simplified Tax Collection and Will Impose Undue Burdens on Collecting Businesses.

Petitioner's claim that nationwide, sales tax regimes have been simplified is unsubstantiated and, therefore, provides no basis for overturning *Quill*.

NetChoice has long been a supporter of the effort to streamline and simplify state sales taxes. But despite a decade of attempting to simplify tax codes, the actual simplifications achieved are few and far between. Unfortunately, for the SSTP, simplification has become just a slogan—not a standard. Across the country, states have not meaningfully simplified their tax systems, including through the SSTP – which has failed to come close to its stated objective.

Instead of simplifying taxes through the SSTP, we have witnessed the abandoning of most of the SSTP's original simplification requirements. For example, the SSTP originally promised one tax rate per state, uniform definitions, and a single audit on behalf of all states. Too many states were unwilling to undertake even these fundamental simplifications, and the simplifications were abandoned. The SSTP also abandoned its original aim to require states to compensate retailers for the cost of tax compliance. SSTP has no small seller exception. In an effort to attract states with origin sourcing, the SSTP abandoned a single sourcing rule, and now allows states to use *origin* sourcing for in-state shipments but requires *destination* sourcing for interstate sales. To entice Massachusetts to join SSTP, the Governing Board allowed thresholds for certain clothing items, even though thresholds were one of the extreme complexities that SSTP founders pledged to eliminate.

Perhaps the most glaring sign of failure is that despite the SSTP's many concessions to allow states to retain their complex systems, less than half of eligible states have become members of the SSTP. The Supreme Court should not overturn *Quill* on the basis of the negligible simplifications actually accomplished by the SSTP.

III. WHETHER TO REQUIRE TAX COLLECTION BY OUT-OF-STATE RETAILERS IS AN ISSUE OF INTERSTATE COMMERCE AND THEREFORE THE CONSTITUTIONAL RESPONSIBILITY OF CONGRESS.

A. Congress Has the Exclusive Authority to Regulate Interstate Commerce Under Article I.

This case presents an effort to leapfrog congressional action by purposefully violating clear Supreme Court precedent. Such a deliberate affront should not be rewarded. "After all, the Commerce Clause is found in Article I of the Constitution and it grants Congress the authority to adopt laws regulating interstate commerce."[15]

Quill observed that "the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions." *Quill*, 504 U.S. at 318.

B. Congress Is Responsibly Exercising Its Legislative Powers with Respect to Internet Taxation.

Congress is currently deeply engaged in legislative debate, fact finding, hearings, and committee consideration of the issues raised by State efforts to require

---

[15] *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147–48 (10th Cir.), *cert. denied*, 137 S. Ct. 591, 196 L. Ed. 2d 473 (2016) (Gorsuch, J., concurring), and *cert. denied*, 137 S. Ct. 593, 196 L. Ed. 2d 473 (2016).

tax and regulatory compliance work by out-of-state online merchants. There is robust discussion and debate on a range of potential legislative approaches. While Congress has not yet acted in the way that petitioners desire, this hardly dispenses with the dormant Commerce Clause issue raised by petitioners' desire to overturn *Quill*. Indeed, Congress' power at the moment is anything but dormant. That Congress was engaged in the very process designed by the Founders to foster a deliberative and thoughtful approach to legislation[16] is an argument in favor of, not against, respecting Congress' authority in this area.

Contrary to petitioner's and some *amici*'s claim, Congress has demonstrated an abiding interest in legislating on this issue and has uninterruptedly sought ways to address it in recent years. In the past two years alone, Congress has considered, including through hearings, the following legislation: the Marketplace Fairness Act (MFA),[17] the Remote Transactions Parity Act (RTPA),[18] the No Regulation without Representation Act of 2017,[19] and the Online Sales

---

[16] Newbold, Stephanie P., and David H. Rosenbloom. *Critical Reflections on Hamiltonian Perspectives on Rule-Making and Legislative Proposal Initiatives by the Chief Executive*, p. 1049-1056, Public Administration Review 67.6 (2007).

[17] Marketplace Fairness Act of 2015 (2015) S. 698, Marketplace Fairness Act of 2017 (2017) S. S.976.

[18] Remote Transactions Parity Act of 2015 (2015) H.R.2775, Remote Transactions Parity Act of 2017(2017) H.R.2193.

[19] No Regulation Without Representation Act of 2017 (2017) H.R. 2887.

Simplification Act (OSSA).[20] These proposals represent a range of approaches that seek to balance competing interests in differing ways. Resolving such differences based on policy inputs is exactly what legislatures are best at, and exactly what courts – charged with resolving cases and controversies – are least well equipped to handle. That the Constitution assigns the regulation of interstate commerce to Congress of course provides the ultimate reason for this Court to defer to the legislative branch, should any additional reason be required.

Further undermining petitioner's claim that Congress is not exercising its powers in the area of internet taxation is the fact that Congress recently enacted, and President Obama signed, the Permanent Internet Tax Freedom Act (PITFA).[21] This law makes permanent a federal ban on taxation of email, internet access, and other forms of internet-specific exactions, broadly prohibiting all multiple or discriminatory taxes on e-commerce. This legislation established an end date of June 30, 2020, for South Dakota's tax on internet access. It would seem not that Congress is abdicating legislating in the area of internet tax, but rather that petitioner does not like the policy choices that Congress is making.

Should this Court grant certiorari and overturn *Quill,* it would eliminate any incentive for States to

---

[20] The Online Sales and Simplification Act of 2016 (2016), *available at* http://images.internetretailer.com/IR/2016/082516_DraftLanguage.pdf.

[21] Trade Facilitation and Trade Enforcement Act of 2015 (2015), H.R.644.

simplify their tax systems. It would cut off the opportunity for any national legislative solution from Congress. It would subject small businesses across the country to burdens of compliance with the reporting and collection regimes of thousands of state and local jurisdictions. It would undercut the stable and proven legal framework upon which the entire small business retail community has heretofore relied.

Justices have often warned about the Supreme Court usurping the role of Congress by legislating from the bench. As Justice Kennedy has eloquently noted, "Any society that relies on nine unelected judges to resolve the most serious issues of the day is not a functioning democracy."[22] This is not how things are supposed to work in our legal order, where, as Justice Gorsuch observed, "judges distinguish themselves from politicians by the oath they take to apply the law as it is, not to reshape the law as they wish it to be."[23]

We respectfully ask that the Supreme Court heed this wisdom, especially on an issue that directly implicates State usurpation of congressional authority over interstate commerce. The Court's established precedents recognize that Congress is the proper arbiter of this issue.

---

[22] Brian Resnick, Anthony Kennedy: *The U.S. 'Is Not a Functioning Democracy'*, The Atlantic (Oct. 4, 2013).

[23] *Direct Mktg. Ass'n*, 814 F.3d at 1147–48.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CARL M. SZABO
NETCHOICE
1401 K Street N.W., Suite 502
Washington, DC 20005
(202) 420-7498

WM. GREGORY TURNER
Counsel of Record
TURNER LAW
1125 L Street, Suite 700
Sacramento, CA 95814
(916) 251-7398
greg@turnersalt.com

Counsel for Amicus Curiae

December 7, 2017

CORD
AND
RIEFS

Supreme Court, U.S.
FILED
NOV 1 - 2017
OFFICE OF THE CLERK

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
donald.verrilli@mto.com
(202) 220-1100

MARK R. YOHALEM
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, California 90071

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

CORPORATE DISCLOSURE STATEMENT

The Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in the RLC.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. The Retail Economy Has Transformed Since *Quill*, Undercutting *Stare Decisis* and Underscoring the Need to Reevaluate the Physical-Presence Requirement 7

II. Far From Promoting Stability in the Law, the Physical-Presence Requirement Is Generating a Welter of Legislation and Litigation 18

III. The Court Should Not Expect Congress to Correct the Constitutional Error of *Bellas Hess* and *Quill* 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 25

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) 7, 8

Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) 25

D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) 6

Direct Marketing Ass'n v. Brohl (DMA), 135 S.Ct. 1124 (2015) 2, 6, 23

Direct Marketing Ass'n v. Brohl (DMA II), 814 F.3d 1129 (10th Cir. 2016) 1, 7, 19, 20

Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) 26

Granholm v. Heald, 544 U.S. 460 (2005) 8

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) 26

Hughes v. Oklahoma, 441 U.S. 322 (1979) 5

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) 16

Marbury v. Madison, 1 Cranch 137 (1803) 26

Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill., 386 U.S. 753 (1967) ..... *passim*

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

State Oil Co. v. Khan, 522 U.S. 3 (1997) 8, 26

ARTICLES

A dozen ways Pa.'s 2017-18 state budget may impact your life, Penn Live (Oct. 27, 2017, 10:19 a.m.) 21

A.W., *The Economist explains: What disruptive innovation means*, The Economist (Jan. 25, 2015) 16

Ben Unglesbee, *Sears borrows $100M (more) from Eddie Lampert's hedge fund*, Retail Dive (Oct. 6, 2017) 12

CEO Hubert Joly: Best Buy 2020 focused on growth, CNBC (Sept. 19, 2017, 8:34 a.m.) 12

Clifford Stoll, *Why the Web Won't Be Nirvana*, Newsweek (Feb. 25, 1995, 7:00 p.m.) 4

Corinne Ruff & Ben Unglsebee, *The running list of 2017 retail apocalypse victims*, Retail Dive (July 5, 2017) 18

Dan O'Shea, *Mobile commerce to dominate online sales by 2021*, Retail Dive (Oct. 29, 2017) 11

Daphne Howland, *Sears Holdings to shutter another 20 stores*, Retail Dive (June 23, 2017) 12

Eric T. Anderson, et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, J. of Mktg. Research, Vol. 47, No. 2 (April 2010) 10, 18

Jay Yarow, *Paul Krugman Responds To All the People Throwing Around His Old Internet Quote*, Business Insider (Dec. 30, 2013, 9:06 a.m.) 9

Julie Creswell, *Buy a Sofa Online? Wayfair Is Counting on It*, New York Times (Oct. 15, 2017) 13

Julie Jargon, Annie Gasparro, and Heather Haddon, *For Amazon, Now Comes the Hard Part*, Wall Street Journal (June 18, 2017, 7:07 p.m.) 14

Kavita Kumar, *Target will remodel more stores to compete with Amazon and Walmart*, Star Tribune (Oct 19, 2017, 9:39 p.m.) 12

Kelly Phillips Erb, *Tax Free No More: Amazon To Begin Collecting Sales Tax Nationwide on April 1*, Forbes (March 27, 2017, 4:22 p.m.) 9

Morgan True, *State sending 20,000 letters to collect alternative sales tax*, Brattleboro Reformer (Sept. 4, 2017, 5:33 p.m.) 15

Robert Spector, *The Rise and Fall of Toys "R" Us*, The Robin Report (Oct. 18, 2017) 11

Shan Li, *Amazon overtakes Wal-Mart as biggest retailer*, Los Angeles Times (July 24, 2015, 1:06 p.m.) 9

Tracy Maple, *Crutchfield sues to block Massachusetts from collecting online sales tax*, Digital Commerce 360 (Oct. 25, 2017) 22

Tyler A. LeFevre, *Justice in Taxation*, 41 Vt. L. Rev. 763, 769-70 (2017) 20

Valerie Bauerlein, *Retail Stores Made Elmira, N.Y., an Unlikely Success—Now They're Gone*, Wall Street Journal (Sept. 27, 2017, 11:23 a.m.) 11

William F. Fox, *Inability to Collect Sales Tax on Remote Sales Still Harms the Economy*, State Tax Notes (Nov. 6, 2017, forthcoming) 2

INTEREST OF AMICUS CURIAE[1]

Amicus, the Retail Litigation Center, Inc., represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of industries.[2] The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases.

This is just such a case. By distorting the retail market in favor of absentee e-commerce, *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), have caused palpable harm to the RLC's members and the communities and customers they serve. Doctrinally, *Bellas Hess* and *Quill* are eccentric outliers in this Court's Commerce Clause jurisprudence. *See Direct Mktg. Ass'n v. Brohl (DMA II)*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). But *practi-*

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than the RLC or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. On October 16, 2017, and October 19, 2017, respectively, Petitioner and Respondents gave blanket consent to amicus briefs. On October 31, 2017, the RLC notified the parties of its intention to file this brief, and they again indicated their consent.

[2] The RLC's membership is listed on its website, www.RetailLitCenter.org.

cally, those decisions continue to have tremendous, harmful effect on America's retail industry. Indeed, there has been a strikingly inverse relationship between the legal support for, and practical significance of, the physical-presence requirement.

Over the past quarter century, technology has transformed retail commerce in a way utterly unforeseen when *Quill* revisited *Bellas Hess* in 1992. The word "internet" does not appear in *Quill*, which instead focused upon the "goliath" mail-order industry, with sales amounting to about $180 billion. 504 U.S. at 303. Since then, the internet has changed everything. "By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States." *Direct Mktg. Ass'n v. Brohl (DMA)*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring). By 2015, such sales totaled $5.71 trillion.[3] The mail-order "goliath" has given way to an e-commerce leviathan.

The RLC's members have met these market forces by incorporating technology into their businesses to provide their customers with superior service at reduced costs. But no amount of ingenuity can get around the unfair advantage that *Bellas Hess* and *Quill* give to absentee retailers by making their online sales appear duty-free. Thus, the RLC has a vital interest in whether this Court grants South Dakota's petition.

---

[3] William F. Fox, *Inability to Collect Sales Tax on Remote Sales Still Harms the Economy*, State Tax Notes (Nov. 6, 2017, forthcoming).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents an issue of pressing importance to businesses seeking to compete fairly in interstate commerce and States seeking to collect sales taxes sustainably in the digital age. By giving absentee retailers—*i.e.*, businesses with no physical presence in the communities in which they sell their products—constitutional immunity from the obligation to collect sales taxes, *Bellas Hess* and *Quill* have tremendously distorted interstate commerce and State tax policy. Because the lack of point-of-sale sales tax collection makes absentee e-commerce sales appear duty-free, customers are drawn to such transactions. And because the precondition to that duty-free status is being physically absent, such transactions *necessarily* drain money away from both the private and public sectors of the local community. Every day that distortion grows greater as the internet and e-commerce become more entwined in our lives. If the Court does not act now, *Quill* threatens to inflict irremediable practical harms even as its legal and economic rationales have vanished.

The 50 years since *Bellas Hess*, and the 25 years since *Quill*, have seen a transformation in retail. When *Bellas Hess* was decided in 1967, it would have been beyond imagination that Americans would use credit cards to instantaneously buy books, clothes, food, tools, movies, appliances, furniture, and any other movable good via computers. Shopping malls, bookstores, and hardware stores seemed like irremovable fixtures of the American landscape. Neither the

internet nor even its military predecessor, ARPANET, yet existed. There was simply no way for e-commerce to displace traditional retail.

When *Quill* was decided in 1992, that possibility was still farfetched. As noted, the internet went unmentioned in *Quill*. Justice White's partial dissent notes sales made via "computer linkup," but only after sales by "wire transfers," "fax," and "phone," before concluding that "the days of the door-to-door salesperson are not gone." 504 U.S. at 328. Three years after *Quill*, *Newsweek*—still then a print publication—scoffed at the notion that "[c]ommerce and business will shift from offices and malls to networks and modems" and declared that a "local mall does more business in an afternoon than the entire Internet handles in a month."[4] But what seemed fantastical then is now retail reality—the ability to "just point and click for great deals" in "instant catalog shopping" via "a trustworthy way to send money over the Internet."[5]

Technological innovation and creative disruption have been at the heart of American business from the very founding, when Alexander Hamilton strove to bring British water mill technology to Paterson, New Jersey. Traditional retailers, such as those that compose the RLC, have adapted to, or outright adopted, the transformative forces of the internet, e-commerce, the supply chain revolution, and other developments over the past 25 years. Such advances may sometimes

---

[4] Clifford Stoll, *Why the Web Won't Be Nirvana*, Newsweek (Feb. 25, 1995, 7:00 p.m.), http://www.newsweek.com/clifford-stoll-why-web-wont-be-nirvana-185306.

[5] *Id.*

destroy individual business, but on the whole they make America's economy stronger.

But the tax shelter provided to absentee e-commerce retailers by the physical-presence requirement is something else entirely. That kind of tax distortion does not make the economy stronger; rather, it encourages practices that make little business sense but nevertheless confer a bottom-line advantage. (See Pet. 18.) *Quill* itself recognized that "the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." 504 U.S. at 316. But because *stare decisis* caused the Court to look backwards to *Bellas Hess*, the Court could not see ahead to just how unjustified and destructive that tax "exemption" would become.

Twenty-five years later, it has become easier than ever to operate as an absentee retailer: far from posing extraordinary challenges, it is now in many ways cheaper to sell and ship goods from afar than to do so as a part of the local community. Of course, there remain benefits to operating on Main Street rather than simply on the Web. But businesses cannot strike a sensible balance because absentee retailers are able to hold themselves out as duty-free, giving them an apparent discount in comparison to stores that remain in the community. Thus, while the Commerce Clause is meant to encourage economic integration among the States, see *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979), the dormant Commerce Clause ruling in *Bellas Hess* has had the perverse effect of encouraging Balkanization and isolation, with companies hunkering in a single State to avoid collecting sales taxes when they sell their products elsewhere. The tax advantages of

that business form are, with ever-growing speed, driving businesses off Main Street and away from local communities. Faced with these mounting harms, Justice Kennedy called for "an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *DMA*, 135 S.Ct. at 1135.

South Dakota answered that call. With South Dakota's petition, the Court now has the opportunity, and indeed the obligation, to do the same thing it did in *Quill*: look back at what has happened over the past quarter century (in *Quill*, 1967-1992; here, 1992-2017) and determine whether enough has changed to revisit the lonely precedent of *Bellas Hess*. The 25 years leading up to *Quill* eroded *Bellas Hess*'s legal foundation. The last 25 years have eroded its economic assumptions as well. Now, it is the brick-and-mortar stores whose reliance interests should be vindicated: namely, reliance on the commonsense notion that they would not suffer competitive disadvantage merely for being a physical part of the communities they serve. It is past time to stop exempting absentee retailers from the general Commerce Clause rule that "interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988).

The Court should grant South Dakota's petition and eliminate the physical-presence requirement.

ARGUMENT

I. THE RETAIL ECONOMY HAS TRANSFORMED SINCE *QUILL*, UNDERCUTTING *STARE DECISIS* AND UNDERSCORING THE NEED TO REEVALUATE THE PHYSICAL-PRESENCE REQUIREMENT

As explained in South Dakota's petition (Pet. 21-27)—and as recognized in *Quill* itself, 504 U.S. at 311—the physical-presence requirement established in *Bellas Hess* is inconsistent with the rest of the Court's Commerce Clause jurisprudence. Then-Judge Gorsuch described *Quill*'s increasingly eccentric and anachronistic character in his concurrence in *DMA II*, 814 F.3d at 1150-51. The primary basis for retaining the physical-presence requirement in *Quill* was thus *stare decisis*. But, given the changed circumstances since *Quill*, *stare decisis* cannot justify keeping the rule any longer, and it certainly does not justify denying South Dakota's petition for certiorari.

As this Court has long recognized, *stare decisis* is not an inexorable command, and when the world changes, it is appropriate to consider whether the law should change as well. For instance, in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), the Court rejected *stare decisis* as a basis for hewing to existing dormant Commerce Clause precedent. Justice O'Connor dissented, urging that "the reliance interest sought to be protected by the doctrine of *stare decisis* ha[d] grown up around the settled rule." *Id.* at 300. But she agreed with the majority in principle that

"[s]ignificantly changed circumstances can make an older rule, defensible when formulated, inappropriate, and [this Court has] reconsidered cases in the dormant Commerce Clause area before." *Id.* at 301-02. The Court is particularly willing to engage in such reconsideration when technological changes have made prior dormant Commerce Clause rules obsolete and counterproductive. For instance, in *Granholm v. Heald*, 544 U.S. 460, 492 (2005), the Court departed from prior precedent allowing discrimination against out-of- state liquor sellers because "improvements in technology have eased the burden of monitoring out-of- state wineries." As the Court has explained in the antitrust context, "[a]lthough we do not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error," neither should the Court maintain "*per se*" bright-line rules that "remain[] forever fixed" while the world moves on. *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (internal citation and quotation marks omitted).

It is hard to imagine circumstances more profoundly changed than those of the retail economy from 1992 to 2017. When *Quill* was decided, less than 2% of Americans had some form of internet access,[6] and Amazon.com did not even exist; today, that number is about

---

[6] The World Bank, *Individuals using the Internet (% of population)*, https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US (last visited Oct. 31, 2017). The overwhelming majority of these few users would have been connecting to text-only interfaces via 2400-baud modems.

89%,[7] and Amazon.com is the single largest retailer in the world.[8] Not only was this transformation unforeseen in *Quill*, it was largely unforeseeable. Indeed, even in 1998, six years after *Quill* was decided, Nobel Prize-winning economist Paul Krugman famously declared that "[b]y 2005 or so, it will become clear that the Internet's impact on the economy has been no greater than the fax machine's."[9] The internet defied predictions precisely because it was so revolutionary.

By aggregating retail offerings into a single point of access, the internet enabled a form of online e-commerce that is different from mail-order not only in scale—almost $6 trillion annually for e-commerce versus $180 billion annually for mail-order in *Quill*—but also in kind. In 2010, a group of academics at MIT and Northwestern studied the effect of exempting absentee retailers from sales tax collection, and they concluded that e-commerce sales work quite differently

---

[7] *United States Internet Users*, http://www.internetlivestats.com/internet-users/us/ (last visited Oct. 24, 2017).

[8] Shan Li, *Amazon overtakes Wal-Mart as biggest retailer*, Los Angeles Times (July 24, 2015, 1:06 p.m.). http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html. This year, Amazon began collecting sales tax nationwide irrespective of its physical presence. Kelly Phillips Erb, *Tax Free No More: Amazon To Begin Collecting Sales Tax Nationwide on April 1*, Forbes (March 27, 2017, 4:22 p.m.), https://www.forbes.com/sites/kellyphillipserb/2017/03/27/tax-free-no-more-amazon-to-begin-collecting-sales-tax-nationwide-on-april-1/#5bcf92414e59.

[9] Jay Yarow, *Paul Krugman Responds To All the People Throwing Around His Old Internet Quote*, Business Insider (Dec. 30, 2013, 9:06 a.m.). http://www.businessinsider.com/paul-krugman-responds-to-internet-quote-2013-12.

from catalog sales. See Eric T. Anderson, et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, J. of Mktg. Research, Vol. 47, No. 2 (April 2010), pp. 229-239. While there was no apparent "reaction to sales taxes in the catalog channel," there was a considerable benefit to the tax exemption in e-commerce. *Id.* at 236. This is so, at least in part, because of the ease of "comparison shopping" on the internet. *Id.* at 235-37. E-commerce thus cannot be seen simply as an extension or expansion of mail-order; it is something materially different, with a far greater effect on the retail industry.

The transformation of retail wrought by the internet, computers, and digital technology is in no sense over; rather it is an ongoing, likely accelerating, process. Internet access statistics tell only part of the story. Even a decade ago, Americans went online almost exclusively from their computers, but today, almost 80% of Americans own smartphones.[10] Thus, the choice is no longer between shopping at home via a computer and shopping in person at a store; now, the great majority of Americans can remotely shop *at any time* via smartphone apps or web browsers. Already, "[m]obile commerce is expected to account for 34.5% of total e-commmerce sales this year, and it's further anticipated to surpass 50% by 2021.[11]" Other changes,

---

[10] Mobile Fact Sheet, Pew Research Center, http://www.pewinternet.org/fact-sheet/mobile/ (last visited Oct. 24, 2017).

[11] Dan O'Shea, *Mobile commerce to dominate online sales by 2021*. Retail Dive (Oct. 29, 2017), https://www.retaildive.com/news/mobile-commerce-to-dominate-online-sales-by-2021/508403/.

from virtual reality headsets to 3D printing, are also making headway. As one retail industry commentator noted:

> The Toys "R" Us bankruptcy is another reminder that retail is in a constant state of disruption, which is why only those retailers that relentlessly adapt and innovate have a chance of survival.[12]

America's traditional retailers, from the smallest mom-and-pop store to the largest chain, have lived and sometimes died by that dictum. While the *Wall Street Journal* has written about "2017's brick and mortar carnage,"[13] it is not all a story of decline. For instance, Target recently announced a $7 billion multi-year investment into its team and business that involves remodeling 1,000 stores across the country and opening hundreds of new ones around a novel, smaller floorplan.[14] Sears has opened new "concept stores," partnered with Amazon, and used its own "Shop Your Way membership platform, websites and mobile apps ... to maintain [its] valued [customer] relationships

---

[12] Robert Spector, *The Rise and Fall of Toys "R" Us*, The Robin Report (Oct. 18, 2017), http://www.therobinreport.com/the-rise-and-fall-of-toys-r-us/.

[13] See Valerie Bauerlein, *Retail Stores Made Elmira, N.Y., an Unlikely Success—Now They're Gone*, Wall Street Journal (Sept. 27, 2017, 11:23 a.m.), https://www.wsj.com/article_email/retail-stores-made-elmira-n-y-an-unlikely-successnow-theyre-gone-1506525802-lMyQjAxMTI3NTIyNzIyMDc0Wj/.

[14] Kavita Kumar, *Target will remodel more stores to compete with Amazon and Walmart*, Star Tribune (Oct 19, 2017, 9:39 p.m.), http://www.startribune.com/target-will-remodel-more-stores-to-compete-with-amazon-and-walmart/451633813/

long after a store closes its doors."[15] Best Buy's newly announced plan for growth includes expanding into new service offerings such as In-Home Advisors and Total Tech Support.[16] At the same time, online e-commerce has spread into areas where formerly it would have seemed impossible, such as Wayfair's recent push to sell sofas online.[17]

And these stories are drawn from a mere six-week slice of what is happening in retail.

These changes vindicate the prescient misgivings voiced by Justice White in *Quill*, namely that, "in today's [1992] economy, physical presence frequently has very little to do with a transaction a State might seek to tax," and that it was impossible "to attempt to justify an anachronistic notion of physical presence in economic terms." 504 U.S. at 328 (concurring in part and dissenting in part). But even Justice White did not, and could not, anticipate the degree to which "physical presence" and "sales" would be decoupled by 2017. In 1992, the majority in *Quill* could still write that "the

---

[15] Ben Unglesbee, *Sears borrows $100M (more) from Eddie Lampert's hedge fund*, Retail Dive (Oct. 6, 2017), http://www.retaildive.com/news/sears-borrows-100m-more-from-eddie-lamperts-hedge-fund/506702/; Daphne Howland, *Sears Holdings to shutter another 20 stores*, Retail Dive (June 23, 2017), http://www.retaildive.com/news/sears-holdings-to-shutter-another-20-stores/445710/.

[16] *CEO Hubert Joly: Best Buy 2020 focused on growth*, CNBC (Sept. 19, 2017, 8:34 a.m.), https://www.cnbc.com/video/2017/09/19/ceo-hubert-joly-best-buy-2020-focused-on-growth.html.

[17] Julie Creswell. *Buy a Sofa Online? Wayfair Is Counting on It*, New York Times (Oct. 15, 2017), https://www.nytimes.com/2017/10/15/business/wayfair-online-furniture.html.

Bellas Hess rule appears artificial at its *edges*," *id.* at 315 (emphasis added), whereas today it looks artificial to its very core.

Consider, for example, that the physical-presence requirement relies not on the location of the *transaction* but on the location of the *retailer*. Thus, an identical online transaction—buying a product on Wayfair.com versus Walmart.com—is treated differently not because the Walmart.com server processing the transaction or the Walmart warehouse shipping the good is "physically present" in the State, but simply because *some* Walmart store or warehouse or office space, possibly wholly unrelated to the transaction, is in-state. Thus, a customer of Walmart.com has sales taxes collected at the on-line point of sale based purely on the coincidence of the retailer's real estate footprint.

To the extent there is any actual physical connection between a particular online transaction and the State, it is not the happenstantial existence of a store somewhere within the State's borders. Rather, it is the fiber-optic cables transmitting the purchase request, the concrete roads carrying the trucks that deliver the packages, and the flesh-and-blood law enforcement officers ensuring those packages are not stolen off a customer's porch. Indeed, it is precisely the local "last mile" that presents the greatest hurdle to absentee retailers,[18] a hurdle that would be insurmountable if States and communities did not provide such solid

---

[18] See, e.g., Julie Jargon, Annie Gasparro, and Heather Haddon, *For Amazon, Now Comes the Hard Part*, Wall Street Journal (June 18, 2017, 7:07 p.m.), https://www.wsj.com/articles/for-amazon-now-comes-the-hard-part-1497827240 (describing Amazon's need to "solve the 'last mile' logistics puzzle").

infrastructure. Far from taking place solely in the ether, online sales are transacted across and upon the physical State. Absentee e-commerce depends upon modern, well-developed government and extensive public infrastructure to conduct its business.

Yet while a State may require Walmart to collect sales taxes when it conducts an online sale, *Quill* gives Wayfair constitutional immunity from that obligation. *Quill* incorrectly describes this as "exemption from state taxation." 504 U.S. at 316. In fact, the transaction is still taxed; Wayfair is exempt only from the *de minimis* cost of collecting the tax.

But the Court's own confusion reveals the real value to absentee retailers: the widespread misimpression that their sales are duty-free. (See Pet. 19.) Given the tight margins in the retail industry, these "no tax" sales have a huge advantage. States can, and do, struggle to collect those taxes. Witness Vermont's decision to send "close to 20,000 letters to Vermonters telling them they may owe sales tax for online and other purchases."[19] The practical reality is that *Quill* "creates an interstate tax shelter for one form of business," 504 U.S. at 329 (White, J., concurring in part and dissenting in part), while turning millions of online customers into unknowing tax cheats.

Even at the time of *Quill*, the Court recognized that *Bellas Hess*'s 25-year-old physical-presence requirement was contrary to "current Commerce Clause juris-

---

[19] Morgan True, *State sending 20,000 letters to collect alternative sales tax*, Brattleboro Reformer (Sept. 4, 2017, 5:33 p.m.), http://www.reformer.com/stories/state-sending-20000-letters-to-collect-alternative-sales-tax,518443.

prudence," which expressly held that the Commerce Clause did not "relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business." *Id.* at 310 & n.5 (maj. op.) (internal quotation marks, citation, and brackets omitted). The Court justified this unfair discrepancy based on "settled expectations" and "reliance interests." *Id.* at 316-17. But such "reliance interests ... cannot justify an inefficient [and narrow] rule," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007), particularly given that the oft-boasted "disruptive innovation"[20] of e-commerce logically precludes claiming reliance interests. Moreover, that reliance rationale has withered over the past quarter century even while the "just share of the state tax burden" left uncollected by absentee retailers has swollen enormously.

In fact, to the extent any retailers possess a reliance interest that merits the Court's recognition, it is the brick-and-mortar retailers that have—over the course of decades—invested billions of dollars in helping literally build up local communities, only to discover that this footprint carries with it an enormous competitive tax disadvantage when it comes to retail sales, whether in-store *or* online.

Take, for example, RLC member Petco. When Petco began in 1965, it was a mail-order business, and it did

---

[20] See A.W., *The Economist explains: What disruptive innovation means*, The Economist (Jan. 25, 2015), https://www.economist.com/blogs/economist-explains/2015/01/economist-explains-15.

not expand beyond California until 1980.[21] By 1994, it had expanded into 13 States,[22] and by 2008, it had reached all 50 States.[23] This is, by any measure, a classic American success story, and exactly the kind of interstate economic integration that the Commerce Clause was designed to foster.

While Petco was investing millions in providing exemplary pet care and products to customers in communities in all 50 States, the internet e-commerce boom changed retail. Petco adapted by complementing its physical stores with a return to its mail-order roots via Petco.com. When Petco sells its goods via Petco.com, it accurately informs customers that, "[b]y law, we must collect applicable sales tax for orders shipping to states where we have retail stores."[24] By contrast, when petsupplies.com sells the same products, it poses the question, "Must I pay sales taxes?" and answers it, "We are required to collect sales tax for orders delivered in the states [where] we are located: PA, MO, OH, CT and NY," recommending that customers do their own research into their "state's tax regulations for online purchases, as petsupplies.com is not responsible

---

[21] https://about.petco.com/1960s-80s-petcohistory (last visited Oct. 24, 2017).

[22] https://about.petco.com/1990s-petcohistory (last visited Oct. 24, 2017).

[23] https://about.petco.com/early2000s-petcohistory (last visited Oct. 24, 2017).

[24] https://www.petco.com/content/petco/PetcoStore/en_US/pet-services/help/help-payments-fees.html (last visited Oct. 24, 2017).

for [any other] individual state sales tax collection."[25] Far from vindicating "settled expectations" and "reliance interests," the interaction of *Quill* and e-commerce has instead turned Petco's amazing 50-state expansion into a competitive disadvantage against absentee retailers like petsupplies.com, which only collects sales tax in five States. Retailers now hesitate to expand into new states precisely to avoid such a disadvantage. See Anderson, *Sales Taxes*, *supra*, at 237-39.

This is just one small example of how the "significantly changed circumstances" of the past 25 years have not only eroded the economic premises of *Quill* but also imperiled far more legitimate expectation interests than the ability to inaccurately claim duty-free status or avoid the minimal cost of collecting sales tax. These "changed circumstances" require the Court's prompt attention. "It's no secret the retail industry is undergoing a transformational period that has many scaling back physical operations, shuttering stores, reorganizing mounting debt loads, and in some cases ending up in bankruptcy court."[26]

It is imperative that, as the retail industry adapts to the growing ubiquity of the internet and e-commerce, that transformation is driven by business efficiencies and not tax dodges, so that community-based retailers

---

[25] https://www.petsupplies.com/CS/ShippingInfo.aspx#2 (last visited Oct. 24, 2017).

[26] Corinne Ruff & Ben Unglsebee, *The running list of 2017 retail apocalypse victims*. Retail Dive (July 5, 2017), http://www.retaildive.com/news/retail-bankruptcies-2017/446086/.

are not forced to abandon their physical presence in order to avail themselves of *Quill*'s "tax shelter." The invisible hand of the market, and not the visible thumb of *Quill* on the scales, should guide retail's growth.

II. FAR FROM PROMOTING STABILITY IN THE LAW, THE PHYSICAL-PRESENCE REQUIREMENT IS GENERATING A WELTER OF LEGISLATION AND LITIGATION

As Justice Kennedy noted—and as South Dakota's petition powerfully establishes—the "tax shelter" created by *Quill* is draining State and local coffers of desperately needed tax revenue. Unsurprisingly, the States are not sitting idly by. While South Dakota has enacted a direct and forthright challenge to the physical-presence requirement, other States have attempted "to find ways of achieving comparable results through different means," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring). Some States have done this by attempting to get as close to what *Quill* forbids as possible without coming within its literal terms, such that general Commerce Clause norms will permit the taxation. *Id.* And others have remained within *Quill*'s literal terms but, like Houdini in a straight-jacket, engaged in such contortions as to escape the decision's restraint. See, e.g., 830 Mass. Code Regs. 64H1.7 (defining "physical presence" to include, *inter alia*, "the use of in-state software (*e.g.*, 'apps') and ancillary data (*e.g.*, 'cookies') which are distributed to or stored on the

computers or other physical communications devices of a vendor's in-state customers").[27]

All of these legislative novelties impose far greater burdens than the nominal cost of collecting sales taxes at the point of sale, and all of them have spawned litigation as absentee retailers struggle to maintain "a competitive advantage over their brick-and-mortar competitors thanks to *Bellas Hess* and *Quill*." *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). The result is that the physical-presence requirement has the arbitrariness and harshness of Draconian law but not the consistency or stability. *Quill* was thus simply wrong when it concluded that the "artificiality" of the physical-presence requirement would be "more than offset by the benefits of a clear rule." 504 U.S. at 315. Present circumstances show that the physical-presence requirement does *not* "firmly establish[] the boundaries of legitimate state authority to impose a duty to collect sales and use taxes" or "reduce[] litigation concerning those taxes." *Id.*

The shifting boundaries of State taxation have given rise to litigation over *Quill*'s effect in Alabama, Colorado, Indiana, Massachusetts, South Carolina,

---

[27] The real effect of *Quill* has been to encourage the States to adopt gerrymandered approaches to sales tax collection that violate basic principles of sound taxation recognized at least since Adam Smith wrote *The Wealth of Nations*: that like enterprises be taxed the same way; that taxes be obvious to the taxpayer at the time of the transaction; that taxes be collected at the most opportune moment for the taxpayer; and that governments employ the most efficient forms of tax collection. See Tyler A. LeFevre, *Justice in Taxation*, 41 Vt. L. Rev. 763, 769-70 (2017).

Tennessee, and Wyoming.[28] Pennsylvania's legislature just passed a new online sales tax law that incorporates features of Colorado's reporting and the economic-nexus approach,[29] and Mississippi seems poised to adopt one as well.[30] These will no doubt yield challenges, too. Many of these State rules have already taken effect (or will soon), imposing registration, collection and remittance requirements—at least one imposes penalties for failure to act by October 1, 2017. See 830 Mass. Code Regs. 64H1.7. While Respondents may argue that such a ferment should cause the Court to wait and watch the development of the law, there are compelling reasons not to do so here.

First, as explained above, time is of the essence if community-based retailers are to maintain their physical presence. (See supra pp. 10-18.)

Second, waiting and watching as businesses and States maneuver around *Quill* is like watching to see how a badly broken bone knits on its own before deciding whether or not to set it back in proper alignment. The business and legal structures that are growing up around *Quill* are crooked. Some may prove workable,

---

[28] The RLC has collected general information about this area of litigation, as well as pleadings from some of the cases, on its website. See http://www.rila.org/enterprise/retaillitigationcenter/efairnesslitigation/Pages/eFairness%20Litigation.aspx (last visited Oct. 24, 2017).

[29] *A dozen ways Pa.'s 2017-18 state budget may impact your life*, Penn Live (Oct. 27, 2017, 10:19 a.m.), http://www.pennlive.com/politics/index.ssf/2017/10/a_dozen_ways_pas_2017-8_state.html.

[30] https://s3.amazonaws.com/pdfs.taxnotes.com/2017/2017-77863_STTDocs-MS-Remote-Sellers-Rule-Economic-Statement.pdf (last visited Oct. 24, 2017).

after a fashion, but they will necessarily be inferior to the structures that would arise from a level playing field and a coherent Commerce Clause jurisprudence.

Third, none of the other cases arising from State efforts to address *Quill*'s distortion is as timely and unencumbered a vehicle as this one. For instance, Newegg's challenge to Alabama's sales tax raises issues of state law and good-faith reliance that are not present in this case.[31] The challenge to Massachusetts's new tax policy rests on state administrative procedure and the Internet Tax Freedom Act as well as on the Commerce Clause and *Quill*.[32] Moreover, a new challenge to Massachusetts's policy has just been filed *in Virginia*—with the inevitable jurisdictional issues that raises—adding yet another layer of complexity.[33]

Similar complexities exist in the other lawsuits as well. Moreover, those cases may take years to reach

---

[31] Newegg Inc.'s Notice of Appeal of the Alabama Dept. of Revenue's Final Assessment of Seller's Use Tax, http://www.rila.org/enterprise/retaillitigationcenter/Documents/E-Fairness%20Files/Newegg-Inc.-Alabama-Tax-Tribunal-Notice-of-Appeal-filed-June-8-2016.pdf (last visited Oct. 24, 2017).

[32] American Catalog Mailers Association and Netchoice's Verified Complaint for Declaratory Judgment, http://www.rila.org/enterprise/retaillitigationcenter/Documents/E-Fairness%20Files/Verified%20Complaint%20for%20Declaratory%20Jud%206-13-17%20(1).pdf (last visited Oct. 24, 2017).

[33] Tracy Maple, *Crutchfield sues to block Massachusetts from collecting online sales tax*, Digital Commerce 360 (Oct. 25, 2017), https://www.digitalcommerce360.com/2017/10/25/crutchfield-sues-block-massachusetts-collecting-online-sales-tax/.

this Court. During that time, States will struggle to establish tax policy to address the internet's accelerating transformation of retail while bound by a rule made for mail-order long before the internet even existed. These are circumstances that call not for delay and "percolation," but for swift correction of a legal standard widely agreed to be wrong.

South Dakota's law, and its pending petition, provide a clean, direct challenge to *Quill* and an excellent example of how the ordinary economic-nexus approach can provide a brighter line than the physical-presence requirement. Requiring retailers with more than $100,000 in in-state sales or 200 in-state transactions to collect sales tax is vastly more straightforward than, for example, requiring retailers to report transactions so that the State can send dunning letters to consumers, see, e.g., *DMA*, 135 S. Ct. at 1127 (describing Colorado's law), or determining whether electronic data stored on in-state devices constitutes a physical presence, see 830 Mass. Code Regs. 64H1.7. It also has the virtue of treating community retailers and absentee retailers the same way when they participate in e-commerce. The RLC respectfully submits that there will not be a better time, or a better vehicle, to set the Court's dormant Commerce Clause doctrine aright so that the retail industry and sales tax policy can develop as they should.

III. THE COURT SHOULD NOT EXPECT CONGRESS TO CORRECT THE CONSTITUTIONAL ERROR OF *BELLAS HESS* AND *QUILL*

The hope of congressional intercession is not a basis for this Court to decline to reconsider the judge-made physical-presence requirement.

In *Quill*, the Court left the physical-presence requirement in place because "even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence," the error was one that "Congress has the ultimate power to resolve." 504 U.S. at 318. That is not quite right. Only this Court has the power to correct the *constitutional* error that is the basis of *Bellas Hess* and *Quill*, namely the notion that the Constitution forbids the States from requiring that absentee retailers collect sales tax unless Congress grants them that power by largesse. Congress cannot overrule this Court's interpretation of the Commerce Clause. At most Congress can *bypass* the error by returning to the States as a matter of legislative grace the taxing power denied them by this Court as a matter of constitutional law.[34]

The Commerce Clause holdings in *Bellas Hess* and *Quill* are not political decisions, but legal ones about the default allocation of sales-taxing power between the States and Congress in our federal system of gov-

---

[34] To be sure, dormant Commerce Clause rulings are the constitutional holdings most susceptible to congressional override, e.g., *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring), but they are nevertheless distinct from statutory interpretation or common-law rulings.

ernment. Were the Court to reevaluate the physical-presence requirement, it would be deciding not whether, as a matter of policy, States ought to require internet-only sellers to collect sales tax but whether, as a matter of law, States possess the inherent constitutional authority to do so absent congressional authorization. Conversely, were Congress to evaluate whether to bypass *Quill* through legislation enabling State laws such as South Dakota's, it would not be interpreting the Commerce Clause. Instead, it would be weighing myriad political considerations that have nothing to do with the Constitution.

While the constitutional and political questions are distinct, this Court's decisions in *Bellas Hess* and *Quill* exert enormous influence on the political process because of inertia and endowment effects. The same political body may be loath to strip States of their sovereign taxing power *and* loath to pass legislation that could be misinterpreted as a tax increase. Thus, this Court's legal ruling as to where the Constitution initially places the taxing power has been not just the first word, but also the last word on the political question over the past 50 years. Just as it is impossible for Congress to correct this Court's interpretation of the Commerce Clause, it may well be impracticable for Congress to remedy that ruling's consequences.

"[I]n the absence of congressional action this Court has prescribed the rules which determine the power of states to tax interstate traffic, and therefore should alter these rules if necessary." *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546 (1950), *abrogated on other grounds by Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990). As this Court has recognized, "it is hard to see how the judiciary can wash its hands of a

problem it created," even if the bottom-line outcome could be said to implicate policy considerations often left to political branches. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008). "[W]hen we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2426 (2014) (Thomas, J., concurring in the judgment).

The RLC respectfully submits that where the Court intervenes in interstate commerce with a "fixed" judge-made rule, it has the obligation to review from time to time whether that rule is reflecting or distorting current "economic realit[y]." See *Khan*, 522 U.S. at 21. That is exactly what the Court did in *Quill*, when it gave the physical-presence requirement a 25-year checkup. Now another 25 years have passed, and the need for another checkup is more pressing than ever. Regardless of how the Court ultimately resolves this case on the merits, *at a minimum* the retail sea change over the past quarter century requires that the Court give a hard, considered look at the physical-presence requirement to decide whether such an "artificial" constitutional rule must still be maintained on account of putative reliance interests. *Quill*, 504 U.S. at 315. Such review is the proper role of the Court, not Congress, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

CONCLUSION

The Court should grant South Dakota's petition for a writ of certiorari and eliminate the physical-presence requirement.

Respectfully submitted,

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
donald.verrilli@mto.com
(202) 220-1100

MARK R. YOHALEM
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, California 90071

NOVEMBER 1, 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV - 1 2017
OFFICE OF THE CLERK

No. 17-494

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

–v–

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for Writ of Certiorari to the South Dakota Supreme Court

BRIEF OF AMICUS CURIAE SOUTH DAKOTA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

WILLIAM M. VAN CAMP
COUNSEL FOR AMICUS CURIAE
OLINGER, LOVALD, MCCAHREN, VAN CAMP & KONRAD, P.C.
117 E. CAPITOL AVENUE
P.O. BOX 66
PIERRE, SD 57501
(605) 224-8851
BVANCAMP@OLINGERLAW.NET

NOVEMBER 2, 2017

SUPREME COURT PRESS • (888) 958-5705 • BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTEREST OF AMICUS CURIAE 1
INTRODUCTION 3
REASONS FOR GRANTING THE PETITION 6
I. COMPETITIVE DISADVANTAGE 6
II. WEAKNESS IN SALES TAX REVENUES 8
CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Direct Market Association v. Brohl,
135 S. Ct. 1124 (2015) 4, 7, 8, 9

Montgomery Ward and Co. v. South Dakota Retail Merchants' and Hardware Dealers' Ass'n et al., 150 F. 413
(Circuit Court. D. South Dakota, 1907)..... 1

Quill Corporation v. North Dakota,
112 S. Ct. 1904 (1992) .....passim

South Dakota v. Wayfair,
2017 WL 4051554 (SD 2017) 5, 7

STATUTES

SDCL § 10-45 et seq..... 2

SDCL § 10-45-22 2

SDCL § 10-45-27.3 3

SDCL § 10-46 et seq..... 3

SDCL § 10-64, et seq..... 3, 6

JUDICIAL RULES

Sup. Ct. R. 37.2(a)..... 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

"National Retail Federation Estimates 8-12% U.S. E-commerce growth in 2017" *Business Insider*, February 10, 2017 6

"Online Shopping and E-Commerce", *Pew Research Center*, December 19, 2016 8

Deloitte, LLP, 2017 Holiday Survey, October 24, 2017 6

Douglas Kellogg. NTU press release, June 15, 2015 12

Douglas Kellogg. NTU press release, October 31, 2014 11

Kelly Phillips Erb. "Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" *Forbes*, March 27, 2017 4

Letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee interim meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17lettertorevenuedoc2.pdf 10

South Dakota Comprehensive Annual Financial Report for fiscal year ending June 30, 2016 10

TABLE OF AUTHORITIES—Continued

Page

South Dakota Department of Revenue Presentation to the Interim Joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf 4

South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June 2016. http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf 5

U.S. Census Bureau, Annual Estimates of Resident Population for the United States Region, States and Puerto Rico: April 1, 2010 to July 1, 2015 8

U.S. Census Bureau, State Area Measurements (2010) 8

U.S. Department of Commerce Quarterly Retail E-Commerce Sales, August 17, 2017 6

INTEREST OF AMICUS CURIAE[1]

The South Dakota Retailers Association ("SDRA") was founded in 1897 as the South Dakota Retail Merchants Association. Eighty-five business owners joined together in the summer of that year to draft a constitution and bylaws for the organization. From the official records of SDRA, the charter members agreed that their aim was to improve and increase the business being done by the merchants of South Dakota. Interestingly, membership was not allowed for catalog houses or anyone doing business with catalog houses as such activities were seen at that early date as a challenge to the retail businesses of South Dakota. In 1906, Montgomery Ward and Company sued SDRA claiming conspiracy amongst other charges while seeking an injunction on the Board's activity. SDRA prevailed.[2]

Today, SDRA has over 3,700 members and ranks as one of the largest retail associations in the nation. The members of SDRA operate in over 160 categories of business.

---

[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus,* its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

[2] *Montgomery Ward and Co. v. South Dakota Retail Merchants' and Hardware Dealers' Ass'n et al.,* 150 F. 413 (Circuit Court. D. South Dakota, 1907).

The issue presented to the Court in the Petitioner's request for Certiorari is not a new one to SDRA. In the resolutions passed at the June 1937 SDRA board meeting, the board at the time resolved:

> . . . in as much as a measure is now before our national congress, which would compel the collection of sales tax by chain stores and mail order houses, without the state in which the consumer lives and compel a remittance of these sales taxes to the federal government with a return to the state of consumer residence; we ask our South Dakota congressional members to work toward enactment of this law, and that they be advised by our Secretary.

Even with no record to speak of the impact of chain stores and mail order houses in 1937, we believe it is safe to assume that e-commerce and the ease with which items are bought, sold and shipped across state lines impacts the members of SDRA today, much the same as was the case in 1937 with mail order sales escaping sales tax at that time. Eighty years later, South Dakota retailers are still waiting for this concern to be addressed.

Currently under South Dakota Law, a member of SDRA ("Member") is held responsible for collecting sales tax due to the State and any municipality. *See*, SDCL § 10-45 et seq. The Member may collect from the customer the sales tax that is due and owing on a purchase. *See*, SDCL § 10-45-22. The Member holds that money in trust for the State of South Dakota and remits it as provided by law. *See*, SDCL § 10-45-

27.3. Today, as a result of the *Quill*[3] decision, an online retailer without a physical presence in the State of South Dakota is not required to collect or remit sales tax from a South Dakota consumer or customer. *See*, *Quill* generally. For this reason, SDRA has a substantial interest in the Court's review of the decision below. The economic playing field for the members of SDRA is not level versus our internet brethren. Overturning *Quill* as the Petitioner seeks is an important step to allow for fair competition amongst businesses, both within and outside of South Dakota.

INTRODUCTION

It should be noted that over 100 online retailers are voluntarily collecting and remitting sales tax on transactions with South Dakota consumers as a result of the 2016 legislation passed in South Dakota known as Senate Bill 106.[4] *See*, SDCL § 10-64, et seq. This voluntary compliance takes away any argument the Respondent would make on the difficulty of such collection and remission.

If an internet retailer chooses not to collect and remit sales tax, a South Dakota consumer is required under SDCL § 10-46 et seq. to submit and pay use tax for items purchased online. By *Quill* allowing online

---

[3] *Quill Corporation v. North Dakota*, 112 S. Ct. 1904 (1992).

[4] South Dakota Department of Revenue presentation to the interim joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf

retailers to avoid the requirement of collecting sales tax from the consumer, the result has been stagnant sales tax growth in the State of South Dakota even as internet commerce continues to grow. Most consumers, frankly, do not know use taxes may be owed with online purchases. *See*, Kelly Phillips Erb. "Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" *Forbes*, March 27, 2017.[5] This Court is well aware of the fact that use tax is often not reported and paid by the consuming public. As Justice Thomas stated, "voluntary compliance with the latter requirement (use tax) is relatively low, leading to a significant loss of tax revenue, especially as internet retailers have increasingly displaced their brick-and-mortar kin." *Direct Market Association v. Brohl*, 135 S. Ct. 1124, 1127 (2015).

In attempting to obtain what is owed as use tax, the State of South Dakota issues a use tax information packet decrying "it's a matter of fairness." *See*, South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June 2016.[6]

---

[5] Citing as evidence that use tax payments do not keep pace with sales a 2015 International Council of Shopping Centers poll that found 62% of registered voters were not aware that use taxes were payable with online purchases.

[6] The document states in part, "It's a matter of fairness . . .With the ease of purchasing over the Internet, online sales have exploded over the years and are increasing every year. Main street businesses, the ones who employ our citizens, pay property tax and support local organizations, are at a 6.5% competitive disadvantage since most out-of-state businesses are not required to pay tax in a state where they have no physical presence. It becomes the purchaser's responsibility to pay the use tax that is due." *Id.*

http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf

At the same time, internet sales nationally, and by logical extension in South Dakota, have continued to grow at a rate much higher than retail industry sales as a whole. *See*, "National Retail Federation Estimates 8-12% U.S. E-commerce growth in 2017." *Business Insider*, February 10, 2017.[7] According to the U.S. Department of Commerce, e-commerce sales in the second quarter of 2017 increased 16.2% from the second quarter of 2016. *See*, U.S. Department of Commerce Quarterly Retail E-Commerce Sales, August 17, 2017. Total retail sales increased only 4.1% in the same period. *Id.* In a recent survey by Deloitte, LLP, consumers now for the first time expect the majority of their holiday spending to occur online. *See*, Deloitte, LLP, 2017 Holiday Survey, at 17, October 24, 2017.

In the case now seeking to be reviewed by this Court, the South Dakota Supreme Court recognized that "South Dakota has no state income tax and relies on retail sales and use tax for much of its revenue . . . (and) (a)s internet sales by these sellers (e-commerce) have risen, state revenues have decreased." *South Dakota v. Wayfair*, 2017 WL 4051554 (SD 2017). The South Dakota Legislature found in 2016 that

> The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products trans-

---

[7] Citing the National Retail Federation, which expects online retail to grow 8-12% for 2017, which may be up to three times higher than the retail industry in general.

> ferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;[8] and (t)he structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.[9]

REASONS FOR GRANTING THE PETITION

I. COMPETITIVE DISADVANTAGE

Selling and buying a product in the unique rural marketplace that is South Dakota is difficult. South Dakota is a state with a population of 865,454 (2016 estimate)[10] ranking it 46 amongst 50 in population yet 17 amongst 50 in geographical size.[11] With the cost of a good sold in South Dakota subject to collection of sales tax adding as much as six and one-half

---

[8] SDCL § 10-64-1(1).

[9] SDCL § 10-64-1(4).

[10] U.S. Census Bureau, Annual Estimates of Resident Population for the United States Region, States and Puerto Rico: April 1, 2010 to July 1, 2015.

[11] U.S. Census Bureau, State Area Measurements (2010).

percent to the cost of an item versus an identical item sold online the unfair business advantage of the e-commerce company not collecting and remitting sales tax is obvious. Logic dictates that consumers will buy the less expensive item if they are in fact the same item.[12] This as the online shopping public has gone from 22% of Americans in 2000 to 79% of Americans who now say they purchase items online. *Id at 5.*

At the same time online sales have continued to increase the responsibilities felt by local businesses in their communities have not decreased. The continued need to support community activities and events has not diminished. As a result of e-commerce sales based on a competitive advantage, logically these local costs of doing business have taken a greater piece of the SDRA Members' operational budgets as sales continue to decline or face pressure. When the local school needs a sponsor to help support its activities, it does not reach out to Wayfair, it reaches out to the local hardware store. Moreover, the very jobs that retailers create in South Dakota face the competitive disadvantage our businesses deal with in the *Quill* environment. Lower sales due to unfair tax rules can only translate to fewer small businesses in South Dakota and fewer jobs available.

Justice Kennedy recognized in his concurrence in *Brohl,* that there is an "unfairness to local retailers

---

[12] Not surprisingly, in a Pew Research Survey, when asked, 65% of online consumers stated they would make a purchase based on price in looking at a purchase being made online or in a physical store. *See,* "Online Shopping and E-Commerce." *Pew Research Center,* at 8, December 19, 2016.

and their customers who do not pay taxes at the registers" as a result of e-commerce transactions not subject to point of sales tax collection. *Brohl,* Kennedy concurring at 1135. This avoidance of tax collection in the e-commerce sphere, the outgrowth of *Quill,* causes, "extreme harm and unfairness to the States." *Brohl,* Kennedy concurring at 1134.

II. Weakness In Sales Tax Revenues

A weakness in the growth of sales tax revenues has forced the regulatory authorities in the State of South Dakota to increase their audit activities and efforts at collecting sales and use taxes. With slowing sales tax revenues, the State necessarily must step up its enforcement efforts of businesses that it can regulate and audit to seek out taxes that have not been remitted and may be owed to the State of South Dakota. *See,* letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee interim meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17lettertorevenuedoc2.pdf. Such efforts bring additional audit risks and costs for SDRA members. Such risks and costs are avoided by online sellers due to *Quill.*

For the fiscal years 2014, 2015 and 2016, the State of South Dakota saw a year over year average increase in sales tax revenues of 1.80 percent.[13] What

---

[13] *See,* South Dakota Comprehensive Annual Financial Report for fiscal year ending June 30, 2016, at 176. For the year ending June 30, 2014 sales tax revenues were $858,001,000. For the year ending June 30, 2015, they were $871,402,000. For 2016 they were $905,475,000.

is interesting in these statistics is that the retail trade industry in South Dakota represents approximately 38% of the reporting filers in the fiscal year ending 2016. But that 38% represents a disproportionately large 52.66% of the taxable sales. *Id.* at 180. SDRA Members represent the tax collecting hub for South Dakota and need to be able to compete in order for South Dakota to obtain the tax revenue it needs.

This experience in South Dakota, as witnessed in sales tax collections, clearly does not meet with or coincide with the continued online sales growth. *See* above at 5. Rather, it clearly points to the problem of tax receipts not capturing the growth in internet sales.

Again, this out flight of unattainable tax revenue due to the increase of e-commerce sales has, as was pointed out by Justice Kennedy, hurt the State. "*Quill* now harms states to a degree far greater than could have been anticipated earlier." *Brohl,* Kennedy concurring at 1135.

As is often the case, your argument is sometimes best made by your opponent. In a press release opposing the market place fairness act, an effort to bring legislation overturning the physical presence requirement found in *Quill,* the National Taxpayers Union ("NTU") stated that for the ten years following 2015, the implementation of such legislation could amount to $340 Billion in additional taxes collected. Douglas Kellogg. NTU press release, October 31, 2014. In a similar release by NTU in June of 2015, the Executive Vice President of NTU commented that consumers would be required, if similar legislation passed, to pay "hundreds of billions of dollars in addi-

tional sales tax . . . " Douglas Kellogg. NTU press release, June 15, 2015. Obviously, these additional taxes are simply the amounts that should be captured by use tax and are due and owing the states where the consumers live, work and buy products online. The revenues (taxes) escape collection at the State level due to *Quill's* physical presence test. It is time for that to change.

CONCLUSION

For these reasons, and those stated by the Petitioner, SDRA urges the Court to grant the petition for Certiorari and reverse the decision below.

Respectfully submitted,

WILLIAM M. VAN CAMP
COUNSEL FOR AMICUS CURIAE
OLINGER, LOVALD, MCCAHREN,
VAN CAMP & KONRAD, P.C.
117 E. CAPITOL AVENUE
P.O. BOX 66
PIERRE, SD 57501
(605) 224-8851
BVANCAMP@OLINGERLAW.NET

NOVEMBER 2, 2017

BLANK PAGE

Supreme Court, U.S.
FILED
NOV 2 2017
OFFICE OF THE CLERK

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

On Petition for a Writ of Certiorari to the South Dakota Supreme Court

BRIEF FOR *AMICUS CURIAE* STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER

R. BRUCE JOHNSON
R. BRUCE JOHNSON, LLC
2342 East Wrenhaven Lane
Holladay, Utah 84121
(801) 558-4128
rbrucejohnson@outlook.com

LAURA K. MCNALLY
Counsel of Record
ANDREW R. DEVOOGHT
LOEB & LOEB LLP
321 N. Clark Street
Suite 2300
Chicago, IL 60654
(312) 464-3155
lmcnally@loeb.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

BRIEF FOR *AMICUS CURIAE* STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER 1

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

The Streamlined Sales and Use Tax Agreement Has Eliminated Any Undue Burden on Interstate Commerce 6

A. The Practical Burdens of Compliance Formed the Foundations of *Bellas Hess* and *Quill.* 6

B. The Streamlined States Have Eliminated Any Undue Burdens On Sellers. 7

1. State and Local Taxes Are Administered at the State Level. 8

2. Tax Rates Are Standardized at the State Level. 8

3. Exemptions Are Standardized at the State Level. 9

4. Administrative Requirements Are Standardized Across All Member States. 10

a. Uniform Definitions. 10

b. Simplified Electronic Returns 11

c. Centralized Registration 11

d. Other Uniform Procedures. 12

5. Certified Service Providers Are Made Available to Remote Sellers at No Charge. .. 12

C. *Stare Decisis* Provides An Insufficient Basis to Deny Review. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124 (2015), (Kennedy, J., concurring) 4, 14

National Bellas Hess v. Department of Revenue of Illinois, 386 U.S. 753 (1967) 3, 6, 10

Quill v. North Dakota, 504 U.S. 298 (1992) 3, 7, 13

Other Authority

Streamlined Sales and Use Tax Agreement .....*passim*

BRIEF FOR *AMICUS CURIAE* STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Streamlined Sales Tax Governing Board (the "Governing Board") is the body that administers the Streamlined Sales and Use Tax Agreement (the "Agreement"),[2] a multi-State agreement that "simplif[ies] and modernize[s] sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102.

Forty-four States, the District of Columbia, and Puerto Rico participated in the development of the Agreement. The Governing Board is currently comprised of 24 States. Twenty-three of these States (the "Streamlined States") fully comply with the

---

[1] Petitioners and Respondents filed Blanket Consents to the filing of *amicus* briefs with the Clerk's office on October 16, 2017 and October 19, 2017, respectively. On November 1, 2017, *Amicus* notified the parties of its intention to file this brief. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

[2] The Streamlined Sales and Use Tax Agreement ("SSUTA") may be found at http://tinyurl.com/SSUTA. This brief describes in general terms certain material provisions of the Agreement. There are of course more detailed elements to all of the provisions described below, and this brief is not intended as a comprehensive summary of all aspects of the Agreement.

Agreement and are full members of the Governing Board. SSUTA § 801.[3] One State, Tennessee, has "achieved substantial compliance with the terms of the Agreement taken as a whole, but not necessarily each provision," and is an associate member. SSUTA § 801.3. In addition, 20 States, the District of Columbia, and Puerto Rico serve the Governing Board as non-voting advisor States. SSUTA § 801.4.[4] The Governing Board is also advised by members of the private sector, through the Business Advisory Council, and representatives of local government, through the Local Government Advisory Council. SSUTA §§ 811, 812.[5]

The Streamlined States have all made the sovereign choice to obtain a significant component of their total revenue from sales taxes. Those States, which include the petitioning State of South Dakota, have enacted the requirements of the Streamlined

---

[3] The full member states are Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. A map of the Streamlined States can be found at http://tinyurl.com/StreamlinedStatesMap.

[4] The advisor states are Alabama, Arizona, California, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Mexico, New York, Puerto Rico, South Carolina, Texas, and Virginia.

[5] The members of the Local Government Advisory Council are Government Finance Officers Association, National Association of Counties, National League of Cities, and U.S. Conference of Mayors.

Sales and Use Tax Agreement to allow sellers to take advantage of simplified sales tax administration and compliance enabled by the Agreement. In implementing the Agreement, the Streamlined States modified their sales tax laws and adopted numerous uniform definitions and administrative provisions. Streamlined States have designed and implemented technological solutions to address compliance and enforcement problems, and they work together, through the Governing Board, to monitor compliance with Agreement. SSUTA § 809.

Since 1999, the group of States (including South Dakota) that eventually became the Governing Board has devoted countless hours to developing a program that addresses the practical and pragmatic concerns identified by the Court in *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and *Quill v. North Dakota*, 504 U.S. 298 (1992). Beyond those concerns, the Governing Board focuses its work on lessening burdens on participating sellers. The Business Advisory Council and Local Government Advisory Council assisted the Governing Board at every step, ensuring that the final Agreement covered the full range of participants in the sales tax system. In turn, the legislature of each Streamlined State took the baton from the Governing Board and revised statutes and regulations to come into compliance with the Agreement.

This enormous undertaking, spanning States from coast to coast and border to border, has resulted in a truly streamlined system of collecting sales taxes.

With this wealth of experience and full understanding of the modern practicalities of sales tax collection, the Governing Board has a significant interest in this Court reconsidering long-outdated assumptions underlying *Bellas Hess* and *Quill*, and this case represents "an appropriate case for this Court to reexamine" them. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015), (Kennedy, J., concurring).

SUMMARY OF ARGUMENT

It is fitting that this Court's last case examining a State's ability to obligate a seller to collect and remit sales taxes on purchases delivered into the State goes by the name *Quill*, an iconic writing device belonging to another century and entirely unsuited to today's business world.

Equally anachronistic are the practical considerations underlying the decisions in *Quill* and its predecessor *Bellas Hess*. When those cases were decided, the thought that retailers in one State could feasibly calculate, collect, and remit sales taxes owing to far-flung jurisdictions was as unthinkable to many as the idea that we would all soon walk around with supercomputers in our pockets or even on our wrists.

Today, thanks to the hard work of State legislators, tax administrators, local government officials, and their partners in the business communities, the Streamlined Sales and Use Tax Agreement has dismantled each of the practical roadblocks identified by this Court in *Quill* and *Bellas Hess*. Through this Agreement, sales tax

administration now includes centralized administration, simplified rate and exemption structures, and streamlined recordkeeping. The Agreement also provides remote sellers[6] with the option to use Certified Service Providers, paid for by the participating States, that eliminate the burdens on the sellers related to determining the taxability of products, calculating the appropriate tax, preparing and filing the required returns, making the remittances and resolving any audits or notices received by those sellers.

As described in detail in the Petitioner's brief, *Quill* is no longer consistent with modern Commerce Clause jurisprudence from this Court. Other *amici* have described how *Quill* is ironically *damaging* interstate commerce. As discussed below, the Streamlined Sales and Use Tax Agreement is clear evidence that not even *stare decisis* should provide a basis for declining another look at *Quill*. The practical considerations that provided a foundation for that case have entirely eroded. This case provides the best, cleanest vehicle for considering the question presented, and the Governing Board urges this Court to grant the Petition.

---

[6] The term "remote seller(s)" as used in this brief has the same meaning as the term "volunteer seller" as defined in Section D.2.(b) of the contract the Governing Board has with the Certified Service Providers. The contract may be found at http://tinyurl.com/CSPContract.

ARGUMENT

The Streamlined Sales and Use Tax Agreement Has Eliminated Any Undue Burden on Interstate Commerce.

A. The Practical Burdens of Compliance Formed the Foundations of *Bellas Hess* and *Quill*.

In 1967, with both the postal zip code system and the nationwide direct dial telephone system only a few years old, this Court struck an Illinois law requiring out-of-state mail order companies to collect Illinois sales taxes on sales into Illinois. *Bellas Hess*, 386 U.S. at 759–60. The Court grounded its holding in the practical burdens that would derive from every State and municipality requiring sellers in every other State and municipality to collect their taxes. "The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" *Id.* (footnotes omitted.) In light of the many different local and State tax regimes, the Court held that "if just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable." *Id.* at 759 n.14 (internal quotations omitted).

In 1992, two years before the world's first secure retail transaction over the Web, this Court revisited

the issue of cross-State sales tax collection in *Quill*, 504 U.S. 298. Although the Court recognized that modern Commerce Clause jurisprudence might not dictate the same result, *id.* at 311, it reaffirmed *Bellas Hess* on *stare decisis* grounds. *Id.* at 317. In doing so, it calculated the number of taxing jurisdictions to be more than 6,000 and again noted the burden on sellers that would result from a collection requirement. *Id.* at 313 n. 6.

B. The Streamlined States Have Eliminated Any Undue Burdens On Sellers.

The Governing Board studied *Bellas Hess* and *Quill*, determined to create a voluntary multi-State agreement that would address the Court's concerns. The Board recognized that the Court was concerned with the variations in sales tax rates, allowable exemptions, and administrative and recordkeeping requirements in States and local jurisdictions throughout the country. Working with input from States, municipalities, and the private sector, the Governing Board created the Agreement guided by a statement of purpose that directly answered the Supreme Court concerns: "It is the purpose of this Agreement to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102. It is with no small amount of pride that the Governing Board can today say that the Streamlined Sales and Use Tax Agreement has addressed the practical problems identified in *Bellas Hess* and *Quill* relating to multiplicity of jurisdictions,

rates, exemptions, and record-keeping requirements.[7] For proof that the Agreement, along with technological innovations, have removed the collection and reporting burdens, this Court need look no further than the list of over 3,600 sellers who have voluntarily registered to collect and remit taxes, as of October 1, 2017 in all of the Streamlined States, regardless of any physical presence in those states.

1. State and Local Taxes Are Administered at the State Level.

The keystone simplification required by the Agreement is State-level administration for *all* sales and use taxes imposed by the State or its political subdivisions. SSUTA § 301. Sellers are only required to register with, file returns with, and remit funds to the State-level authority and can only be audited by that central authority. The central authority, then, is responsible for distributing any applicable local taxes to the appropriate jurisdictions.

2. Tax Rates Are Standardized at the State Level.

The Agreement has reduced the number of different sales tax rates in place in each jurisdiction. In selecting its sales tax rate, each State must

---

[7] All of the provisions discussed below, which remove any undue burdens on sellers, apply fully to remote sellers that voluntarily register under the Agreement and make sales into the State of South Dakota (and all other Streamlined States).

generally select a single State-wide rate, and the same is true for each local jurisdiction. SSUTA § 308.

The Agreement also requires each State to provide an easily-accessible, searchable, and current database of all the sales tax rates for all of the jurisdictions levying taxes within the State. SSUTA § 307. Streamlined States agree to provide 60 days' notice to sellers (120 days in the case of catalog sellers) of local rate changes and limits their effective date to the first day of a calendar quarter. *Id.* at § 305.

Critically, Streamlined States relieve sellers from all liability for any errors in the database. SSUTA § 306. Thus, the Member States, and their local partners, have made every effort to relieve a retailer's burden in this area.

3. Exemptions Are Standardized at the State Level.

Streamlined States also generally agree to a single statewide set of tax exemptions that apply to both State and local taxes. As a result, rather than hundreds or even thousands of sets of exemptions, there is generally only one set of exemptions per State. SSUTA § 316.

For exemptions based on the status of the purchaser (such as an exemption for charitable organizations), or the use of the purchased item (such as an item used in manufacturing), Streamlined States agree that the seller need only require the purchaser

to provide an electronic or written exemption certificate. SSUTA § 317. Absent some type of fraud on the part of the seller, if the seller obtains and retains the necessary information, it is absolved of any liability if the customer is later deemed to have claimed the exemption improperly. *Id.* Thus, the basis for the Court's concern in *Bellas Hess*, 386 U.S. 759 n. 14, that the application of exemptions "especially for the industrial retailer – turns on facts which are often too remote and uncertain for the level of accuracy demanded by the prescribed system" has been eliminated.

Product-based exemptions (such as exemptions for food or health care items) have been similarly standardized State-wide. These exemptions are subject to uniform definitions and are downloadable in a "taxability matrix." SSUTA § 328. As with many other provisions of the Agreement, a retailer who relies on the taxability matrix is absolved of liability for under-collection of tax resulting from erroneous data in the taxability matrix. SSUTA § 328.C.

4. Administrative Requirements Are Standardized Across All Member States.

The Agreement also addresses the Court's concern about multiple administrative and recordkeeping requirements.

a. Uniform Definitions. The Agreement requires Streamlined States to adopt uniform definitions of many administrative terms, such as "bundled

transactions,"[8] "delivery charges," "direct mail," "lease or rental," "purchase price," "retail sale," "sales price," "telecommunications nonrecurring charges," and "tangible personal property." SSUTA Appendix C, Library of Definitions.

b. Simplified Electronic Returns. Multistate sales tax compliance is also greatly simplified through a simplified electronic return. *See generally* SSUTA § 318. No Streamlined State may require more than one return per State for each reporting period; each State return must include all local taxing jurisdictions in the State; and no State can require the return sooner than twenty days after the close of the reporting period. The return itself is in a uniform format approved by the Governing Board and no State may require additional data elements. The Streamlined States also must adopt standardized processes for receiving the information returns and for accepting electronic payments. SSUTA § 319.

c. Centralized Registration. Each Streamlined State participates in a single central online registration system. SSUTA § 303. Thus, a retailer registers once on one site and is then automatically registered for all the Streamlined States. SSUTA § 401. Any change to a retailer's information, such as changes in address, contact information or similar items, may be made for all jurisdictions by a one-time change on the central site. A retailer no longer has to

---

[8] A "bundled transaction" is one where two or more items are sold for a single price, but the component items are not all subject to the sales tax. SSUTA § 330.

update the information separately for every jurisdiction. SSUTA § 303.J.

d. Other Uniform Procedures. In addition to the simplifications outlined above, there are myriad other uniform procedures that the Streamlined States have agreed to, including, uniform sourcing rules to prevent double taxation (SSUTA §§ 309, 310, 310.1, 311, 313, 313.1, and 314), uniform rules for the enactment and administration of exemptions (SSUTA §§ 316 and 317), uniform rules for the recovery of bad debts (SSUTA § 320), uniform provisions governing sales tax holidays (SSUTA § 322), limitations on caps and thresholds (SSUTA § 323), uniform rounding rules (SSUTA § 324), and standardized customer privacy requirements (SSUTA § 321).

5. Certified Service Providers Are Made Available to Remote Sellers at No Charge.

In an effort to further alleviate the burden on sellers, the Governing Board has contracted with Certified Service Providers to handle *all* sales and use tax functions for remote sellers and have *the Streamlined States compensate the Certified Service Providers for these services.*

Certified Service Providers perform all of the retailer's sales and use tax functions, other than the retailer's obligation to remit tax on its own purchases. SSUTA § 203 and CSP Contract Section B.1.[9] By using

---

[9] The CSP Contract may be found at http://tinyurl.com/CSPContract.

a Certified Service Provider, the remote seller is relieved of any burden to determine the taxability of its products, calculate the rate of applicable tax, prepare and file the return, or respond to audits.

These Certified Service Providers must meet stringent requirements for accuracy, financial stability, and taxpayer confidentiality. SSUTA § 501. Critically, with limited exceptions, the retailer who uses a Certified Service Providers is relieved of virtually all liability, in the absence of fraud, for any errors in compliance. SSUTA § 502.

C. *Stare Decisis* Provides An Insufficient Basis to Deny Review.[10]

The Governing Board is justifiably proud of this broad-based Agreement, and a refusal by this Court to grant the Petition may well harm such efforts in the future. We expect that a denial of certiorari would discourage additional States from joining the Agreement, thereby stagnating the benefits streamlining provides to the States, the participating sellers, and the national economy. Worse, a denial by this Court, despite the decades-long efforts by the States (including South Dakota), local governments,

---

[10] Justice White noted in his *Quill* dissent that "The Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability." 504 U.S. at 332 (White, J., dissenting). As Justice White noted, that conclusion need not follow, and in all events, retroactivity can be addressed directly by the Court. *Id.*

and the business communities to ameliorate each of the practical concerns that drove *Bellas Hess* and *Quill*, could well serve to chill these types of cooperative efforts in the future.

Put simply, *Quill* deserves another look. The practical realities that explicitly or impliedly justified the physical-presence test no longer apply. Indeed, in these days of telecommuting, pop-up operations, and electronic commerce, the task of determining "physical presence" (and therefore a *Quill*-based obligation to collect) may well be more pragmatically difficult than simply collecting and remitting taxes through the mechanism set up by the Agreement.

As Justice Kennedy noted in his concurrence in *Direct Marketing Ass'n v. Brohl*, "[a] case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." 135 S. Ct. at 1135 (Kennedy, J., concurring). In light of these undeniable changes, "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

R. BRUCE JOHNSON
R. BRUCE JOHNSON, LLC
2342 East Wrenhaven Lane
Holladay, Utah 84121
(801) 558-4128
rbrucejohnson@outlook.com

LAURA K. MCNALLY
Counsel of Record
ANDREW R. DEVOOGHT
LOEB & LOEB LLP
321 N. Clark Street
Suite 2300
Chicago, IL 60654
(312) 464-3155
lmcnally@loeb.com

Counsel for Amicus Curiae

November 2, 2017

RECORD
AND /
BRIEFS.

Supreme Court, U.S.
FILED
NOV 2 - 2017
OFFICE OF THE CLERK

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA.,
Petitioner,
v.
WAYFAIR, INC., OVERSTOCK.COM, INC.,
AND NEWEGG, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOSEPH D. HENCHMAN*
**Counsel of Record*
TAX FOUNDATION
1325 G Street N.W., Ste. 950
Washington, DC 20005
(202) 464-6200
henchman@taxfoundation.org
Counsel for Amicus Curiae

November 2, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, DC 20002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. STATES ARE IGNORING THE QUILL DECISION, AND ABSENT THIS COURT'S ACTION, THIS WILL RESULT IN A COMPLEX AND INDEFENSIBLE PATCHWORK OF LAWS HARMING INTERSTATE COMMERCE 5

A. Eighteen States Have Adopted New York-Style Click-Through Nexus Sales Tax Laws, Which Expand Physical Presence Beyond What This Court Described as Its Furthest Extent. 6

B. Seven States Have Adopted Colorado-Style Reporting Sales Tax Laws, Which Raise First Amendment Issues. 9

C. Three States Have Adopted Economic Nexus Sales Tax Provisions Which Ignore Physical Presence Completely 12

D. States May Soon Consider Massachusetts-Style Cookie Taxes, Which Expand State Sales Tax Jurisdiction to All Sellers Everywhere. 12

E. Three States Have Concluded that Physical Presence is Inapplicable for Business Taxes, Undermining the Spirit of the Quill Decision. 13

II. SOUTH DAKOTA'S SALES TAX LAW IS WELL-STRUCTURED AND THE BEST VEHICLE FOR THE COURT TO CONSIDER WHAT STATE ACTIONS INFRINGE INTERSTATE COMMERCE 16

A. South Dakota is One of Three States That Tax Nearly All Services Under Its Sales Tax, Demonstrating the Statute Has No Discriminatory Intent or Purpose. 16

B. South Dakota is One of 23 States with Simplified Sales Tax Collection That Imposes Minimal Burden on Collecting Businesses. 19

C. South Dakota's Statute Includes a Minimum Sales Threshold and a Ban on Retroactive Collection, Both Essential to Preventing Excessive Burden to Interstate Commerce 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Amazon.com LLC v. Lay,
758 F.Supp.2d 1154 (W.D. Wash. 2010) 11

Avnet, Inc. v. Dep't of Revenue,
384 P.3d 571 (Wash. 2016) 14

Budget Rent-A-Car of Wash.-Or., Inc. v. Dep't of Revenue,
500 P.2d 764 (Wash. 1972) 14

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 21

Complete Auto v. Transit, Inc. v. Brady,
430 U.S. 274 (1977) 3

Crutchfield Corp. v. Testa.
No. 2015-0386 (Ohio 2016), 2016 WL 6775765 14

Direct Marketing Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 9

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 22, 23

Freeman v. Hewit,
329 U.S. 249 (1946) 3

General Motors Corp. v. Romein,
503 U.S. 181 (1992) 23

Leloup v. Port of Mobile,
127 U.S. 640 (1888) 3

National Bellas Hess, Inc. v. Dep't of Revenue of Illinois, 386 U.S. 753 (1967) 5

Overstock.com, Inc. v. New York State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013) 6

Performance Marketing Ass'n, Inc. v. Homan,
998 N.E. 2d. 54 (Ill. 2013) 7

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... passim

Ry. Express Agency v. Virginia,
347 U.S. 359 (1954) 3

Ry. Express Agency v. Virginia,
358 U.S. 434 (1959) 3

Scripto, Inc. v. Carson,
362 U.S. 207 (1960) 5

Simpson Inv. Co. v. Dep't of Revenue,
3 P.3d 741 (Wash. 2000) 14

Steven Klein, Inc. v. Dep't of Revenue,
357 P.3d 59 (Wash. 2015) 14

Tax Comm'r v. MBNA America Bank,
640 S.E.2d 226 (W. Va. 2006) 15

Time Oil Co. v. State,
483 P.2d 628 (Wash. 1971) 14

Tyler Pipe Indus. v. Dep't of Revenue of Washington,
482 U.S. 232 (1987) 5

United States v. Carlton,
512 U.S. 26 (1994) 22

Statutes & Regulations

2015 Nev. A.B. 380. 8

2015 Tenn. H.B. 644 8

2016 La. H.B. 30, 1st Extra Sess. 7

35 Ill. Comp. Stat. 105/2 & 110/2 7

ALA. ADMIN. CODE r. 810-6-2.90.03 12

ALA. CODE § 40-2-11 10
ARK. CODE § 26-52-117(d)-(e)..... 6, 7
CAL. REV. & TAX § 6203(b)(5). 7
COLO. REV. STAT. § 39-21-112(3.5)..... 9
CONN. GEN. STAT. § 12-407(a)(12)(L)..... 7
GA. CODE § 48-8-2(8)(M). 7
Internet Freedom Act ("ITFA"), 47 U.S.C. § 151..... 13
KAN. STAT. § 79-3702(h)(2)(C)..... 7
KY REV. STAT. § 139.450 10
ME. REV. STAT. tit. 36, § 1754-B(1-A)(C). 7
MICH. COMP. LAWS § 205.52(b)(3). 7
MINN. STAT. § 297A.66(4a)..... 7
N. Y. TAX LAW § 1101(b)(8)(vi)..... 6
N.C. GEN. STAT. § 105.164.8(b)(3). 8
N.J.S.A 54:32B-2(i)(1). 8
OHIO REV. CODE § 5751.01(I). 14
R.I. GEN. LAWS § 44-18-15(a)(2)..... 8
TENN. COMP. R. & REGS. 1320-06-01-.129 11
TEX. TAX CODE § 151.107(a)..... 8
VT. STAT. ANN., tit. 32, §9712 (2017). 11
VT. STAT. tit. 32, § 9701(9)(F). 12
VT. STAT. tit. 32, § 9783(b)-(c). 8
WASH. REV. CODE § 82.04.220..... 14
WASH. REV. CODE § 82-08-052..... 8, 11

Other Authorities

Avalara, *How Does Avatax Handle Rounding in Maryland?*, https://goo.gl/YdyA1W 20

Billy Hamilton, "*Remembrance of Things Not So Past: The Story Behind the Quill Decision*," 59 STATE TAX NOTES 807 (Mar. 14, 2011)..... 23

Bloomberg BNA, *State Tax Snapshot: A Dozen States Say Click-Through Nexus Applies, Despite Absence of Legal Authority*, https://goo.gl/Do5tNx..... 6

Bloomberg BNA, Survey of State Tax Departments (2017 ed.) 15

Brief of Tax Foundation as Amicus Curiae Supporting Petitioners, *Direct Mtkg v. Brohl*, 135 S. Ct. 1124, 2014 WL 6845684 (Sept. 16, 2014)..... 2

Brief of Tax Foundation as Amici Curiae Supporting Petitioners, *Overstock.com, Inc. v. N.Y. Dep't of Taxation and Fin., et.al*, 134 S.Ct. 682, 2013 WL 5400248 (Sept. 23, 2013 2

Case No. 12-1032, Transcript of oral argument (Dec. 8, 2014) 10

City of Chicago, *Tax List*, https://goo.gl/28y3Mj..... 20

Email from Tricia Schafer-Petrecz, Pub. Relations & Soc. Media Lead, Vertex, Inc., to Joseph Henchman, Exec. Vice President, Tax Foundation. 21

James Madison, THE FEDERALIST NO. 42..... 16

Jared Walczak & Scott Drenkard, *State and Local Sales Tax Rates, Midyear 2017*, Tax Foundation (Jul. 2017), https://goo.gl/UcGQfW 21

Jared Walczak, Scott Drenkard, & Joseph Bishop-Henchman, *2018 State Business Tax Climate*

Index, Tax Foundation (Oct. 2017), http://www.stateindex.org 18

Joseph Henchman & Kavya Rajasekar, The Bounds of Retroactive State Taxes, Tax Foundation (Feb. 2017), https://goo.gl/7LWSGn 23

Joseph Henchman, *Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction,* 46 STATE TAX NOTES 387 (Nov. 5, 2007), https://goo.gl/jz42vm 3

Nicole Kaeding, *Sales Tax Base Broadening: Right-Sizing a State Sales Tax,* Tax Foundation (Oct. 2017), https://goo.gl/dYfovD 16

Paul H. Frankel & Amy L. Nogid, The Manifest Justice to the Manifest Injustice Doctrine: The Time Has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases, Legal Updates & News, Dec. 2008, https://goo.gl/9uZdm3 23

South Dakota Department of Revenue, Municipal Tax Information Bulletin (Jul. 2017), https://goo.gl/wHCVaB 20

TAX FOUNDATION, FACTS & FIGURES 2017: HOW DOES YOUR STATE COMPARE? (table 8), https://goo.gl/AkFKNR 18

The Role of Congress in State Taxation: Hearing Before the U.S. House of Representatives Committee on the Judiciary (testimony of Joseph Henchman), https://goo.gl/wBohQM 15

Wisconsin Department of Revenue, *Sales of Ice Cream Cakes and Similar Items,* https://goo.gl/XLCrkD 20

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA.,
Petitioner,
v.
WAYFAIR, INC., OVERSTOCK.COM, INC.,
AND NEWEGG, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Tax Foundation submits this brief as *amicus*

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amicus* represents that all parties were provided notice of *Amicus's* intention to file this brief on October 6, 2017. Letters from the parties consenting to the filing of the brief are filed with the Clerk of the Court.

curiae in support of Petitioner in the above-captioned matter.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., we seek to make information about government finance more accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability.

Because *Amicus* has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many state courts considering this issue, and because any decision will significantly impact taxpayers and state tax administration, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

We at the Tax Foundation are not a partisan for aggressive or expansive state tax power. Until this case, briefs we have submitted on this issue have always been to urge a ruling against the state. *See, e.g.*, Brief of Tax Foundation as Amici Curiae Supporting Petitioners, *Overstock.com, Inc. v. N.Y. Dep't of Taxation and Fin., et.al*, 134 S.Ct. 682, 2013 WL 5400248 (Sept. 23, 2013); Brief of Tax Foundation as Amicus Curiae Supporting Petitioners, *Direct Mtkg v. Brohl*, 135 S. Ct. 1124, 2014 WL 6845684 (Sept. 16, 2014). But because it is necessary to resolve an almost universal lack of clarity about the proper scope of state sales taxation of out-of-state internet sellers, we urge this Court to grant certiorari in this case and to rule in favor of South Dakota's statute.

This Court has ample precedent to draw upon.

Before the 1950s, states were heavily restricted in their ability to tax individuals, businesses, and sales involving interstate commerce. *See, e.g.*, *Freeman v. Hewit*, 329 U.S. 249, 252-53 (1946) ("A State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States"); *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888) ("No State has the right to lay a tax on interstate commerce in any form."). In the 1950s, this Court began to ease those restrictions, correctly concluding that involvement in interstate commerce does not completely insulate an individual or business from contributing to providing government services in states where they enjoy the benefits of them. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284-85 (1977) (comparing *Ry. Express Agency v. Virginia*, 347 U.S. 359 (1954) (*Railway Express I*) and *Ry. Express Agency v. Virginia*, 358 U.S. 434 (1959) (*Railway Express II*)). This Court's *Complete Auto* decision gave a comprehensive and workable list of criteria for determining whether a state's tax law violates constitutional limitations on state tax power: a tax (1) must be "applied to an activity with a substantial nexus with the taxing State," (2) must be "fairly apportioned," (3) must "not discriminate against interstate commerce," and (4) must be "fairly related to the services provided by the State." *Id.* at 279. The decision built on a long history of this Court using its dormant commerce clause power to prevent states from taxing or otherwise penalizing activity out-of-state while leaving identical activity in-state untaxed or unpenalized. *See, e.g.*, Joseph Henchman, *Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction*, 46 STATE TAX NOTES 387 (Nov.

5, 2007), https://goo.gl/jz42vm.

This Court will soon be asked over and over and over to consider challenges to a variety of state laws expanding state sales tax authority over interstate commerce. Eighteen states have adopted New York-style click-through nexus sales tax laws, which expand physical presence beyond what this Court described as "the furthest extension" of nexus. Seven states have adopted Colorado-style reporting sales tax laws, which raise First Amendment issues. Three states have adopted economic nexus sales tax laws, which ignore physical presence completely. States may soon consider Massachusetts-style "cookie taxes," which expand state sales tax jurisdiction to all sellers everywhere. At least three states have concluded that physical presence is inapplicable for business taxes, undermining the spirit of the *Quill* decision. While legislation has been introduced in Congress, legislators will not act until this Court does.

The South Dakota law in question gives this Court the best opportunity to resolve this area of law, upholding state action while defining the limits of state tax power. The South Dakota law should be upheld as constitutional because (1) the state taxes nearly all other goods and services under its sales tax except internet-based transactions, demonstrating no discriminatory intent or purpose; (2) the state has minimized the costs of sales tax collection to the extent practicable, by adhering to interstate standards of sales tax administration, maximizing statewide sales tax uniformity, and adopting a *de minimis* threshold likely to exclude interstate activity where state burdens exceed state benefits; (3) the state law bars retroactive collection; and (4) the state

law limits the scope of its tax liability to taxpayers present in the state (residents who purchase goods and services online), keeping with the spirit of physical presence as the basis of taxation.

ARGUMENT

I. STATES ARE IGNORING THE QUILL DECISION, AND ABSENT THIS COURT'S ACTION, THIS WILL RESULT IN A COMPLEX AND INDEFENSIBLE PATCHWORK OF LAWS HARMING INTERSTATE COMMERCE.

This Court expressly endorsed the proposition that a state has the power to exercise its taxing authority against an out-of-state vendor if the vendor has a "physical presence" within the state in *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), and reaffirmed its applicability twenty-five years later in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). While this Court has acknowledged that an "attributional nexus" standard is the "furthest extension" of nexus, *Quill Corp.*, 504 U.S. at 306, *citing Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Indus. v. Dep't of Revenue of Washington*, 482 U.S. 232, 250 (1987), many states have interpreted this as a floor rather than the ceiling. As a result, many states have enacted legislation that expands nexus beyond *Quill*, including New York-style click-through nexus, Colorado-style reporting and notification, and Massachusetts-style cookie nexus. Further, several states and courts have declined to apply the physical presence standard to business and individual income taxes.

A. Eighteen States Have Adopted New York-Style Click-Through Nexus Sales Tax Laws, Which Expand Physical Presence Beyond What This Court Described as Its Furthest Extent.

In 2008, New York was the first state to adopt a "click-through" nexus statute. *See* N. Y. Tax Law § 1101(b)(8)(vi). This statute expanded the definition of nexus to include (as a rebuttable presumption) any out-of-state seller who "enters into an agreement with a resident of [the state of New York] under which the resident . . . directly or indirectly refers potential customers . . . to seller" and such sales exceeds $10,000 per year. *Id.* This statute was upheld in *Overstock.com, Inc. v. New York State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013), finding that contracts with in-state non-employees who refer customers for compensation constitutes substantial nexus. *Id.* at 626 ("Active in-state solicitation that produces a significant amount of revenue qualifies as more than a 'slightest presence' . . .").

Following in New York's footsteps, several other states have enacted similar statutes. *See generally*, Bloomberg BNA, *State Tax Snapshot: A Dozen States Say Click-Through Nexus Applies, Despite Absence of Legal Authority*, https://goo.gl/Do5tNx.

- Arkansas in 2011 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* ARK. CODE § 26-52-117(d)-(e).
- California in 2012 adopted a statute with the rebuttable presumption, a $10,000 threshold, and a further requirement that the out-of-state seller have national sales of at least $1 million. *See* CAL.

REV. & TAX § 6203(b)(5).

- Connecticut in 2011 adopted a statute with a $2,000 threshold and no rebuttability. *See* CONN. GEN. STAT. § 12-407(a)(12)(L).
- Georgia in 2012 adopted a statute with the rebuttable presumption and a higher $50,000 threshold. *See* GA. CODE § 48-8-2(8)(M).
- Illinois in 2011 adopted a statute with a $10,000 threshold and no rebuttability. *See* 35 ILL. COMP. STAT. 105/2 & 110/2. *See Performance Marketing Ass'n, Inc. v. Homan*, 998 N.E. 2d. 54 (Ill. 2013) (holding the statute was preempted by federal law and violated the commerce clause of the United States Constitution).
- Kansas in 2013 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* KAN. STAT. § 79-3702(h)(2)(C).
- Louisiana in 2016 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* 2016 LA. H.B. 30, 1st Extra Sess.
- Maine in 2013 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* ME. REV. STAT. tit. 36, § 1754-B(1-A)(C).
- Michigan in 2015 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* MICH. COMP. LAWS § 205.52(b)(3).
- Minnesota in 2013 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* MINN. STAT. § 297A.66(4a).
- Nevada in 2015 adopted a statute with the

rebuttable presumption and a $10,000 threshold. *See* 2015 NEV. A.B. 380.

- New Jersey in 2014 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* N.J.S.A 54:32B-2(i)(1).
- North Carolina in 2009 adopted an identical statute, with the rebuttable presumption language and the $10,000 threshold. *See* N.C. GEN. STAT. § 105.164.8(b)(3).
- Rhode Island in 2009 adopted a statute with the rebuttable presumption language and a lower $5,000 threshold. *See* R.I. GEN. LAWS § 44-18-15(a)(2).
- Tennessee in 2015 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* 2015 TENN. H.B. 644.
- Texas in 2011 adopted a statute expanding the definition of "retailer" to include any out-of-state seller who "derives receipts" from sales in the state and any out-of-state seller who delivers items to customers in the state. *See* TEX. TAX CODE § 151.107(a). The statute has no minimum threshold and no rebuttability.
- Vermont in 2011 adopted a statute with the rebuttable presumption and a $10,000 threshold, with a further requirement that it not take effect until similar legislation passes 15 other states. *See* VT. STAT. tit. 32, § 9783(b)-(c).
- Washington in 2015 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See.* WASH. REV. CODE § 82.08.0521(1).

These statutes create physical presence when a

retailer uses an independent contractor even if those contractors do not engage in maintaining an in-state market or a substantial flow of goods. While these statutes provide for an ability to rebut the presumption that solicitation occurred, rebutting such presumption would inherently be futile, as it is hard to prove what has been done by individuals on the internet. As a result, due to the global nature of the internet, these click-through laws apply more broadly and encompass not only retailers who target sales within a given state, but also retailers who may not actually produce a sale in the given state.

B. Seven States Have Adopted Colorado-Style Reporting Sales Tax Laws, Which Raise First Amendment Issues.

In 2010, Colorado enacted a statute requiring non-collecting retailers to: (1) provide Colorado purchasers a "transactional notice" at the time of purchase, informing them that the purchase may be subject to Colorado's use tax; (2) provide an "annual purchase summary" with the dates, amounts, and categories of purchases of all Colorado purchasers with purchases over $500; and (3) file with the Colorado Department of Revenue an annual report listing their customers' names, addresses, and total purchases. COLO. REV. STAT. § 39-21-112(3.5). The transactional notice and annual consumer report informs Colorado purchasers that they are required to pay taxes, while the annual retailer report assists Colorado in determining the tax liability. In *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), the Tenth Circuit upheld the Colorado statute after concluding that *Quill's* holding applied to sales and use tax collection and not to the imposition of regulatory requirements.

While the DMA case was presented to this Court on the sole issue of jurisdiction, this Court recognized the potential significance of a ruling upholding the Colorado reporting statute. During oral arguments, Justice Scalia stated: "This is certainly a very important case because I have no doubt that if we come out agreeing with [Colorado's State Counsel], every one of the states is going to pass a law like this." Case No. 12-1032, Transcript of oral argument (Dec. 8, 2014) ("Tr") at 24:25-34. Justice Alito echoed this conclusion, stating: "If the Colorado law is upheld, as a small internet business, I will have to submit potentially 50 different forms to all of these States reporting that somebody in South Carolina purchased something from me that cost $23.99. . .. [T]hat's where this all could lead, couldn't it?" Tr. 32:14-21. Critics contend that the reporting requirements are deliberately cumbersome so as to compel collection.

Six states have enacted similar notice and reporting statutes:

- Alabama in 2017 adopted legislation authorizing the Alabama Department of Revenue (DOR) to require non-collecting remote sellers to report Alabama sales to the DOR and notify Alabama customers of their use tax obligations. *See* ALA. CODE § 40-2-11.
- Kentucky in 2013 enacted a statute requiring remote sellers with more than $100,000 in gross sales to Kentucky residents and businesses to provide notice that purchasers must report and pay use tax to the Kentucky Department of Revenue. *See* KY. REV. STAT. § 139.450.
- Louisiana in 2016 enacted a statute including all

of the provisions contained in the Colorado one. *See* LA. STAT §47.309.1.

- Oklahoma in 2016 enacted legislation requiring non-collecting out-of-state sellers to provide each customer with a statement of all sales made to them during the preceding calendar year by February 1. OKLA. STAT. tit. 68, § 1406.1.
- Vermont in 2017 enacted legislation requiring non-collecting retailers who make at least $100,000 in sales to Vermont buyers, or have 200 or more individual sales transactions with Vermont buyers, to send use tax notifications to buyers and to the Vermont Department of Revenue. VT. STAT. tit. 32, § 9712.
- Washington in 2017 enacted legislation requiring "marketplace facilitators" to either (1) register to collect and remit Washington sales tax or (2) comply with Washington's newly-established notice and reporting regime. *See* WASH. REV. CODE § 82-08-052.

These statutes also raise privacy concerns relating to the requirement to notify state officials about what each customer purchases online. A North Carolina revenue ruling similar to the Colorado statute was struck down on these grounds. *See Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154 (W.D. Wash. 2010). The ACLU joined with Amazon.com to challenge this, noting the danger of unnecessarily requiring disclosure of purchases such as the movie *Lolita* or the book *How to Leave Your Husband*, or even the name of the website as some websites sell embarrassing things. The court held that the First Amendment forbids state tax collectors from knowing

what taxpayers are buying. *Id.* at 1170 ("Citizens are entitled to receive information and ideas through books, films and other expressive materials anonymously.").

C. Three States Have Adopted Economic Nexus Sales Tax Provisions Which Ignore Physical Presence Completely.

In 2015, Alabama enacted Reg. 810-6-2.90.03, requiring an out-of-state seller to collect and remit sales tax if the vendor has more than $250,000 in Alabama sales and are engaged in an enumerated list of activities. ALA. ADMIN. CODE r. 810-6-2.90.03

In 2017, Tennessee enacted a similar rule, with a $500,000 level of sales, but suspended enforcement pending court challenges. *See* TENN. COMP. R. & REGS. 1320-05-01-.129.

In 2016, Vermont enacted a statute requiring collection by sellers with at least $100,000 in annual sales or 200 individual transactions in Vermont, to take effect on the first quarter after this Court overturns *Quill*. *See* VT. STAT. tit. 32, § 9701(9)(F).

D. States May Soon Consider Massachusetts-Style Cookie Taxes, Which Expand State Sales Tax Jurisdiction to All Sellers Everywhere.

On September 22, 2017, Massachusetts proposed Reg. 830. 830 MASS. CODE REGS. 64H.1.7, which would have required vendors with more than $500,000 in sales into Massachusetts from internet transactions and 100 or more transactional sales into the state during the previous twelve months to collect and remit sales and use tax if the vendor: (1) has established a physical presence through property interests in and/or

the use of in-state software (making "apps" available to be downloaded by in-state residents) and ancillary data (placing "cookies" on in-state residents' web browsers), (2) has contracts and/or relationships with content distribution networks, or (3) uses marketplace facilitators and/or delivery companies. Massachusetts subsequently withdrew the regulation but has begun the process of reissuing it. Discussion among state tax administrators suggests other states may consider adopting similar app and cookie nexus provisions.

Under this "cookie nexus" standard, Massachusetts would have the power to tax any online store on the planet if a Massachusetts resident accesses the vendor's website or downloads its app. These "cookie" nexus provisions likely also violate the Internet Tax Freedom Act (ITFA), which prohibits "multiple or discriminatory taxes on electronic commerce." 47 U.S.C. § 151. Advertising in a state has historically not created nexus, or even personal jurisdiction, and the Massachusetts provision creates obligations solely for the online equivalent of advertising, cookies and apps. Absent judicial review, many states may follow Massachusetts's lead.

E. Three States Have Concluded that Physical Presence is Inapplicable for Business Taxes, Undermining the Spirit of the *Quill* Decision.

Ohio, Washington, and West Virginia have enacted laws, and courts in those states have upheld them, which impose business taxes without regard to physical presence.

In 2005, Ohio enacted a "factor presence" law which imposed a tax on any business with at least

$500,000 of Ohio gross receipts. OHIO REV. CODE § 5751.01(I). The Ohio Supreme Court concluded that physical presence is a sufficient condition but not a necessary condition when constitutionally imposing business privilege taxes. *See Crutchfield Corp. v. Testa*. No. 2015-0386 (Ohio 2016), 2016 WL 6775765.

Washington imposes a business and occupancy (B&O) tax on the privilege of "engaging in business activities", measured by gross receipts. *See* WASH. REV. CODE § 82.04.220. Washington courts have frequently upheld the application of the tax against businesses with minimal or no physical presence in the state. *See, e.g., Avnet, Inc. v. Dep't of Revenue*, 384 P.3d 571 (Wash. 2016) (applying B&O tax to sales made by an out-of-state company to another out-of-state company if delivery to the ultimate customer is in Washington); *Steven Klein, Inc. v. Dep't of Revenue*, 357 P.3d 59 (Wash. 2015) ("Washington's B&O tax system is extremely broad."); *Simpson Inv. Co. v. Dep't of Revenue*, 3 P.3d 741 (Wash. 2000) (applying B&O tax to receipt of dividends exempt from B&O taxation); *Budget Rent-A-Car of Wash.-Or., Inc. v. Dep't of Revenue*, 500 P.2d 764 (Wash. 1972) (applying B&O tax to casual sales); *Time Oil Co. v. State*, 483 P.2d 628, 630 (Wash. 1971) ("[I]t is obvious that the legislature intended to impose the business and occupation tax upon virtually all business activities carried on within the state.").

In 2005, West Virginia ordered payment of its corporate income tax by credit card companies with customers, but no employees or property, in the state. The West Virginia Supreme Court found this sufficient for substantial nexus for the tax. *See Tax Comm'r v. MBNA America Bank*, 640 S.E.2d 226 (W.

Va. 2006). A dissenting judge characterized the decision as "finding tax liability for an out-of-state corporation with no presence, tangible or intangible, in West Virginia on income realized out-of-state by that corporation from accounts kept out-of-state." *Id.* at 236 (Benjamin, J., dissenting).

States increasingly apply business taxes to out-of-state businesses without an in-state physical presence, dragging out-of-state sellers into their taxing regime based on as little as one transaction. *See* BLOOMBERG BNA, SURVEY OF STATE TAX DEPARTMENTS (2017 ed.) (listing various scenarios in which states conclude nexus has been established by non-physically-present businesses); *The Role of Congress in State Taxation: Hearing Before the U.S. House of Representatives Committee on the Judiciary* (testimony of Joseph Henchman), https://goo.gl/wBohQM ("Does shipping in a returnable container versus a common carrier create nexus? Does placing an internet browser cookie on someone's computer create nexus in that someone's state? Does downloading an app in a hub airport while waiting between two interstate flights create nexus in the state of that hub airport? Once established, how long does nexus last? It is not just that we have different answers for different states, but also that many states supply vague or indeterminate non-answers to many of these questions.").

As a result, states are creating the scenario that the Commerce Clause sought to avoid: the voice for sound tax policy, for levying taxes only from those in-state businesses and residents who benefit from provided services, is overridden by those seeking to use the state tax code to benefit in-state people and

businesses. *Cf.* James Madison, THE FEDERALIST NO. 42 ("[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of impatient avidity for immediate and immoderate gain."). This Court's guidance is needed before the states subject interstate commerce to death by a thousand cuts.

II. SOUTH DAKOTA'S SALES TAX LAW IS WELL-STRUCTURED AND THE BEST VEHICLE FOR THE COURT TO CONSIDER WHAT STATE ACTIONS INFRINGE INTERSTATE COMMERCE.

Although many internet sales tax laws will be appealed to this Court in the coming years, South Dakota's law is the best vehicle for this Court to consider the issue, because (1) the state taxes nearly all other goods and services under its sales tax except internet-based transactions, demonstrating no discriminatory intent or purpose; (2) the state has minimized the costs of sales tax collection to the extent practicable, by adhering to interstate standards of sales tax administration, maximizing statewide sales tax uniformity, and adopting a generous *de minimis* threshold; (3) barring retroactive collection; and (4) limiting the scope of its tax liability to taxpayers present in the state (residents who purchase goods and services online), keeping with the spirit of physical presence as the basis of taxation.

A. South Dakota is One of Three States That Tax Nearly All Services Under Its Sales Tax, Demonstrating the Statute Has No Discriminatory Intent or

Purpose.

Unlike other states that decry the erosion of their sales tax base while exempting goods and services that total over half their economy, South Dakota taxes it all. Internet sales are the only thing South Dakota does not tax, because they cannot under federal law.

Public finance and economic theory says sales taxes should apply to all final sales of goods and services, and no business inputs. Partly due to historic accident and partly due to policy efforts to exempt some goods, the median state sales tax base covers only 23 percent of final personal income. When states began to levy a sales tax in the 1930s, the tax applied to tangible personal property, items such as clothing, home appliances, and furniture, among other taxable goods. This made the tax relatively easy to administer. It also produced sufficient revenue, as the economy largely consisted of manufacturing and tangible goods. Over time, however, the U.S. economy has changed from a manufacturing-based economy to a service-based economy. Americans are purchasing more services than goods as a percentage of their consumption. In the first quarter of 2017, services accounted for approximately 68 percent of personal consumption expenditures in the United States. *See, e.g.*, Nicole Kaeding, *Sales Tax Base Broadening: Right-Sizing a State Sales Tax*, Tax Foundation (Oct. 2017), https://goo.gl/dYfovD.

Despite the transformation in the economy, states have responded slowly to updating their sales tax bases. The narrow tax bases undermine neutrality, favoring one product or industry over another. While many states decry the forced exclusion of internet sales from their tax bases, they make little effort to

address their decision to exclude other goods and services.

South Dakota has chosen not to discriminatorily tax its in-state consumption, instead broadly taxing nearly all categories of transactions under its sales and use tax: South Dakota taxes groceries (taxed in full by only 7 states of the 45 plus the District of Columbia with the tax), clothing (taxed in full by 39 states), non-prescription drugs (taxed by 35 states), personal services such as dry cleaning and haircuts (taxed in full by only 4 states), real estate transactions (taxed by only 3 states), legal transactions (taxed by only 3 states), accounting services (taxed by only 3 states), and even lobbying services (taxed by only 6 states). *See* Jared Walczak, Scott Drenkard, & Joseph Bishop-Henchman, *2018 State Business Tax Climate Index*, Tax Foundation (Oct. 2017), at 70-72 (complete list by type of transaction and by state), http://www.stateindex.org. South Dakota also relies heavily on its sales tax: in FY 2014, sales tax collections made up 40 percent of South Dakota's state and local revenue, the third highest of any state (behind Washington and Tennessee). *See* TAX FOUNDATION, FACTS & FIGURES 2017: HOW DOES YOUR STATE COMPARE? (table 8), https://goo.gl/AkFKNR. South Dakota has no state individual income or corporate income tax; sales and property taxes are essentially their only taxes and make up three-quarters of total South Dakota state and local tax revenue. *See id.*

These policy choices by South Dakota demonstrate a lack of discriminatory intent or purpose with the law challenged in this case. While many states correctly describe the forced exclusion of

internet sales from their sales tax bases as inconsistent with public finance and economic theory, and sound tax policy, they do little to address billions of dollars of exclusions of goods and services provided primarily by in-state businesses. A hallmark of discrimination under the Commerce Clause is a state taxing or otherwise penalizing activity out-of-state while leaving identical activity in-state untaxed or unpenalized. South Dakota, along with New Mexico and Hawaii, leaves virtually no in-state activity outside its sales tax base. For a clearer consideration of the extent of state tax powers, this Court should decide this statute from South Dakota rather than laws passed in other states that may be less pure in their lack of discriminatory intent or purpose.

B. South Dakota is One of 23 States with Simplified Sales Tax Collection That Imposes Minimal Burden on Collecting Businesses.

South Dakota is one of 23 states to be a full member of the Streamlined Sales Tax and Use Agreement (SSUTA), a multistate effort to adopt simplified administration and remittances, establish uniform definitions of items subject to tax, and require uniformity between state and local sales tax bases. SSUTA was started in large part to what was perceived as this Court's challenge in *Quill*: to achieve simpler and more uniform state sales taxes whose imposition would not be an impermissible burden on interstate commerce. For this reason, SSUTA has been less successful than it could be, due to the non-participation by large states such as California, Florida, Illinois, New York, and Texas. Some states refuse to join so as to maintain idiosyncratic sales tax

practices, such as Maryland's "rounding rule" requiring vendors to round remainders of 4 and above up, rather than the more common practice of only rounding up remainders of 5 and above; Chicago, Illinois's decision to tax sales of bottled water, soda, non-soda drinks, restaurant meals, candy, and groceries all at different tax rates; and Wisconsin's differential tax treatment of different types of ice cream cakes. *See, e.g.*, Avalara, *How Does Avatax Handle Rounding in Maryland?*, https://goo.gl/YdyA1W; City of Chicago, *Tax List*, https://goo.gl/28y3Mj; Wisconsin Department of Revenue, *Sales of Ice Cream Cakes and Similar Items*, https://goo.gl/X1CrkD (giving 10 examples of ice cream cakes, 6 taxable and 4 non-taxable).

It is hard to overstate the hard work and hard decisions that go into being a member of SSUTA. While many states have opted not to undertake this work, and consequently declined to address the issues raised by the Court in *Quill*, South Dakota and its fellow SSUTA members have. While more work can be done by SSUTA, South Dakota's participation in it shows a desire to minimize the interstate tax burden of its sales tax administration and collection mechanisms.

South Dakota has adopted this simplified system with respect to its local sales tax jurisdictions. South Dakota permits its municipalities to levy sales taxes, but only by adhering to the state base of transactions and only at uniform rates (either 1 or 2 percent, or 4.5 percent for Indian tribes). *See* South Dakota Dep't of Revenue, *Municipal Tax Information Bulletin* (Jul. 2017), https://goo.gl/wHCVaB. While most countries have one unified consumption tax for the entire

country or for each major region or province, sales taxes in the United States are very decentralized. 38 states authorize local sales taxes with their own rates, and Arizona, Colorado, and Louisiana even permit local sales taxes to have a different base of taxable transactions than the state sales tax. *See* Jared Walczak & Scott Drenkard, *State and Local Sales Tax Rates, Midyear 2017*, Tax Foundation (Jul. 2017), https://goo.gl/UcGQfW.

Nationally there are a total of 10,708 jurisdictions in the United States that impose a sales tax, as of June 30, 2017, ranging by state on the high end from 1,277 in Missouri, 1,153 in Texas, 908 in Iowa, and 800 in Alabama, to just one each in the states of Connecticut, Indiana, Kentucky, Maine, Maryland, Massachusetts, and Michigan. Email from Tricia Schafer-Petrecz, Pub. Relations & Soc. Media Lead, Vertex, Inc., to Joseph Henchman, Exec. Vice President, Tax Foundation. Far from getting fewer, the number of sales tax jurisdictions grows each year, and is up from about 6,000 at the time of the *Quill* decision. South Dakota's decision to require adherence to the state sales tax base, and to establish uniform local tax rates, minimizes sales tax compliance burdens on businesses.

C. South Dakota's Statute Includes a Minimum Sales Threshold and a Ban on Retroactive Collection, Both Essential to Preventing Excessive Burden to Interstate Commerce.

South Dakota's statute minimizes its burden on interstate commerce through establishment of a minimum dollar threshold (of $100,000 in sales). S.D. S.B. 106, §1. This *de minimis* threshold has the effect

of excluding those sellers with incidental or purposefully directed sales into the state and where establishing collection mechanisms might outstrip the business's incremental revenue from selling into South Dakota. The inclusion of this provision demonstrates the state's thoughtfulness in preventing unnecessary burdens on interstate commerce associated with its tax collection. If similar provisions were adopted by other states, in proportion to their population or total economy relative to South Dakota's (for example, New York has 22.8 times the population of South Dakota, so its comparable *de minimis* threshold would be $2.28 million; Massachusetts, with 7.9 times the population of South Dakota, would have a comparable threshold of $787,000), state burdens would be limited to be borne primarily by those enjoying state benefits, comporting with the benefit principle of sound tax policy.

South Dakota's statute also has a provision barring retroactive collection. S.B. 106 §5. While this Court has not definitively spoken on the extent of permissible retroactive state tax collection under the Due Process Clause, *compare United States v. Carlton*, 512 U.S. 26, 30 (1994) (upholding retroactive tax laws when "supported by a legitimate legislative purpose furthered by rational means") *with id.* at 38 (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session would raise, in my view, serious constitutional questions.") *and Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (setting out a three-part test on retroactive interpretation of law), numerous precedents, public sentiment, and the principles of sound tax policy look upon retroactive tax collection with disfavor. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998)

(Kennedy, J., concurring in the judgment and dissenting in part) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership."); *id.* at 558 (Breyer, J., dissenting) ("[A]n unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself."); *General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) ("Retroactive legislation . . . can deprive citizens of legitimate expectations"); Joseph Henchman & Kavya Rajasekar, *The Bounds of Retroactive State Taxes*, TAX FOUNDATION (Feb. 2017), https://goo.gl/7LWSGn; Paul H. Frankel & Amy L. Nogid, *The Manifest Justice to the Manifest Injustice Doctrine: The Time Has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases*, Legal Updates & News, Dec. 2008, https://goo.gl/9uZdm3. Indeed, at least one scholar thinks this Court ruled as it did in *Quill* in part because at oral argument in the case, the state's counsel committed to pursuing retroactive tax collection in response to a question from Justice O'Connor. See, e.g., Billy Hamilton, "*Remembrance of Things Not So Past: The Story Behind the Quill Decision*," 59 State Tax Notes 807 (Mar. 14, 2011), https://goo.gl/X7xL1J.

South Dakota's decision to exempt *de minimis* sales and bar retroactive collection in its statute upholds taxpayer expectations for past transactions and ensures validity under this Court's Due Process Clause. It is more evidence of South Dakota's determination to craft a well-written statute that can be considered and upheld by this Court.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

JOSEPH D. HENCHMAN*
**Counsel of Record*
TAX FOUNDATION
1325 G Street N.W., Suite 950
Washington, DC 20005
(202) 464-6200
henchman@taxfoundation.org
Counsel for Amicus Curiae

November 2, 2017

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

JOINT APPENDIX

Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Counsel of Record for Petitioner

George S. Isaacson
BRANN & ISAACSON
P.O. Box 3070
184 Main Street
Lewiston, ME 04243-3070
(207) 786-3566
gisaacson@brannlaw.com

Counsel of Record for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED OCT. 2, 2017
CERTIORARI GRANTED JAN. 12, 2018

TABLE OF CONTENTS

Docket Excerpts: South Dakota Supreme Court, No. 28160 ..... JA1

Docket Excerpts: South Dakota Circuit Court, No. 32CIV16-000092 ..... JA3

Docket Excerpts: U.S. District Court for the District of South Dakota, No. 3:16-cv-03019 ..... JA6

Complaint (S.D. Cir. Ct. Apr. 28, 2016) JA11

The following decisions have been omitted in printing the joint appendix because they appear in the appendix to the petition for certiorari, beginning on the following pages:

Opinion of the Supreme Court of South Dakota (Sept. 13, 2017) 1a

Opinion of the Circuit Court of South Dakota (Mar. 6, 2017) 15a

The following relevant pleadings have been omitted in printing the joint appendix because they appear in the appendix to the brief in opposition, beginning on the following pages:

Defendants' Statement of Material Facts (S.D. Cir. Ct. Feb. 22, 2017) A-1

Plaintiff's Response to Defendants' Statement of Material Facts (S.D. Cir. Ct. Feb. 23, 2017) B-1

Supreme Court of South Dakota

No. 28160

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,

v.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants and Appellees.

DOCKET ENTRIES

Doc #	Date	Actions
001	03/10/2017	Certified Copy of NOTICE OF APPEAL, P/S 3/8/17 (Odyssey and mail) (filed in TC 3/8/17) (AB due 4/24/17, if no trans ordered)
		* * *
014	04/13/2017	APPELLANT'S BRIEF (w/ cert of comp), P/S 4/13/17 (email) (RB due 5/31/17)
		* * *
015	06/14/2017	APPELLEE'S BRIEF (w/ cert of comp), P/S 6/14/17 (email) (Req for Oral Arg) (ARB due 7/5/17)
016	06/22/2017	APPELLANT'S REPLY BRIEF (w/ cert of comp), P/S 6/22/17 (email)
		* * *
020	08/29/2017	CALLED ON MERITS, ARGUED BY COUNSEL AND TAKEN UNDER ADVISEMENT

Doc #	Date	Actions
021	09/13/2017	Affirmed, Severson, Justice. Gilbertson, Chief Justice, and Zinter and Kern, Justices and Wilbur, Retired Justice, concur.
022	09/13/2017	JUDGMENT
		* * *
024	09/22/2017	LETTER dated 9/15/17 requesting the Court to correct a minor, but significant, technical error in the opinion issued 9/13/17 (Response due 10/12/17)
		* * *
026	10/30/2017	ORDER DENYING APPELLEES' REQUEST FOR CORRECTION OF THE OPINION
		* * *

South Dakota Sixth Judicial Circuit Court

No. 32CIV16-000092

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants.

DOCKET ENTRIES

Events and Hearings

04/28/2016	COMPLAINT WITH ATTACHMENTS
04/28/2016	APPLICATION FOR PRELIMINARY INJUNCTION ORDER WITH ATTACHMENT
	* * *
05/19/2016	PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE RE: SYSTEMAX INC AND CERTIFICATE OF SERVICE
05/25/2016	NOTICE OF FILING OF NOTICE OF REMOVAL AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
01/19/2017	ORDER AND OPINION GRANTING PLAINTIFF'S MOTION TO REMAND TO STATE COURT (FEDERAL COURT)
	* * *
02/21/2017	ANSWER JOINT ANSWER OF DEFENDANTS WAYFAIR INC, OVERSTOCKCOM INC AND NEWEGG INC AND CERTIFICATE OF SERVICE

02/21/2017	STATEMENT PARTIES' JOINT STATEMENT REGARDING PROCEEDINGS FOLLOWING REMAND AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
02/22/2017	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
02/22/2017	DEFENDANT'S STATEMENT OF MATERIAL FACTS AND CERTIFICATE OF SERVICE
02/22/2017	DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
02/23/2017	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
02/23/2017	PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AND CERTIFICATE OF SERVICE
02/24/2017	DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
03/06/2017	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

03/07/2017	NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE WITH ATTACHMENT
03/08/2017	NOTICE OF APPEAL
03/08/2017	PLAINTIFF'S AND APPELLANT'S DOCKETING STATEMENT

* * *

U.S. District Court for the District of South Dakota

No. 3:16-cv-03019

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants.

DOCKET ENTRIES

Date Filed	#	Docket Text
05/25/2016	1	NOTICE OF REMOVAL by Newegg Inc., Overstock.com, Inc., Wayfair Inc. from Circuit Court of the Sixth Judicial Circuit in Hughes County, South Dakota, case number 32CIV16-000092. (Attachments: # 1 Ex. A – State Court Documents, # 2 Ex. B – State Court Documents, # 3 Ex. C – State Court Documents, # 4 Ex. D – Notice of Filing Notice of Removal) (JLS) (Entered: 05/25/2016)
		* * *
05/25/2016	7	*Joint* ANSWER to Complaint by Newegg Inc., Overstock.com, Inc., Wayfair Inc.. (Bratkiewicz, Jeffrey) (Entered: 05/25/2016)
		* * *
07/22/2016	21	MOTION to Remand to State Court by State of South Dakota. (Jasper, Kirsten) (Entered: 07/22/2016)

Date Filed	#	Docket Text
07/22/2016	22	MEMORANDUM in Support re 21 MOTION to Remand to State Court filed by State of South Dakota. (Jasper, Kirsten) (Entered: 07/22/2016)
07/22/2016	23	STATEMENT OF MATERIAL FACTS by Defendants Newegg Inc., Overstock.com, Inc., Wayfair Inc. (Bratkiewicz, Jeffrey) (Entered: 07/22/2016)
07/22/2016	24	BRIEF by Defendants Newegg Inc., Overstock.com, Inc., Wayfair Inc. *IN SUPPORT OF DEFENDANTS' 25 MOTION FOR SUMMARY JUDGMENT* (Bratkiewicz, Jeffrey) Modified on 7/25/2016 to link document (SKK). (Entered: 07/22/2016)
07/22/2016	25	MOTION for Summary Judgment *AND REQUEST FOR ORAL ARGUMENT* by Newegg Inc., Overstock.com, Inc., Wayfair Inc.. (Bratkiewicz, Jeffrey) (Entered: 07/22/2016)

Date Filed	#	Docket Text
08/12/2016	26	MEMORANDUM in Opposition re 21 MOTION to Remand to State Court filed by All Defendants. (Attachments: # 1 Exhibit ACMA State Court Lawsuit Complaint for Declaratory Judgment, # 2 Exhibit State Court Lawsuit Answer of the South Dakota Department of Revenue) (Bratkiewicz, Jeffrey) (Entered: 08/12/2016)
08/12/2016	27	RESPONSE to Motion re 25 MOTION for Summary Judgment *AND REQUEST FOR ORAL ARGUMENT* filed by State of South Dakota. (Jasper, Kirsten) (Entered: 08/12/2016)
08/12/2016	28	RESPONSE to 23 Statement of Material Facts filed by State of South Dakota. (Jasper, Kirsten) (Entered: 08/12/2016)
08/26/2016	29	REPLY BRIEF by Defendants Newegg Inc., Overstock.com, Inc., Wayfair Inc. in Support of 25 *Defendant's Motion for Summary Judgment* (Bratkiewicz, Jeffrey) Modified on 8/29/2016 to link document and add text (SKK). (Entered: 08/26/2016)
08/26/2016	30	REPLY to 26 Memorandum in Opposition to Motion, filed by State of South Dakota. (Williams, Richard) (Entered: 08/26/2016)

Date Filed	#	Docket Text
		* * *
12/08/2016	36	Motion Hearing held on 12/8/2016 re 21 MOTION to Remand to State Court filed by State of South Dakota before U.S. District Judge Roberto A. Lange (Court Reporter Jill Connelly) (SLW) (Entered: 12/08/2016)
		* * *
01/17/2017	38	ORDER AND OPINION granting 21 Motion to Remand to State Court. Certified copy of Order and Opinion mailed to Hughes County Clerk of Courts. Signed by U.S. District Judge Roberto A. Lange on 1/17/17. (DJP) (Entered: 01/17/2017)

Date Filed	#	Docket Text
02/02/2017	39	TRANSCRIPT of Proceedings re 36 Motion Hearing held on 12-8-2016 before Judge Roberto A. Lange. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/23/2017. Redacted Transcript Deadline set for 3/6/2017. Release of Transcript Restriction set for 5/4/2017. (Connelly, Jill) (Entered: 02/02/2017)
02/02/2017	40	NOTICE of Filing of Official Transcript re 36 Motion Hearing. The Court Reporter shall manually serve a hard copy of this Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 02/02/2017)

STATE OF SOUTH DAKOTA	) : ss)	IN CIRCUIT COURT
COUNTY OF HUGHES		SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

WAYFAIR INC
4 Copley PL FL 7
Boston MA 02116-6504

SYSTEMAX INC
11 Harbor Park Dr
Port Washington NY 11050

OVERSTOCK.COM INC
6350 S 3000 E
Salt Lake City UT 84121-5952

NEWEGG INC
16839 E Gale Ave
City of Industry CA 91745
Defendants.

32 Civ. 16-92
COMPLAINT

The State of South Dakota, by and through the Department of Revenue (hereinafter the State), Plaintiff in the above-entitled matter, for its Complaint states and alleges as follows:

SUMMARY

1. The State – through this declaratory judgment action – seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a

declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

RELEVANT LEGAL BACKGROUND

2. In 1967, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court of the United States held that the Due Process Clause and dormant Commerce Clause of the United States Constitution both prohibit states from requiring out-of-state mail-order retailers that lack any physical presence within a state to collect that state's sales and/or use taxes respecting sales for delivery to in-state residents.

3. Thereafter, the U.S. Supreme Court's jurisprudence regarding the "minimum contacts" sufficient to allow states to regulate conduct by non-residents became far less restrictive. The U.S. Supreme Court's cases regarding the dormant Commerce Clause also changed their focus. Responding to these changes, in 1991, the North Dakota Supreme Court held that *Bellas Hess* was "an obsolescent precedent." *State v. Quill Corp.*, 470 N.W. 2d 203, 208 (N.D. 1991).

4. The Supreme Court of the United States granted certiorari and reversed. In *Quill*, 504 U.S. at 306-308, it agreed with the North Dakota Supreme Court that the Due Process Clause holding of *Bellas Hess* had been overtaken by subsequent precedent. But it further held that, despite the fact that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," *id.* at 311, the "continuing value of a

bright-line rule in this area and the doctrine and principles of *stare decisis*," led it to "disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18. Particularly because the Due Process Clause holding would for the first time permit Congress to "overrule" *Bellas Hess* itself, the Court would withhold its "hand, at least for now." *Id.* at 318.

5. The effect of *Bellas Hess* and *Quill* is to effectively immunize out-of-state retailers lacking a physical presence within a state from having to remit any state sales or use taxes. As further explained below, the effects of that immunity on the State treasury and its general retail markets have vastly multiplied because of the meteoric rise of Internet commerce.

6. Nonetheless, in the 24 years since *Quill* was decided, Congress has failed to make good on the Supreme Court's invitation to address this issue through legislation at the federal level. Bills are introduced and debated, but routinely fail to receive even an up-or-down vote because of committee leaders advancing esoteric interests or other well-understood "veto" points that make congressional inaction the strong default rule. Indeed, while many states (including South Dakota) reacted to *Quill* by creating a "Streamlined" system that would allow out-of-state retailers to easily comply with the rationalized sales and use tax laws of all those states at once, Congress has not taken the necessary action to allow the Streamlined system to take effect.

7. The absence of federal legislative progress on this issue reflects the effect of *Bellas Hess* and *Quill* on the federal Constitution's separation of powers. Absent *Quill*, Congress would of course retain the power

"to regulate Commerce . . . among the several States," U.S. Const. Art. 1, sec. 8, cl. 3, including by exempting out-of-state retailers that lack physical presence within a state from any obligation to collect and remit a state's sales or use taxes. But the effort to obtain affirmative congressional action would fall on those retailers seeking a special exemption from the states' ordinary powers of taxation, and the states would no longer be forced to seek Congress's permission to exercise their own sovereign authority. If – as is quite often the case – Congress were to continue to do nothing in this area, the power to tax those conducting business in the state would remain "reserved to the States respectively," as the Constitution provides. U.S. Const. Amend. X.

8. In a recent case, Justice Kennedy signaled that the United States Supreme Court may be willing to once again consider whether "the time has come to renounce the bright-line test of *Bellas Hess*." *Quill*, 504 U.S. at 317-18. In his concurrence in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (Kennedy J., concurring), Justice Kennedy urged that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.* at 1135. He noted that *Quill* was "now inflicting extreme harm and unfairness on the States," in part because of the massive explosion in e-commerce. *Id.* at 1134-1135. ("This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States.") (citation omitted).

9. Indeed, Justice Kennedy specifically urged that cases permitting reconsideration of *Quill* should be developed as quickly as possible, because the harm to state treasuries has become severe. "Given these changes . . . it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." *Id.* at 1135.

10. The State has taken up Justice Kennedy's invitation, motivated by the imminent damage that *Quill* continues to cause to state tax revenues, by enacting Senate Bill 106, 91st Session, South Dakota Legislature, 2016, "An Act to provide for the collection of sales taxes from certain remote sellers." (Appendix A – hereafter referred to as "the Act" or cited to as "S.B. 106").

11. Legislative findings accompanying the passage of the Act reflect that Justice Kennedy's concerns are well placed, particularly with respect to South Dakota, and that the United States Supreme Court "should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax[.]" *See* S.B. 106 § 8(7).

PARTIES

12. Plaintiff is the sovereign State of South Dakota, which collects "[a]ll taxes levied and collected for state purposes . . . into the state treasury." S.D. Const. Art. XI, sec. 9.

13. The Department of Revenue administers the laws of the State respecting taxation generally, SDCL 10-1-1 *et seq.*, and the sales tax in particular. SDCL 10-45 *et seq*. The Secretary of the Department is

charged with investigating and taking various enforcement actions respecting the sales tax. *See* SDCL 10-59-1, -5, -8, -10, -14, -15.

14. The State is specifically authorized by section 2 of the Act to "bring a declaratory judgment action under [SDCL] 21-24 in any circuit court" to establish that the obligations created by the Act are valid and applicable to any particular taxpayer that meets the statutory thresholds in the Act.

15. Defendant Newegg Inc. is one of the top online retailers in the United States, and is headquartered in City of Industry, California. It owns and operates Newegg.com, which sells a variety of consumer electronics. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

16. Defendant Overstock.com Inc/ is one of the top online retailers in the United States, and is headquartered in Salt Lake City, Utah. Overstock.com sells a variety of products, ranging from home goods and furniture to clothing and diamond rings. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

17. Defendant Systemax Inc. is a Fortune 1000 company headquartered in Port Washington, New York. It is a leading retailer of brand name and private label products, including industrial, material handling and supplies, personal computers, notebook computers, technology supplies, consumer electronics, and computer-related accessories. It operates a number of product sales websites that ship directly to purchasers throughout the United States, including into South Dakota.

18. Defendant Wayfair Inc. is a leading online retailer of home goods and furniture headquartered in Boston, Massachusetts. It ships sales directly to purchasers throughout the United States, including into South Dakota.

PERSONAL JURISDICTION

19. Based on information and belief, Defendants lack a physical presence in South Dakota but are subject to the personal jurisdiction of the South Dakota courts under SDCL 15-7-2. SDCL 15-7-2 specifically extends the personal jurisdiction of the South Dakota courts to parties "[e]ntering into a contract for services to be rendered or for materials to be furnished in this state by such person," SDCL 15-7-2(5), and to parties committing "any act" when extending such jurisdiction "is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL 15-7-2(14).

20. Both the State and Federal constitutions permit South Dakota state-court jurisdiction over retailers who solicit business from, and deliver tangible personal property and services to, residents of the State. *See Quill*, 504 U.S. at 306-08 (holding that "there is no question" that such contacts suffice for "due process purposes"); *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 13, 743 N.W.2d 402, 406 (holding that personal jurisdiction of South Dakota courts extends to limits of federal constitution).

SUBJECT MATTER JURISDICTION

21. Section 2 of the Act creates a cause of action for declaratory judgment and empowers "any circuit court" to adjudicate that cause of action. Accordingly,

the Sixth Judicial Circuit Court has subject matter jurisdiction over this action.

22. SDCL 21-24-1 empowers "[c]ourts of record within their respective jurisdictions . . . to declare rights, status, and other legal relations whether or not further relief is or could be claimed[,]" provides that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for," and permits "[t]he declaration [to] be either affirmative or negative in form and effect[.]"

23. SDCL 21-24-3 permits "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." "[T]he State is a 'person' within the meaning of" the Declaratory Judgment Act. *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, 706 N.W. 2d 239 (rejecting contrary dictum in *Pennington County v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, 641 N.W. 2d 127).

24. As supported by the allegations below, this request for declaratory judgment also presents a justiciable and ripe controversy, between adverse parties, in which the State has a legally protectable interest. The declaration the State seeks will permit it to require sales tax to be collected and remitted from sellers without a physical presence in the State who are currently not complying with the Act; the State is clearly interested in obtaining the tax revenue it believes is due, and the Defendants have the contrary interest in resisting this tax obligation. Moreover, each Defendant has failed to register to collect and remit the state sales tax after receiving an individualized notice

directing them to do so by April 25, 2016. That notice specifically instructed Defendants that failure to register would demonstrate that they did "not intend to comply with the Act." *See* Notices (Appendix B). Furthermore, under the structure of the Act, the State cannot currently enforce the Act's collection obligation against the Defendants unless the State prevails in this suit. Were the State to prevail, the Act will immediately apply to Defendants, requiring them to collect and remit the state sales tax on a going-forward basis.

25. "A matter is sufficiently ripe [for declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995) (citation omitted) (setting forth requirements for declaratory judgment). The conflict between the State and the Defendants is not only imminent but present: This suit will determine whether or not Defendants must collect and remit state sales tax the day after it is decided.

VENUE

26. Venue is appropriate in this Court. Section 2 of the Act permits this suit to be brought in "any circuit court."

27. Furthermore, SDCL 15-5-6 permits venue "in any county which the plaintiff shall designate" in any case where, as here, "none of the defendants reside in the state."

RELEVANT STATUTES

28. The Act provides that sellers without a physical presence in the State must comply with the State's sales tax laws "as if the seller had a physical presence in the state." S.B. 106 § 1.

29. The Act contains two threshold provisions, however, that limit the effect of this requirement on sellers who – because of their limited size or geographic reach – conduct relatively little business shipping goods and services to South Dakota residents. In particular, in order for the above obligation to apply, the out-of-state seller must have "gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceed[ing] one hundred thousand dollars," or must have "sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions." These thresholds are determined based on either the previous calendar year or the current calendar year to date. S.B. 106 § 1(1)-(2).

30. In addition, the Act creates a declaratory judgment action that the State may bring to determine the validity and applicability of this obligation with respect to individual taxpayers. S.B. 106 § 2. It also establishes special procedures designed to ensure the most expeditious possible adjudication of this action. S.B. 106 §§ 2, 4.

31. The Act contains three provisions designed to protect taxpayers from accruing any tax liability – retroactive or otherwise – during the pendency of this action. First, section 3 of the Act provides that the filing of this action operates as an injunction "prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax

on a voluntary basis."* *See* S.B. 106 § 3. The State filed this suit immediately before the May 1, 2016 effective date of the Act to trigger this injunction and prevent any uncertainty for taxpayers. *See* S.B. 106 § 9 (setting effective date). Second, section 5 of the Act provides that "[n]o obligation to remit the sales tax required by this Act may be applied retroactively." Finally, section 6 of the Act provides that "[i]f an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction."

32. Given the provisions above, the State has simultaneously filed with this Complaint an application for an injunction which records and makes certain the effect of section 3 of the Act. This application can and should be immediately granted without a hearing because the State asks only for an injunction restraining itself and benefiting the Defendants (as well as other taxpayers subject to the Act).

33. These provisions, together with the requested injunction, ensure that any seller not complying voluntarily with the Act will face tax liability only prospectively from the date on which a court holding makes clear that the Act validly applies to the seller.

PROCEDURAL BACKGROUND

34. The Act was signed into law by Governor Dennis Daugaard on March 22, 2016. It provides that it

---

* The Act also makes clear that this injunction will "not apply" to any taxpayer against whom the state prevails in an action like this one. *See* S.B. 106 § 3.

will be effective on the first day of the first month that is at least fifteen calendar days from the date the Act is signed into law. Therefore, its effective date is May 1, 2016. *See* S.B. 106 § 9.

35. To prepare sellers lacking a physical presence in the State for the effect of the law, the Department of Revenue sent an individualized notice to 206 such sellers for whom available information made it almost certain that they met the statutory thresholds set forth above and in Section 1 of the Act. Defendants were each sent a copy of the notice (copies of which attached hereto as Appendix B) on March 25, 2016, by Andy Gerlach, Secretary of the Department of Revenue.

36. The State also posted relevant information about the Act on its website, at http://dor.sd.gov/Taxes/Business_Taxes/SB106.aspx.

37. The State identified the 206 sellers lacking a physical presence within the State who received the notice by using available data to calculate the likely amount of gross revenue that such sellers derive from sales into the State. After applying a mathematical factor designed to avoid close cases in which the seller might not meet the statutory thresholds, the State determined whether the remaining sellers had registered for a license to collect and remit sales tax. Sellers who were not registered, including all of the present Defendants, received the notice directing them to register by April 25, 2016, and thus received both actual and inquiry notice of the Act more than 30 days ago.

38. The notice carefully explained the consequences of failing to register:

> "If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds."

39. The notice also explained that any recipient who did not meet the statutory thresholds in section 1 of the Act should notify the State to avoid legal action.

40. Each Defendant failed to register to collect and remit the sales tax by April 25, 2016, and each has failed to register as of the date of this Complaint.

41. On information and belief, each Defendant meets either or both of the statutory thresholds, having at least $100,000 of gross revenue from sales into the State and/or at least 200 separate such transactions.

42. The State initiated this action against Defendants on the basis of their refusal to register for a license following individualized notice of the need to do so. Because of section 3 of the Act, the filing of this action immediately before the effective date enhances the protection of taxpayers (including Defendants) from any argument that they face an active and enforceable obligation to collect and remit sales taxes before the conclusion of this action.

RELEVANT LEGISLATIVE FINDINGS

43. In enacting the Act, the South Dakota Legislature determined that *Quill* causes a severe harm to the State's tax revenue, and a concomitant harm to state and local services:

a. "The inability to effectively collect the sales or use tax from remote sellers . . . is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services," S.B. 106 § 8(1);

b. "The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services," *id.* § 8(2);

c. Refusal by out-of-state retailers to collect sales taxes "causes imminent harm to this state," *id.* § 8(9).

44. The Legislature's assessment is correct; the Department of Revenue estimates the revenue loss associated with *Bellas Hess* and *Quill* at approximately $48-$58 million annually for state and municipal taxes combined. These figures are based largely on a study

conducted several years ago at the University of Tennessee, and relied upon in Justice Kennedy's concurrence in *DMA*. *See* D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses from Electronic Commerce 11 (2009).

45. Furthermore, the Legislature found that, even as the costs to the State from *Quill* have increased dramatically, the costs of compliance for taxpayers have fallen just as dramatically:

> In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota.

S.B. 106 § 8(6).

46. Again, the legislature's assessment is clearly correct. Numerous retailers now collect and remit sales tax in every state, and are quite capable of administering all their state and local sales tax obligations when customers buy goods through their online sales channels. Software integration options are now readily available from multiple vendors for online "shopping carts." And because it is necessary to obtain immediate information from the purchaser regarding their residence in order to deliver the goods, it is possible for the software to immediately calculate and inform the consumer of the applicable sales tax before completing the transaction, and the tax can be easily collected at the time of the sale. Indeed, the industry that provides these integration options is robust and

growing, which will make such software even easier and less expensive to obtain in the near future. Moreover, many sellers already have such software to address sales to states in which they do have a physical presence.

47. This development is further supported by the Streamlined Sales and use Tax Agreement, which has been enacted by more than twenty states (including South Dakota) in the wake of *Quill*. Any seller lacking a physical presence in the State who intends to comply with the obligations set forth in the Act can register to collect sales taxes through the voluntary Streamlined system. That system, in turn, provides sellers the option to use sales tax administration software from Certified Software Providers (CSPs) with the cost of such software borne by the states. Sellers may choose from seven different CSPs, and the CSP will file the tax returns and remit applicable taxes for sellers that use it. Sellers using a CSP are also immune from audit liability for the sales they process through that software. The Streamlined system also reduces sales tax administration cost and expense through:

a. uniform definitions of products and services across all Member states;

b. freely available tax rate and tax boundary databases;

c. single, state level tax administration;

d. uniform audit procedures (for sellers that choose not to use a CSP);

e. simplified tax rate structures;

f. uniform administration of sales tax expenses; and,

g. uniform rules for sourcing sales.

Accordingly, a taxpayer can comply with the obligations of the Act using the Streamlined system at little to no personal cost (apart from actually remitting the taxes collected from consumers), and with little to no concern regarding audits or errors in compliance. Moreover, many of the above benefits are available even to sellers who do not elect to participate in the Streamlined system as a whole, further easing the burden of compliance on all out-of-state retailers.

48. The Legislature also found that *Bellas Hess* and *Quill* distort the local retail market, causing unfairness to brick-and-mortar retailers generally, and to smaller, locally owned businesses in particular. Out-of-state retailers benefit from local infrastructure without paying their fair share of taxes. *See* S.B. 106 § 8(5). And they also "actively market sales as tax free or no sales tax transactions" even though "a use tax is owed" by the consumer. *Id.* § 8(3). As a result, local retailers are unable to compete fairly with online retailers, which is likely to cause even further harm to the State by harming the local businesses that employ local residents and make up the bulk of the State's tax base. *See id.* § 8(4) ("The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.").

49. Well-documented economic effects support the Legislature's judgment. Expert economists, including researchers associated with both sides of the political spectrum, agree that the special exemption from sales taxation created by *Quill* causes serious harm to state economies (and the national economy) by distorting

the operation of the free market. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000); Arthur B. Laffler and Donna Arduin, *Pro-Growth Tax Reform and E-Fairness*, http://standwithmainstreet.com/ArtLafferStudy.pdf.

50. Finally, the Legislature made clear that it wanted to accommodate the difficulties that might be caused to out-of-state retailers by its effort to respond to Justice Kennedy's invitation to bring an action allowing the United States Supreme Court to reconsider *Quill*. It thus created a specific cause of action with unique protections for taxpayers, allowing the State to seek a declaratory judgment in circuit court, with a direct appeal to the South Dakota Supreme Court, both of which must be resolved as expeditiously as possible. *See* S.B. 106 §§ 2, 4; *see also id.* §§ 8(8)-(9) (finding that "[e]xpeditious review is necessary and appropriate," and that the Act is intended to "permit[] the most expeditious possible review of the constitutionality of this law"). That action obviates the need for an audit and any effort to obtain retroactive tax liability from any out-of-state seller who does not wish to comply with the Act on a voluntary basis. As the Legislature stated:

> Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state.
>
> At the same time, the Legislature recognizes that the enactment of this law places remote

> sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer.

S.B. 106 § 8 (9)-(10).

51. This declaratory judgment action thus represents "the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act." S.B. 106 § 8 (11). Like the Legislature, the State recognizes that a change in federal constitutional doctrine will be necessary for the State to prevail in this case. Nonetheless, the effect of the declaration that the State seeks in this action will be to immediately require the collection and remittance of taxes from these Defendants under the Act – a collection which, absent such a declaration, the State is presently unable to enforce. There is accordingly an immediate controversy over whether existing federal constitutional doctrine should invalidate the Act or not, which this Court can and should adjudicate in the first instance by declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, the State hereby prays for relief as follows:

(1) That the Court declare that the requirements of section 1 of the Act are valid and applicable with respect to the defendants.

(2) That the Court immediately enter an order enjoining the enforcement of the Act during the pendency of this action – reflecting on the record the automatic effect of Section 3 of the Act – and dissolve such injunction upon the entry of a declaratory judgment in favor of the State. (A separate motion for an appropriate order of this form has been contemporaneously filed).

(3) That the Court enter an injunction requiring the defendants to register for a license to collect and remit the sales tax.

(4) That the Court grant such other relief as it deems just and proper in this matter.

Dated this 28th day of April, 2016.

/s/ Richard M. Williams
Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

[Appendices to Complaint omitted]

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

PETITIONER'S BRIEF

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Jeanne Jeong
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

QUESTION PRESENTED

Should this Court abrogate *Quill*'s sales-tax-only, physical-presence requirement?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
INTRODUCTION 1
OPINIONS BELOW 2
JURISDICTION 3
CONSTITUTIONAL PROVISIONS INVOLVED 3
STATEMENT 3
I. Legal Background 3
II. Developments Since *Quill* 9
III. Case History 15
SUMMARY OF ARGUMENT 17
ARGUMENT 21
I. The Physical-Presence Rule Requires This Court's Correction. 21
A. As this case shows, the physical-presence rule is squarely inconsistent with *Complete Auto*'s "substantial nexus" test. 22
B. The physical-presence rule is an outlier. 24
C. The application of the physical-presence rule has become both arbitrary and unclear, causing unintended and harmful effects. 27
II. The Concerns That Animated *Quill*'s Decision To Retain *Bellas Hess*'s Rule Are No Longer Present. 38

A. South Dakota's statute serves *Quill*'s own goals better than the physical-presence rule.... 38

B. Eliminating the physical-presence rule does not require this Court to hold that *Bellas Hess* and *Quill* were wrong when decided.... 40

C. The burden of sales-tax collection is now marginal.... 44

D. Abrogating the physical-presence rule in this case raises no special problems of retroactive taxation.... 48

III. *Stare Decisis* Does Not Justify Retaining The Physical-Presence Rule.... 51

CONCLUSION.... 59

APPENDIX A: S.B. 106, 91st Legis. Assemb. Session (S.D. 2016).... 1a

APPENDIX B: Summary of Present State Legal Regimes.... 7a

TABLE OF AUTHORITIES

Cases

Alleyne v. United States,
570 U.S. 99 (2013) 57

Am. Trucking Ass'ns v. Smith,
496 U.S. 167 (1990) 24

Arizona v. Gant,
556 U.S. 332 (2009) 51

Arizona v. Rumsey,
467 U.S. 203 (1984) 53

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 6, 7

Burnham v. Superior Court,
495 U.S. 604 (1990) 40

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 34

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 24, 34

Carroll v. Carroll's Lessee,
57 U.S. (16 How.) 275 (1854) 42

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 42

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) ..... *passim*

Comptroller v. Wynne,
135 S. Ct. 1787 (2015) 20

Crutchfield Corp. v. Testa,
88 N.E.3d 900 (Ohio 2016) 25

D.H. Holmes Co. v. McNamara,
486 U.S. 24 (1988) 29

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) ..... *passim*

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) ..... *passim*

Fulton Corp. v. Faulkner,
516 U.S. 325 (1996) 34

Gen. Trading Co. v. State Tax Comm'n of Iowa,
322 U.S. 335 (1944) 27

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 53

Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) 40

Granholm v. Heald,
544 U.S. 460 (2005) 50

Heck v. Humphrey,
512 U.S. 477 (1994) 42

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 39

KFC Corp. v. Iowa Dep't of Revenue,
792 N.W.2d 308 (Iowa 2010) 25

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 17, 51, 52, 57

Lamtec Corp. v. Dep't of Revenue,
246 P.3d 788 (Wash. 2011) 20, 26

McBurney v. Young,
569 U.S. 221 (2013) 57

Miller Bros. v. Maryland,
347 U.S. 340 (1954) 22

Montejo v. Louisiana,
556 U.S. 778 (2009) 57

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 58

Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.,
386 U.S. 753 (1967) ..... *passim*

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization,
430 U.S. 551 (1977) 6, 8, 27

Okla. Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 22

Orvis Co. v. Tax Appeals Tribunal of N.Y.,
86 N.Y.2d 165 (N.Y. 1995) 26

Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.,
987 N.E.2d 621 (N.Y. 2013) 31

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 56

Pearson v. Callahan,
555 U.S. 223 (2009) 53, 56, 57

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Randall v. Sorrell,
548 U.S. 230 (2006) 52

Reno v. ACLU,
521 U.S. 844 (1997) 12

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 41

Spector Motor Serv., Inc. v. O'Connor,
340 U.S. 602 (1951) 4, 23

Standard Pressed Steel Co. v. Dep't of Revenue of Wash., 419 U.S. 560 (1975) 27

United States v. Carlton,
512 U.S. 26 (1994) 51, 56

Constitutional Provisions

U.S. Const. art. I, §8 53
U.S. Const. art. I, §8, cl. 3 3
U.S. Const. art. I, §9 51
U.S. Const. art. I, §10 51
U.S. Const. amend. V 51
U.S. Const. amend. X 53
U.S. Const. amend. XIV 51

Statutes

28 U.S.C. §1257(a) 3
Ala. Code §40-23-191 *et seq.* 14

Other Authorities

Ala. Dep't of Revenue, Simplified Sellers Use Tax, https://revenue.alabama.gov/sales-use/simplified-sellers-use-tax-ssut/ 14

Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229 (2010) 36

Ariz. Dep't of Revenue, Publication No. 623: Nexus in Arizona (rev. Feb. 2018), https://www.azdor.gov/Portals/0/Brochure/623.pdf 30

Amy Bernstein & Anand Raman, *The Great Decoupling: An Interview with Erik Brynjolfsson and Andrew McAfee*, Harv. Bus. Rev. (June 2015), https://hbr.org/2015/06/the-great-decoupling 13

Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* (2009) 34

Gov. Dennis Daugaard, Budget Address (Dec. 6, 2016), http://sd.gov/governor/docs/FY2018%20Budget%20Address%20Transcript.pdf 35

Peter F. Drucker, *Beyond the Information Revolution*, The Atlantic (Oct. 1999), https://www.theatlantic.com/magazine/archive/1999/10/beyond-the-information-revolution/304658/ 10, 29

E-commerce Takes Off, The Economist (May 13, 2004), http://www.economist.com/node/2668033 12

Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1 (2014) 36

Getting Started with TaxCloud (Nov. 6, 2013), https://www.youtube.com/watch?v=2aoEIcxwtac 45

Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000) 37

H.B. 1182, 91st Legis. Assemb. Session (S.D. 2016) 16

Daniel Hemel, *There Is No Retroactivity Concern with Overruling Quill*, Medium (Jan. 28, 2018), https://medium.com/whatever-source-derived/there-is-no-retroactivity-concern-with-overruling-quill-f6623da6a2d7 50

Martin Hilbert et al., *The World's Technological Capacity to Store, Communicate, and Compute Information* (Apr. 1, 2011), http://www.martinhilbert.net/worldinfocapacity-html 11

Inst. for Prof'ls in Taxation, *Locally Administered Sales and Use Taxes* (2016), http://www.ipt.org/iptdocs//Files/MiscForms/CompleteStudy.pdf 45

Int'l Council of Shopping Ctrs., *Case for Fairness*, http://www.efairness.org/files/united-states.pdf 35

Regina Joseph, *Online Retail Sales*, Forbes (Dec. 4, 1998), https://www.forbes.com/1998/12/04/feat.html#162a1b165e5b 11

Michael L. Klassen, Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer Purchasing Decisions*, 8 J. Direct Marketing 21 (1994) 37

Arthur B. Laffer & Donna Arduin, *Pro-Growth Tax Reform and E-Fairness* (2013), http://www.efairness.org/files/dr-art-laffer-sudy.pdf 36

John McChesney, *Amazon.com's Jeff Bezos Is Bullish on Books*, Wired (June 1, 1997), https://www.wired.com/1997/06/amazon-coms-jeff-bezos-bullish-books/ 10

Nat'l Conference of State Legislatures, *Estimated Uncollected Use Tax from All Remote Sales in 2012*, http://www.ncsl.org/research/telecommunications-and-information-technology/2012-uncollected-use-tax.aspx 35

Nat'l Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (2000) 10

Claire Parker, *Out-of-State Internet Sellers Get Tax Reprieve, for Now*, Boston Globe (June 29, 2017), https://www.bostonglobe.com/business/2017/06/29/state-internet-sales-tax-gets-reprieve-for-now/IwtdxjX3YX8ZdBuzOLwMaK/story.html 49

U.S. Census, *Estimated Annual U.S. Retail Trade Sales—Total and E-commerce I: 1998-2015*, http://www2.census.gov/retail/releases/current/arts/ecommerce.xls 35

Brian Vastag, *Exabytes: Documenting 'the Digital Age' and Huge Growth in Computing Capacity*, Wash. Post (Feb. 10, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021004916.html 11

Leslie Walker, *Amazon Gets Personal with E-Commerce*, Wash. Post (Nov. 8, 1998), http://www.washingtonpost.com/wp-srv/washtech/daily/nov98/amazon110898.htm 11

Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571 (Aug. 7, 2017), http://www.yettertax.com/review/wp-content/uploads/2017/09/State_Tax_Notes_Automation_Article.pdf 14, 15, 46, 47

INTRODUCTION

In 1992, this Court recognized that its sales-tax-only, physical-presence requirement for evaluating state tax laws under the dormant commerce clause was probably incorrect. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992). Back then, however, it was possible to believe it was not *that* wrong—or at least not that important an error—for essentially the same reason: The exception only sheltered the mail-order industry, and no one could have believed that industry would ever approach the size and importance of physical retail, including the dominant "big-box" stores of the day. Then, and for the foreseeable future, it seemed that most major retailers in a market would need a store, salesperson or some other marginal physical presence to succeed. And even if the physical-presence requirement missed some outlier companies who did enough business to have a "substantial nexus" for purposes of by-then-prevailing doctrine, *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Court could console itself that these made up a relatively small slice of the retail industry, limiting the damage this one-off exception could do to the doctrine, state treasuries, and the industry itself.

Times have changed.

Today, the sales-tax-only, physical-presence requirement is both far more wrong and far more significantly so than anyone could have imagined in 1992. It is far more wrong because, in the digital age where ubiquitous e-commerce is projected into our homes and smartphones over the internet, traditional "physical" presence is an increasingly poor proxy for a company's "nexus" with any given market or State. Internet retail now makes it possible to do *billions* in business in

a forum without having a strictly "physical" presence there, while also interacting far more pervasively—and being much more "present"—than catalog mailers ever were. *See, e.g.*, *Direct Mktg. Ass'n v. Brohl* (*DMA*), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Perhaps as a result, these *Quill*-shielded companies now make up a large and expanding slice of retail. This Court's outdated physical-presence rule now causes outsized harms to state treasuries and fundamental unfairness among retailers—a distressing "oddity" for a doctrine that "is all about preventing discrimination between firms." *Direct Mktg. Ass'n v. Brohl* (*DMA II*), 814 F.3d 1129, 1150-51 (10th Cir. 2016) (Gorsuch, J., concurring).

Thus, while it was perhaps possible to disagree in 1992 "with the North Dakota Supreme Court's conclusion that the time ha[d] come to renounce" the sales-tax-only, physical-presence rule, *Quill*, 504 U.S. at 318, that is possible no longer. Indeed, the technological wave that caused the changes above has simultaneously washed away the other theorized benefits of the physical-presence rule. *Stare decisis* does not justify keeping an *ad hoc* exception that is so outdated and harmful. Now, the time *has* come for this Court to revisit the physical-presence rule and hold that South Dakota's statute complies fully with the dormant commerce clause in asking only that retailers like respondents remit their "'fair share of taxes.'" *Complete Auto*, 430 U.S. at 277.

OPINIONS BELOW

The Supreme Court of South Dakota's opinion (Pet.App. 1a-14a) is reported at 901 N.W.2d 754. The trial court's decision (Pet.App. 15a-18a) is unreported.

JURISDICTION

The judgment below, affirming a final judgment on constitutional grounds, was entered September 13, 2017. Pet.App. 1a. The petition for certiorari was filed October 2, 2017, and granted January 12, 2018. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The "Commerce Clause" provides:

> Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I, §8, cl. 3.

STATEMENT

I. Legal Background

A half-century ago, this Court prohibited Illinois's effort to make an out-of-state catalog mailer collect the State's sales or use tax on its transactions with Illinois customers.[1] *See Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967). Invoking both due-process and dormant-commerce-clause doctrine—which the Court called "similar" and "closely related"—*Bellas Hess* held that a company whose "*only*

---

[1] Most states have "complementary sales-and-use tax regime[s]" where the in-state purchaser must pay (as a "use" tax) any difference between the State's sales tax and the amount the seller collected at the sale. *See, e.g.*, *DMA*, 135 S. Ct. at 1127. For present purposes, no difference has been suggested between imposing an obligation on sellers to collect the "sales" or "use" tax. For clarity, we use "sales tax" to describe a tax collected and remitted by the seller, and "use tax" to describe a tax remitted by the consumer.

connection with customers in the State is by common carrier or the United States mail" could not be made to collect the sales tax." *Id.* at 756, 758 (emphasis added). It emphasized that the seller there did not have even "'a telephone listing in Illinois,'" nor "'advertise[] its merchandise for sale in newspapers, on billboards, or by radio or television.'" *Id.* at 754.

Bellas Hess's evident concern was that forcing out-of-state catalog mailers to collect sales taxes for every local tax jurisdiction would "entangle [their] interstate business in a virtual welter of complicated obligations." *Id.* at 759-60. But the Court had already "upheld the power of a State to impose liability upon an out-of-state seller to collect a local use tax in a variety of circumstances." *Id.* at 757. *Bellas Hess* thus grounded its holding in the distinction between "mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier." *Id.* at 758. Three Justices dissented, advocating a less mechanical approach where the requisite "nexus" would be judged by the extent to which the out-of-state seller was "exploiting the local market" rather than whether it was doing so only by mail. *Id.* at 760-66 (Fortas, J., dissenting).

A sea-change in this jurisprudence would come a decade later in *Complete Auto*, 430 U.S. 274—a case, much like this one, in which this Court overturned another *per se* rule it had created under the dormant commerce clause. For the previous 25 years, this Court had followed the "*Spector* rule," *see Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602, 603 (1951), which held that States could not tax the "privilege of

doing business" if the business was engaged in interstate commerce and the nominal incidence of the tax was on the interstate activity. The rule made certain formal designs "*per se* unconstitutional," *Complete Auto*, 430 U.S. at 288-89, and "deem[ed] irrelevant any consideration of the practical effect of the tax." *Id.* at 278. As a result, economically indistinguishable taxes were upheld or struck down for seemingly arbitrary reasons. *See id.* at 284-85. Accordingly, when Mississippi sought three years of back taxes that Complete Auto had not remitted based on the *Spector* rule, this Court recognized that *Spector* no longer had any "relationship to economic realities," *id.* at 279, and so expressly abrogated its *per se* rule and held for Mississippi. *Id.* at 288-89.

As *Complete Auto* explained, its holding was driven by a steady shift away from focusing on the abstract form of the tax and examining instead whether "the tax produces a forbidden effect." *Id.* at 288; *see also id.* at 278-79, 280-81, 285. It identified two "forbidden effect[s]" that concern the dormant commerce clause: (1) home-state "discrimination" against out-of-state businesses; and (2) laying "undue burdens" upon interstate commerce. *Id.* at 278. *Complete Auto* made clear that, absent those two effects, an interstate business "'should pay its fair share of taxes.'" *Id.* at 277, 288. And so, echoing the *Bellas Hess* dissenters, *see* 386 U.S. at 764, it rejected in full-throat the view that the dormant commerce clause creates "a sort of 'free-trade' immunity" for interstate commerce, and jettisoned a *per se* rule that did "not address the problems with which the Commerce Clause is concerned." *Complete Auto*, 430 U.S. at 278, 288.

Complete Auto identified four requirements to police for the dormant commerce clause's forbidden effects. Under this test—which now governs every state-tax question (save this one)—this Court sustains any tax that "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

The same Term, this Court held in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 558, 560-61 (1977), that neither *Bellas Hess* nor *Complete Auto* prevented California from requiring that a periodical (National Geographic) collect sales tax on merchandise it sold to California residents from the back of the magazine, so long as the company had an office (of any kind) in the State. The Court expressly held that this California office could be completely unrelated to the mail-order sales. *Id.* at 558. This made *Bellas Hess*'s requirement into a purely formal condition: Any physical presence could suffice, even if it had no relation to preventing the discriminatory or undue-burden effects that concerned *Complete Auto*.

Thereafter, this Court's due-process doctrine—which *Bellas Hess* had treated as "closely related" to the dormant commerce clause and the source of its in-state-presence requirement, *see supra* pp.3-4—went in another direction, too. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), after a long trend away from a physical-presence focus, this Court squarely held that transacting business with a State resident provided a sufficient "nexus" for the State to regulate

that transaction, whether the out-of-state business "*physically* enter[ed] the forum state" or not.

Then came *Quill*.

In 1992, North Dakota's Supreme Court allowed the State to enforce a tax-collection requirement on an out-of-state catalog retailer whose sole connection to North Dakota was by mail or common carrier. It reasoned that some of the shifts above justified this word-for-word transgression of *Bellas Hess*'s holding. But, "[w]hile [it] agree[d] with much of the state court's reasoning," this Court declined to overrule *Bellas Hess* and reversed. *Quill*, 504 U.S. at 301.

Quill began by agreeing that *Burger King* had abrogated *Bellas Hess*'s due-process rationale. It noted, however, that dormant-commerce-clause and due-process doctrines had come to serve different purposes. *Id.* at 312; *see also id.* at 305-06. The Court thus explained that the first part of the *Complete Auto* test—the "substantial nexus" requirement that "*Bellas Hess* concerns," *id.* at 311, and is at issue here—"is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce," *id.* at 313.

In terms of dormant-commerce-clause *doctrine*, the Court did not attempt to derive *Bellas Hess*'s rule from *Complete Auto* (nor any other case, nor the Constitution), nor did it attempt to demonstrate that *Complete Auto* would come to the same result on the facts presented. Instead, it acknowledged that "in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have *not* adopted a similar bright-line, physical-presence requirement." *Id.* at 317; *see also id.* at 314 (acknowledging that "we have not, in our review of other types of taxes, articulated the same physical-

presence requirement"). *Quill*'s sole doctrinal justification for the physical-presence rule was thus a double-negative: that "[w]hile contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases." *Id.* at 311.

Turning from doctrine to policy, the Court concluded that the bright-line physical-presence rule retained some value in avoiding undue burdens on interstate commerce. It echoed *Bellas Hess*'s concern that mail-order vendors would face distinct tax-collection obligations in all of "the Nation's 6,000-plus taxing jurisdictions." *Id.* at 313 n.6 (citing *Bellas Hess*, 386 U.S. at 759-60). And it worried that "[a]n overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail-order houses." *Id.* at 318 n.10. Conversely, the Court thought that keeping the "bright-line rule of *Bellas Hess*" might "furthe[r] the ends of the dormant Commerce Clause" by "demarcation of a discrete realm of commercial activity that is free from interstate taxation." *Id.* at 314-15; *contra Complete Auto*, 430 U.S. at 278, 281 (expressly rejecting the "'free trade' immunity" version of the dormant commerce clause). Even though *National Geographic* would make the physical-presence rule "artificial at its edges"—because it could "turn on the presence in the taxing State of a small sales force, plant, or office"—the Court believed this anomaly would be "more than offset by the benefits of a clear rule," which might help avoid a "'quagmire'" of future litigation. *Quill*, 504 U.S. at 315. And so, relying on these policy judgments and "principles of *stare*

decisis"—it "disagree[d] with the North Dakota Supreme Court's conclusion that the time ha[d] come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18.

Three Justices (Scalia, Kennedy, and Thomas) concurred to emphasize that they would have relied exclusively on *stare decisis*, particularly because there had been no "flurry of litigation over the meaning of "'physical presence'" between *Bellas Hess* and *Quill*. *Id.* at 321 (Scalia, J., concurring in part and in the judgment). Justice White—the sole Justice remaining from *Bellas Hess*'s majority—changed his view and dissented at length. Among other points, he doubted the bright line would hold and offered "a sure bet that the vagaries of 'physical presence' will be tested to their fullest in our courts." *Id.* at 331 (White, J., concurring in part and dissenting in part).

II. Developments Since *Quill*

While "modern computer and software technology" had reduced the burdens of tax compliance even in 1992, *see id.* at 332 (White, J.), no one could have anticipated the wholesale changes wrought by the coming of the digital age. Shortly after *Quill*, digitization and the birth of the web would revolutionize human commerce and access to information. Data previously available only through analog means—say, tax rules found in legal tomes or product information conveyed on hand-written forms—became instantaneously available to networked computers that could be

programmed to process it just as fast.[2] Nothing would be the same.

That is certainly true for retail. Amazon.com did not begin selling books out of Jeff Bezos's garage until July 1995; even five years after *Quill*, Bezos himself described Amazon as "a pipsqueak in comparison" to Barnes & Noble, while his interviewer struggled to imagine why physical superstores for books "won't just eat you for lunch." *See* John McChesney, *Amazon.com's Jeff Bezos Is Bullish on Books*, Wired (June 1, 1997), https://www.wired.com/1997/06/amazon-coms-jeff-bezos-bullish-books/. With no internet to speak of, *Quill*'s "mail-order houses" referred only to traditional catalog mailers, a relative niche facing seemingly intractable barriers to competing with brick-and-mortar stores when it came to timely pricing and speedy product delivery. Then, the predominant thinking in retail was that large physical stores were eliminating smaller sellers. "E-commerce" was "a totally new, totally unprecedented, totally unexpected development." Peter F. Drucker, *Beyond the Information Revolution*, The Atlantic (Oct. 1999), https://www.theatlantic.com/magazine/archive/1999/10/beyond-the-information-revolution/304658/ (arguing that e-commerce might be the most revolution-

---

[2] *See generally* Nat'l Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* 23 (2000), (explaining that internet growth "added substantially to the information sector's production of an astonishing abundance of information in digital form, as well as offering unprecedented ease of access to it," making it "many times easier and faster in the past decade").

ary aspect of digitization). Even years after *Quill*, neither market analysts nor the industry's own champions foresaw that remote retailers with *no* stores might rapidly acquire many competitive advantages and doom the retail titans of an earlier age.[3]

The same is true for how modern digitization and computer networks revolutionized data-intensive tasks. Importantly, this qualitative shift to the "digital age" or "information age" came not only from an increase in computing *power*, but also from an exponential increase in network *access to information*.[4] It is a quirk of *Quill*'s fateful timing that this exponential increase in digitization would begin only a few years later. *See* Martin Hilbert et al., *The World's Technological Capacity to Store, Communicate, and Compute Information* (Apr. 1, 2011), http://www.martinhilbert.net/worldinfocapacity-html (figure demonstrating exponential growth beginning in decade after *Quill* and placing "beginning of the digital age" shortly after 2000). But, nonetheless, *Quill* lies on the other side of the digital divide.

---

[3] *See, e.g.*, Regina Joseph, *Online Retail Sales*, Forbes (Dec. 4, 1998), https://www.forbes.com/1998/12/04/feat.html#162a1b165e5b (in 1998, forecasters thought "online shopping [was] still too small to put a dent into traditional retail"); Leslie Walker, *Amazon Gets Personal with E-Commerce*, Wash. Post (Nov. 8, 1998), http://www.washingtonpost.com/wp-srv/washtech/daily/nov98/amazon110898.htm (reporting that "Bezos pooh-poohs speculation that Amazon aspires to be a virtual Wal-Mart Stores Inc., directly selling every product imaginable").

[4] Brian Vastag, *Exabytes: Documenting 'the Digital Age' and Huge Growth in Computing Capacity*, Wash. Post (Feb. 10, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021004916.html (detailing skyrocketing growth).

Because nearly all information was analog in 1992, it was impossible then to imagine a world where the data needed to answer almost any question would be immediately available from almost any computer terminal, laptop, or smartphone. Before comprehensive digitization, "Shepardizing" required an up-to-date paper version of Shepard's Citator, hours of trained, painstaking work, and access to an extensive (and expensive) law library—whose volumes themselves required regular updates with "pocket parts" and paper supplements—just to *find* the cases that needed reading. Even the basic building blocks of today's ubiquitous technologies were largely alien to the legal profession several years after *Quill* was decided. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 850-53 (1997) (defining terms including "Web 'pages,'" "links," "surfer," "search engine," "'online services' such as America Online, CompuServe, the Microsoft Network, and Prodigy" and "computer 'mouse'"). Solving something like basic compliance in "6,000-plus taxing jurisdictions," *Quill*, 504 U.S. at 313 n.6, was, then, an entirely different task.

In addition to the tax advantage afforded them, ventures like Amazon and eBay became successful precisely because they digitized and moved to the web all the information necessary to manage the logistical problems of retail.[5] Even specialty buyers and sellers could now find each other, exchange payment info, close transactions, ship products to correct addresses,

---

[5] *See E-commerce Takes Off*, The Economist (May 13, 2004), http://www.economist.com/node/2668033 (detailing consumers' ability to use internet to compare prices among "hundreds of merchants" and "access ... unprecedented amount[s] of product information").

and manage back-end business operations across the new "information superhighway." The same data and processes make tax compliance easy too. *See infra* pp.45-46. Indeed, today, we live in a world full of firms dedicated to using "big data" to quickly solve information-driven, logistical problems that make tax compliance seem trivial by comparison. To take just one example, numerous competitors now use digitized maps, global-positioning-satellite data, and real-time location and speed information from millions of smartphones to instantaneously provide the fastest route from anywhere to anywhere, whether walking, driving, or using public transportation, while accounting for traffic and other hazards.[6]

Other key changes came from the States themselves. Not only is tax-compliance information now readily available in digital form, but many States worked together after *Quill* to substantially simplify their sales-tax compliance systems and processes. Under the "Streamlined Sales and Use Tax Agreement," States have standardized numerous aspects of collection and filing, and consolidated others at the state level. *See* Streamlined Sales Tax (SST) Cert. Br. 8-12. South Dakota was active in creating and adopting that Agreement, and is today among 24 States complying with its obligations. Other States that cannot fully comply (often, for state-constitutional reasons) have

---

[6] Amy Bernstein & Anand Raman, *The Great Decoupling: An Interview with Erik Brynjolfsson and Andrew McAfee*, Harv. Bus. Rev. (June 2015), https://hbr.org/2015/06/the-great-decoupling ("Digital technologies are doing for human brainpower what the steam engine and related technologies did for human muscle power during the Industrial Revolution" and "allowing us to overcome many limitations rapidly.").

also worked to make compliance by out-of-state sellers as easy as possible. *See, e.g.*, Ala. Code §40-23-191 *et seq.*; Ala. Dep't of Revenue, Simplified Sellers Use Tax, https://revenue.alabama.gov/sales-use/simplified-sellers-use-tax-ssut/. The Agreement also obligates member States to provide (and pay) a set of "certified service providers" (or CSPs) that can handle the process of collecting and remitting sales tax *at no cost to out-of-state sellers*. SST Cert. Br. 12-13.

These CSPs and other software providers have revolutionized tax compliance in the same way companies like respondents revolutionized retail. *See generally* Brief of CSPs as *Amici Curiae*, Part A. Analogage tax programs had "some of the data necessary for accurate tax assessment and accounting built in, but not all of it, and they had no built-in method for dealing with changes other than constant software updates." Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 575-76 (Aug. 7, 2017), http://www.yettertax.com/review/wp-content/uploads/2017/09/State_Tax_Notes_Automation_Article.pdf (providing detailed history of tax-compliance automation). The first software that could interface directly with e-commerce platforms was not released until 1996, and even that product was hosted on the user's servers and needed constant manual updates. *Id.* "The biggest change ... would come with the rise of modern, web-based ... solutions," *id.* at 576, and the first such product was introduced in 2000. *Id.* In sum:

> When *Quill* was decided, there were basically two providers with structured solutions that required each business to invest heavily in infrastructure. There are currently at least 33

> providers ... covering sales tax rates, sales tax calculation, address validation, sales tax return preparation, and exemption certificate management, most of which integrate directly with hundreds of different online shopping carts. Most providers offer software as a cloud or hosted solution[,] .... [and] the functionality offered today includes taxability content that did not exist in 1992.
>
> ....
>
> [T]here is obviously still a cost to sellers—whether online or Main Street stores—in mapping their products and services to the appropriate tax rules. It is beyond dispute, however, that the overall cost from this effort has been reduced dramatically.

Id. at 579-80.

III. Case History

In 2015, this Court considered a Colorado law enacted to encourage its citizens to pay at least some of the use taxes owed on out-of-state internet sales. That law required out-of-state sellers to (1) "send a 'transactional notice' to purchasers informing them that they may be subject to Colorado's use tax," (2) "send Colorado purchasers who buy goods from the retailer totaling more than $500 an 'annual purchase summary' with the dates, categories, and amounts of purchases, reminding them of their obligation to pay use taxes," and (3) "send [Colorado] an annual 'customer information report' listing their customers' names, addresses, and total amounts spent." *DMA II*, 814 F.3d at 1133. Compliance was arguably *more* burdensome on the seller than simply collecting the tax, *see id.* at

1146, but Colorado carefully avoided imposing a *collection* requirement of the kind foreclosed by *Quill*.

While the issue was not presented there, the troubling facts that gave rise to Colorado's effort led Justice Kennedy to conclude that *Quill* should be reconsidered, and to encourage "the legal system" to quickly find a vehicle for doing so. *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring).

South Dakota answered that call, and for good reason. It "has no state income tax and relies on retail sales and use taxes for much of its revenue." Pet.App. 1a. So "[a]s Internet sales by [out-of-state] sellers have risen, state revenues have decreased," Pet.App. 2a, leading to serious shortfalls. Indeed, at the very moment it passed the law at issue here, the Legislature felt compelled to raise the sales-tax rate to help increase teacher salaries. *See* H.B. 1182, 91st Legis. Assemb. Session (S.D. 2016). To better address such shortfalls, South Dakota passed "S.B. 106" (or "the Act").

The Act looks to a seller's economic presence within a State, rather than "physical presence," in requiring certain out-of-state sellers to collect and remit sales tax. The operative section requires collection by any retailer transacting more than $100,000 of business or more than 200 times annually with state residents. *See* App. 1a (§1). The Legislature also took multiple steps to protect out-of-state sellers during the inevitable litigation this law would precipitate, including provisions insulating them from interim obligations and any threat of retroactive liability, *see* App. 2a-4a, 6a (§§3, 5-7, 8(10)). The law passed with overwhelming support after public hearings, and included

detailed findings regarding the changed circumstances that drove the Legislature's decision. *See* Pet.App. 8a-9a; App. 4a-6a (§8).

As the Act permitted, the State eventually sued four out-of-state retailers, seeking equitable relief affirming the law's validity and requiring these sellers to begin collecting tax. Pet.App. 9a-10a. Three are respondents here; a fourth (Systemax Inc.) preferred not to assert its *Quill* defense. Instead, the State agreed to dismiss its complaint, and Systemax "registered for a sales tax license and immediately began collecting taxes under the law" the next day. Pet.App. 10a.

Respondents moved for summary judgment on the exclusive ground that South Dakota could not establish "nexus" under *Complete Auto*'s first prong because of *Quill*'s controlling, physical-presence rule. They challenged none of the Legislature's findings; their position was simply that *Quill* would require their victory regardless. *See* Pet. Reply 4. "Mindful of [this] Court's directive to follow its precedent when it 'has direct application in a case,' and to leave to th[is] Court 'the prerogative of overruling its own decisions,'" the state courts granted and then affirmed respondents' motion, placing the continuing viability of the sales-tax-only, physical-presence rule squarely before this Court. Pet.App. 14a, 15a.

SUMMARY OF ARGUMENT

Before it will abrogate a rule it has previously endorsed, this Court requires a showing that the rule is wrong, along with "special justifications" to overcome *stare decisis*. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). There is no definitive set of factors, but the Court has highlighted the considerations that

often matter most. These include, among other things, whether the rule is: (1) inconsistent with other decisions; (2) particularly harmful or important; (3) detrimental to the doctrine or its ends; (4) supported by legitimate reliance interests; (5) unsupported because of changed circumstances; (6) increasingly unworkable; (7) routinely criticized (8) constitutional or statutory; and (9) necessary to a holding, or instead a rationale that did not (or could not) intentionally reach the present facts. This brief proceeds in three parts, each of which addresses some of these concerns.

Part I begins by explaining that the sales-tax-only, bright-line, physical-presence rule is inconsistent with current dormant-commerce-clause doctrine and leads to conflicting results (Part I.A). This may amount to pushing on an open door: *Quill* itself acknowledged that the physical-presence rule had a tenuous connection to the doctrine even then, and subsequent legal developments have only served to further isolate this exception to *Complete Auto* (Part I.B).

Importantly, even when considered on its own terms, the physical-presence rule sits upon a foundation of essentially *factual* premises, frozen in time, about the burdens of collecting sales tax and the likelihood that the rule will promote or undermine the goals of the dormant commerce clause. Those factual premises have now been reversed; the "tides of time" have now comprehensively "wash[ed] away" whatever foundation *Quill*'s rule ever had. *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring). Thus, abrogating the physical-presence requirement is now essential to eliminate arbitrary and unclear results, *promote* interstate commerce, and avoid important, ongoing, and unjustifiable harms to the several States (Part I.C).

Part II focuses on the principle concerns that appeared to animate *Quill*'s decision to retain *Bellas Hess*'s rule, and demonstrates that those concerns are absent here.

First, in contrast to the law at issue in *Quill*, the rule enacted in South Dakota's statute is now superior to the physical-presence requirement *on all of Quill's own criteria*. South Dakota's "economic nexus" standard is easier to administer and far more likely to promote efficiency in the national economy and interstate commerce. (Part II.A).

Second, the *stare decisis* case for retaining the physical-presence rule is weaker here than in *Quill* because its application to modern internet retail was not a considered aspect of *Quill*'s holding. *Bellas Hess* was explicitly about a mail-order house whose only nexus was established through periodic mailings. *Quill* presented *identical* facts and considered only whether the *law* had changed in the interim. In contrast, the internet retailers at issue here are very different from the companies in *Quill* and *Bellas Hess*. While "physical presence" may sound like it was meant to resolve a case like this, it was in fact an unremarkable pleonasm in 1992 because there was no "virtual" or "internet" presence from which to distinguish it. So while the physical-presence rule must be abrogated for petitioner to prevail here, this Court need not overrule *Bellas Hess* as such to hold that its rule now maps poorly onto internet-age facts this Court had no previous chance to consider. (Part II.B).

Third, the alleged practical difficulties of collection have now vanished. Modern digitization and network computing make this the kind of task that is

daunting only to those with a reason to make it look so. (Part II.C).

Fourth, both legally and practically, this Court would create no unique possibility of retroactive tax liability by abrogating the physical-presence rule. South Dakota disavowed retroactive liability, and most states are likely to follow its lead—we are aware of no official among the 7,000-plus lawmakers in the 50 States who has suggested imposing retroactive liability. Indeed, many States do not have a current regime that would allow them to seek retroactive liability, and state law and federal constitutional barriers would stand in the way, even if they did. (Part II.D).

Part III then concludes by highlighting how these points map onto many of the remaining "special justifications" this Court looks to in considering questions of *stare decisis*. The key points here are the manifest change in circumstances, *see, e.g.*, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring); the absence of justified reliance, *see, e.g.*, *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring); *Quill*'s outlier status, *see, e.g.*, *Comptroller v. Wynne*, 135 S. Ct. 1787, 1809 (2015) (Scalia, J., dissenting) (deriding the "ad hoc ... sales-taxes-on-mail-orders exception"); the increasing unworkability of the rule, *see, e.g.*, *Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788, 793 (Wash. 2011) (agreeing with other courts that even a "'*substantial* physical presence test'" would be unworkable); and its persistent criticism by disinterested judges and academics (*see, e.g.*, above).

Ultimately, *Quill*'s serious harms require this Court to act. Congress cannot "fix" this kind of constitutional mistake; it can only *moot* it by choosing to de-

volve powers back to the States—and 25 years of inaction since *Quill* demonstrate that it is unlikely to do so. Congress might be encouraged to act if this Court required it to pass a law regulating interstate commerce, as the Commerce Clause's text allows. But only this Court can restore to the States the *default* powers reserved to them by the Constitution and Tenth Amendment. *See infra* pp.53-55.

ARGUMENT

I. The Physical-Presence Rule Requires This Court's Correction.

Quill acknowledged that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," 504 U.S. at 311, that "subsequent" cases "concerning other types of taxes ... have not adopted a similar bright-line, physical-presence requirement," *id.* at 317, and that the rule leads to results that "appea[r] artificial at its edges," *id.* at 315. These were understatements then, and have only become more so.

This case itself demonstrates that the physical-presence rule leads to results that are squarely inconsistent with the "substantial nexus" test of *Complete Auto*. The rule has thus been quarantined from its doctrinal neighbors since the day *Quill* was decided. Meanwhile, the factually contingent policy judgments that form the rule's sole support have proven contrary to experience in a technologically evolving world. As a result, the rule is now artificial at its core—not its edges—leading to arbitrary distinctions that are increasingly unclear, harmful to the States and the economy, and often directly contrary to the dormant commerce clause's own ends.

A. As this case shows, the physical-presence rule is squarely inconsistent with *Complete Auto*'s "substantial nexus" test.

The best way to see that the physical-presence rule is squarely inconsistent with the underlying doctrine is to test South Dakota's law against that doctrine. S.B. 106 may violate the bright-line physical-presence requirement, but it would plainly pass muster under *Complete Auto*.

As *Quill* notes, 504 U.S. at 311, and respondents acknowledged below with their limited challenge, *supra* p.17, the physical-presence rule relates only to the first element of the *Complete Auto* test: the "substantial nexus" requirement. The question thus becomes whether the sellers covered by S.B. 106 have "substantial nexus" for purposes of *Complete Auto* and its progeny. And they certainly do.

As an initial matter, this Court has never explained how a sale into a State is insufficient *by itself* to create a "substantial nexus" between "a state and the person, property *or transaction* it seeks to tax," *e.g.*, *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954) (emphasis added). Note that, in *Quill*'s own terms, *Complete Auto* requires that a tax be "'applied to an *activity* with a substantial nexus with the taxing State,'" not a tax-collecting *company* with nexus. 504 U.S. at 311 (emphasis added) (quoting *Complete Auto*, 430 U.S. at 279). Since *Quill*, this Court has said that "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995). All South Dakota asks here is to treat

a sale consummated in South Dakota "as a local transaction"—as *Complete Auto*'s language expressly allows.

This Court need not approach such a broad holding, however, to uphold South Dakota's law. Even if the regulated company must itself have the requisite "substantial nexus," S.B. 106 applies only to companies that (easily) do. The Act's ample safe harbor shelters sellers transacting less than 200 times or doing less than $100,000 of business in the State each year. That is a substantial nexus to a small economy like South Dakota's. Scaled to the national economy by relative gross domestic product, South Dakota's law would apply only to businesses making over 75,000 sales or doing well over $30 million in U.S. business. From the standpoint of "substantial nexus" rather than "physical presence," South Dakota's economic standard applies only to persons *and* transactions that have a very strong connection to the State.

As in *Complete Auto*, moreover, respondents have not argued and could not argue that *they* lack a "substantial nexus" with South Dakota by any measure other than the bright-line, physical-presence rule. *See* 430 U.S. at 277-79 (noting that Complete Auto had only invoked bright-line *Spector* rule and did not otherwise challenge its substantial nexus). These companies do *billions* in sales annually on the whole, and South Dakota sent them direct notice of S.B. 106 because it estimated their in-state sales in the millions. Economically, these companies are far more "present" in the South Dakota economy than most of the State's physically present retail businesses, many of whom have only one retail outlet, but must still collect tax on

sales sent to the other side of the State—a time zone and five-hour drive away.

It is worth remembering that, in doctrinal terms, the proposition here is that the *Constitution* somehow prohibits a State from demanding from online-only retailers—who intentionally sell huge quantities of their wares into the State—the same sales-tax collection it demands from everyone else. In a world where many of the most powerful retail companies do not and need not rely on physical presence for their business models, that rule seems only senseless and unfair. The accretion of one common-law precedent upon another can sometimes explain such outcomes. Here, however, the manifest disconnect between the physical-presence rule and the underlying doctrine (and founding document) can only empower the critique that "[w]hatever it is that we are expounding in this area, it is not a Constitution." *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring in the judgment); *see also, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (rejecting the dormant commerce clause as an atextual basis on which to invalidate state laws).

B. The physical-presence rule is an outlier.

Since *Quill*, the physical-presence requirement has achieved the rare status of a rule with no animating principle that lower courts must (or even can) follow in similar cases. Instead, courts have reasoned that *Quill*'s rationale requires *ignoring* physical presence outside the precise context presented in that case.

As then-Judge Gorsuch observed, *DMA II*, 814 F.3d at 1149, this development seems driven by *Quill*

itself. By noting that "in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement," *Quill* invited lower courts to ignore the physical-presence rule in "cases ... concerning other types of taxes." 504 U.S. at 317. So that's what they did. In a variety of cases and contexts, challengers have asserted that one or another tax should be covered by the physical-presence rule—or even that it is practically indistinguishable from a sales tax—to no avail in the lower courts or this Court. *See, e.g.*, *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 320 (Iowa 2010) (collecting cases and noting that "[a]fter *Quill*, [this] Court has generally avoided Commerce Clause cases involving the authority of states to impose taxes other than sales and use taxes on out-of-state entities with or without 'physical presence'").[7] This has shrunk *Quill*'s already narrow doctrinal field, even as that field has grown rapidly in importance because of online retail.

The lower courts have also limited the physical-presence test in other ways. The Tenth Circuit "and many othe[r] courts have already held *Quill* does nothing to forbid states from imposing regulatory and tax duties of comparable severity to sales and use tax collection duties," even in the very context of sales-and-use taxes. *DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring); *see also id.* at 1144-47 (majority) (upholding

---

[7] *See also DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring) (collecting cases); *Crutchfield Corp. v. Testa*, 88 N.E.3d 900, 902-03, 911-14 (Ohio 2016) (upholding "corporate activities tax" calculated based on gross receipts from in-state sales).

reporting regime despite comparable or greater burdens in same sales-tax context). This isolates *Quill* from its own purpose: An out-of-state retailer cannot point to the same sales-tax-related burden that *Quill* sought to avoid and get relief from anything other than strict tax *collection*, because the lower courts recognize that physical presence no longer has anything to do with the burden on remote retailers or any other underlying constitutional value.

Second, and relatedly, the lower courts have held that *Quill* must *necessarily* be limited to requiring only marginal physical presence because any further requirement would prevent it from serving as a bright line. In this regard, both the Washington Supreme Court and New York Court of Appeals have been asked to hold that *Quill* requires "a *substantial* physical presence," and both have expressly refused. *See Lamtec*, 246 P.3d at 793-94; *Orvis Co. v. Tax Appeals Tribunal of N.Y.*, 86 N.Y.2d 165, 180-81 (N.Y. 1995). They have reasoned that, given the lack of guidance or guiding principles on what makes physical presence sufficient or important, searching for "substantial" or "continuous" physical presence would immediately devolve into confusing case-by-case determinations. This means that the lower courts view *Quill*'s criteria as legally and intentionally *in*substantial—that the rule's only reasons for existing are that it (1) is a rule and (2) is binding as a precedent of this Court.

These developments demonstrate that the physical-presence rule is adrift—not only "surrounded by a sea of contrary law," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring), but also unmoored from any constitutional principle or value that could guide its ap-

plication. This is not surprising given that *Quill* "expressly acknowledged" that the physical-presence requirement could lead to "pretty 'artificial' and 'formalistic'" results. *Id.* at 1149 (quoting *Quill*, 504 U.S. at 314-15). But, 25 years later, it remains surprisingly unclear *why* physical presence is important for sales-tax collection requirements but no other tax or regulatory burdens of comparable severity. Nor is it clear what makes a presence "physical," nor why physicality matters even in *Quill*'s own context. And while this Court has said that the "'slightest presence'" might not suffice, *see Nat'l Geographic*, 430 U.S. at 556, it has approved nexus through unrelated, transient, or insubstantial presence without explaining how much is enough, or why. *See id.* at 561 (two in-state offices unrelated to retail activity sufficient); *Standard Pressed Steel Co. v. Dep't of Revenue of Wash.*, 419 U.S. 560, 562 (1975) (single employee serving single customer from his own home in state sufficient; contrary argument "verges on the frivolous"); *Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 337 (1944) (*traveling* salesmen sent into State sufficient). Rules that serve no underlying constitutional principle cannot contribute anything or be applied in any sensible or substantial way outside their immediate context. And that's what has happened to *Quill* as it has outlived its useful life.

C. The application of the physical-presence rule has become both arbitrary and unclear, causing unintended and harmful effects.

If the physical-presence rule were only a doctrinally unsound outlier, it might not merit further concern. But it's much worse than that. The rule governs

a critical slice of the American economy, and because of the changes wrought by online retail, its application is increasingly arbitrary and decreasingly clear. The rule now frequently undermines the very values the dormant commerce clause is meant to serve, causing outsized harm to the national economy, state treasuries, and interstate commerce itself.

1. Internet retail has made the physical-presence rule more arbitrary and unclear.

Quill rested on the policy judgment that a bright-line rule would at least provide some clarity and likely serve the dormant-commerce-clause goal of avoiding "[u]ndue burdens" on interstate commerce. 504 U.S. at 314-15 (suggesting that "the benefits of a clear rule" in this area would offset "artificial" results). These judgments are now upside down: Under modern conditions, *Quill*'s effects are no longer artificial only "at the edges," and the physical-presence rule cannot be applied in any clear way—at least not without undermining the values the doctrine is meant to promote.

For one thing, pervasive internet retail has undermined *Quill*'s working assumptions. The intuition behind making physical presence a "bright-line" requirement is that there is at least some reasonably strong correlation between the States where a seller has sufficient operations to create a "substantial nexus" and the States where it establishes a presence on the ground. In an era where the first rule of retail was "location, location, location," using physical presence as a proxy for "substantial nexus" made sense. Now, it doesn't.

Today, out-of-state retailers can have a strong connection to any given forum—and so derive comprehensive economic benefits from that forum's market

and state services—without any "physical" presence at all. *See* Drucker, *supra* ("[I]n e-commerce there are neither local companies nor distinct geographies."). In large part, that is because the internet now makes it possible for out-of-state sellers to reach consumers with engaging, interactive virtual storefronts in our homes or on our smartphones at any hour of the day. Economists have demonstrated that this pervasive access has turned the physical stores of *other* retailers into virtual showrooms for remote sellers, whose tax-advantage now leads to far more diversion of buyers than was ever true for catalog mailers. *See infra* pp.36-37. Accordingly, what establishes a connection between a forum and a seller—what makes them "present" in our States and in our lives—now has little to no relationship with where that seller inhabits a brick-and-mortar building, and much more to do with their scale or economic presence in the forum.

In fact, compared to looking at a seller's economic presence, the physical-presence requirement now manages to be both over- and under-protective. Amazon's branded boxes on neighborhood doorsteps are a pervasive fact of everyday life. No one could nonetheless conclude that Amazon has a weaker "nexus" to Bethesda, Maryland than does a modest internet operation that sometimes operates a pop-up outlet in Baltimore. The former has the scale, business connections, and economic presence that make it more than reasonable to demand that it pay its "fair share of state taxes." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988). The latter, meanwhile, might really be so small in scale or disconnected from distant locales in the State that it is unreasonable to demand its statewide compliance.

Meanwhile, many substantial internet retailers have apps on our smartphones and track our activities with software they install (sometimes, unannounced) on our computers or watches. These pervasive interactions would seem to make that retailer's forum relationships more viscerally present in the market than any *unrelated* physical plant. Accordingly, the physical-presence test now consistently reaches those who are present in physical but trivial ways and ignores those who are present in non-physical but meaningful ways. *See, e.g.*, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). A bright-line rule that is meant to be a proxy for "substantial nexus" should at least reflect the realities of modern retail, not the economic arrangements prevalent in 1992.

In fact, in an increasingly digital (and decreasingly physical) economy, the physical-presence rule routinely looks to unintuitive criteria, making it a trap for the unwary. Today, if a seller hires a software engineer who (unbeknownst to them) proceeds to *work on* the seller's website in a particular forum, then the seller needs to collect sales tax there. *See, e.g.*, Ariz. Dep't of Revenue, Publication No. 623: Nexus in Arizona (rev. Feb. 2018), https://www.azdor.gov/Portals/0/Brochure/623.pdf ("Independent contractors ... present in Arizona for more than two days per year" may establish "nexus" and trigger liability). Conversely, if people actually *use* the website to *buy* millions of dollars of goods in the forum, that creates no sales-tax nexus at all. This is to say that, in the internet age, traditional conceptions of "physical" presence will miss the point more often than not, *see, e.g.*, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring), and so

some sellers may miss the point, too—unwittingly stumbling into substantial, unforeseen tax liability.

In this way, the internet revolution in retail has not only made physical presence a very poor proxy for "substantial nexus" but has also undermined *Quill*'s core premise that the physical-presence requirement would function as a *clear* safe harbor for out-of-state sellers. Today, determining physical presence is an increasingly fraught and difficult question mostly because modern commerce just does not map onto traditional notions of "physical" presence in obvious ways. Does the presence of the Overstock.com app on consumers' smartphones count? Does its interactive storefront on desktop computers? What consequence is there if these companies install uninvited "cookies" on users' devices that monitor their online interactions and provide targeted advertising? Or what if a buyer ends up finding a product on one website through an advertised link on another site that has physical presence and gets paid a commission based on ad clicks? The website may be "located in no particular geographical location," but what about the servers that host it—do they count? Questions like these have already led to expensive, confusing, and high-stakes litigation as States increasingly grapple with and/or expand their definitions of physical presence—a development that entirely post-dates *Quill*. *Compare* 504 U.S. at 321 (Scalia, J., concurring) (relying on absence of litigation on this issue between *Bellas Hess* and *Quill*), *with* Pet. 9-11 (maps of various "expanded physical nexus" laws and proposals in states as of September 27, 2017), *and Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013) (upholding New York's "click-through nexus" or "Amazon"

law). And if this Court were to retain the physical-presence rule, States would only become more likely to test these boundaries given the budget shortfalls the physical-presence rule has engendered.

Ultimately, what prevents *Quill* from currently delivering on its own promise of clarity is the same thing that makes it increasingly isolated and arbitrary as a precedent—namely, that it is admittedly "'artificial' and 'formalistic.'" *DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring) (quoting *Quill*, 504 U.S. at 314-15). Because the scope of an arbitrary rule is hard to discern, neither courts nor retailers themselves can confidently predict what kinds of "presence" will be considered "physical" enough once States begin (as they have) to push the envelope. If the physical-presence rule cannot produce even the clarity that was supposed to offset its "artificial" results—or if it needs to be rendered even *more* artificial just to keep it clear, *see supra* p.26—the law would be better off without it.

2. The effects of the physical-presence rule are increasingly harmful.

The foregoing shows that the physical-presence rule neither provides clarity nor vindicates constitutional values. But perhaps more important is that the rule also causes quite a lot of real-world harm. In fact, the rule frequently *undermines* the goals of dormant commerce clause jurisprudence, and in so doing, hurts the States, the retail industry, and the economy as a whole.

First, from the standpoint of dormant-commerce-clause values themselves—particularly, non-discrimination—the physical-presence rule now does more harm than good. As then-Judge Gorsuch explained, it is an "analytical oddity" of "the *Bellas Hess* branch of

dormant commerce clause jurisprudence" that it "guarantees a competitive benefit to certain firms simply because of the organizational form they choose to assume while the mainstream of dormant commerce clause jurisprudence ... is all about preventing discrimination between firms." *See DMA II*, 814 F.3d at 1150-51. A rule that leads directly to discrimination between different kinds of firms engaged in interstate commerce turns the dormant commerce clause upside down. And it can only lead to further confusion as States enact new rules (like Colorado's reporting requirement) that try to *restore* competitive balance by imposing different burdens on companies that refuse to collect the tax—and who will then cry discrimination. *See, e.g.*, *id.* at 1142-45 (majority).

Second, the physical-presence rule *creates* a substantial burden on many forms of interstate commerce. As indicated above, many firms now work hard to *avoid* engaging in interstate commercial relationships in order to preserve their apparent duty-free status. But when a Missouri company builds a store in Montana, a Colorado firm hires a sales team in Connecticut, or an Alabama retailer makes deliveries to Arkansas with its own trucks, each is engaged in interstate commerce. The physical-presence rule discourages this interstate commerce on its face; firms maximize the effective subsidy from *Quill* if they minimize their interstate presence and stick to shipping from one State to all the others.

This is entirely backwards: If a State discouraged investment by out-of-state firms by subjecting them to special fees or taxes only if they established an in-state presence or hired an in-state worker, that law would *violate* the dormant commerce clause. *See Camps*

Newfound, 520 U.S. at 578 ("[P]rohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent," and "special fees assessed on nonresidents directly by the State when they attempt to use local services impose an impermissible burden on interstate commerce."). The physical-presence rule is thus a policy at war with itself; it undermines rather than advances the economic union the dormant commerce clause is meant to promote. *See, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) (goal of doctrine is to create "a national market" and prevent "'economic Balkanization'").

The damage this inversion of dormant-commerce-clause values is doing to the States is well-documented and attested to by the breadth of the States' support for petitioner here. As Justice Kennedy explained, Colorado alone lost around $170 million in 2012 because it could not require out-of-state retailers to collect sales tax. *See DMA*, 135 S. Ct. at 1135 (citing Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* 11 tbl.5 (2009)). That year, state and local governments as a whole were owed an estimated $23 billion in sales-tax revenues that out-of-state retailers could not be obligated to collect under

Quill.[8] An updated study projects their likely losses at $33.9 billion in 2018 and $211 billion from 2018-2022.[9]

Conditions in South Dakota vividly illustrate the harm. The State is dependent on its sales tax, and yet even respondents themselves have calculated the State's *Quill*-related losses at about $21 million/year (while making several self-serving assumptions).[10] State officials put that number closer to $50 million for FY2018.[11] Either way, these are big sums in a small State. *See* Pet. 13-15. And the problem only grows worse as more and more sales move online—while overall retail grew only 1.9 percent from 2014 to 2015, internet retail grew by 14 percent.[12] *See also DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (stressing that while "mail-order sales" at time of *Quill* totaled "$180 billion," "e-commerce sales alone totaled $3.16 trillion" in 2008). Absent a change here, states and local governments will fall only further behind.

The problem is also self-reinforcing in multiple ways. Raising sales-tax rates to make up the shortfall

---

[8] Nat'l Conference of State Legislatures, *Estimated Uncollected Use Tax from All Remote Sales in 2012*, http://www.ncsl.org/research/telecommunications-and-information-technology/2012-uncollected-use-tax.aspx.

[9] Int'l Council of Shopping Ctrs., *Case for Fairness*, http://www.efairness.org/files/united-states.pdf.

[10] Appellees' Br. 21, http://ujs.sd.gov/uploads/sc/calendar/28160C_State_v_Wayfair.pdf.

[11] Gov. Dennis Daugaard, Budget Address (Dec. 6, 2016), http://sd.gov/governor/docs/FY2018%20Budget%20Address%20Transcript.pdf.

[12] U.S. Census, *Estimated Annual U.S. Retail Trade Sales—Total and E-commerce I: 1998-2015*, http://www2.census.gov/retail/releases/current/arts/ecommerce.xls.

only pushes more consumers online, where the advertised prices now seem even lower because of the absent tax. Economic research has shown this effect to be particularly strong, *see, e.g.*, Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1, 24 (2014) ("[A] one percentage point increase in a state's sales tax leads to an increase of just under 2 percent in online purchasing from other states, and a 3-4 percent decrease in online purchasing from home-state sellers."), and far stronger for internet retail than it ever was for catalog-mailers, *see, e.g.*, Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 239 (2010) (finding major effect from tax collection on online retail, but "no apparent effect on catalog orders"). Rates thus need to rise even more to make up the shortfall—shrinking the base even further in a vicious cycle.

A similar spiral surrounds State spending and economic effects. Diverting sales to companies that actively avoid creating local jobs or spending on local infrastructure leads simultaneously to a weaker local economy and less tax revenue. With less revenue, local governments themselves hire fewer teachers, police officers, and maintenance crews, draining yet more fiscal fuel from the economy. The pain from *Quill* thus goes beyond even the "extreme harm and unfairness" Justice Kennedy identified, *DMA*, 135 S. Ct. at 1134, because this particular tax imbalance is an enemy of economic efficiency and growth. *See generally* Arthur B. Laffer & Donna Arduin, *Pro-Growth Tax Reform and E-Fairness* (2013), http://www.efairness.org/files/dr-art-laffer-sudy.pdf.

The physical-presence rule is also reshaping American communities and distorting the national economy. Changing conditions mean that *Quill* no longer props up a retail niche but rather provides a *further* advantage to companies like respondents on a playing-field already tipped against small, local businesses. Out-of-state vendors like respondents "don't seek comparable treatment to their in-state brick-and-mortar rivals" when they invoke *Quill*; rather, "they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). Multiple studies by noted economists confirm that this "arbitrage" is harming local retail by diverting sales to online competitors. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000). And that leads not only to economic inefficiency but also to decay in local communities. Retail provides important job opportunities in towns that need them, and unfair tax rules should not push those jobs to distant tech companies. Meanwhile, empty storefronts and abandoned retail institutions both contribute to creeping economic anxiety and signal the disappearance of shared spaces and experiences in small towns and big cities alike.

In 1992, there was no modern internet and "a paucity of research on the subject of state sales tax effects on consumer behavior in mail order purchasing decisions." *See* Michael L. Klassen, Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer Purchasing Decisions*, 8 J. Direct Marketing 21, 22 (1994). Now, peer-reviewed research like the studies

cited above have shown that, *particularly* in the internet era, these effects on consumer behavior are devastating to retail-industry fairness and state revenues alike. *See supra* pp.36-38. Particularly because *Quill* is itself grounded in factually contingent policy judgments, this Court should take account of these present realities and abrogate its sales-tax-only, physical-presence exception.

II. The Concerns That Animated *Quill*'s Decision To Retain *Bellas Hess*'s Rule Are No Longer Present.

Although the foregoing suffices to reject the physical-presence rule, there are four further, key respects in which concerns that seemingly animated *Quill* have either vanished or flipped the other direction in the intervening 25 years. These changes make it appropriate to abrogate the physical-presence rule and demonstrate that *stare decisis* principles (discussed in more detail in Part III) have less force here than they otherwise might.

A. South Dakota's statute serves *Quill*'s own goals better than the physical-presence rule.

Not only does S.B. 106 clearly satisfy *Complete Auto*'s nexus requirement, *see supra* pp.22-24, it is now better than the physical-presence rule at advancing *Quill's own goals*.

Whereas physical presence is increasingly arbitrary in assessing both a seller's connection to a State and its ability to shoulder the burdens of sales-tax collection, "economic nexus" tracks both perfectly. Sales shipped to residents are a direct measure for how systematically a seller exploits a given market. And,

more importantly, the burden imposed by state sales-tax collection is now inversely correlated to scale. In the analog days of *Bellas Hess* and *Quill*, it was possible to believe that national catalog mailers faced a particularly difficult task in complying with the rule in "6,000-plus taxing jurisdictions." *Quill*, 504 U.S. at 313 n.6. But because this is now a problem easily solved through specialized software, achieving nationwide scale rapidly *decreases* the difficulty and expense of multi-jurisdictional compliance. *See infra* Part II.C. Put simply, the size and reach of a seller's economic connections are better measures than physical presence of *everything* the dormant commerce clause might care about.

Similarly, an economic-presence standard now makes for a much brighter and straighter line than physical presence. Today's data-driven businesses know their sales by jurisdiction perfectly well; monitoring against accidental physical presence is harder and the nature of the requirement far more litigable. *See supra* pp.30-32.

Indeed, this Court has recognized since *Quill* that a term like "physical presence" is hard to correctly apply to corporations like respondents in *any* respect because their "ability to conduct business *without physical presence* ha[s] created new problems *not envisioned by rules developed in another era*." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994) (emphasis added). Even this Court itself does not use the phrase consistently: Since *Quill*, this Court has made clear that many of the things that appear to pass for corporate "physical presence" under *Quill* do *not* count as corporate "physical presence" for purposes of general personal jurisdiction. *Compare supra* p.27 (collecting

cases where limited physical presence suffices for dormant commerce clause), *with Burnham v. Superior Court*, 495 U.S. 604, 620 (1990) (plurality) (making "physical presence" sufficient for general personal jurisdiction), *and Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (corporation only present for general jurisdiction purposes in State of incorporation or principal place of business—not all places that suffice under *Quill*). If clarity is the ultimate goal—as both the *Quill* majority and concurrence said it was, *see* 504 U.S. at 315, 321—then clearly S.B. 106 should be both upheld and held up as a model rule.

B. Eliminating the physical-presence rule does not require this Court to hold that *Bellas Hess* and *Quill* were wrong when decided.

Because, even 25 years ago, *Quill* intimated that this Court would not write the sales-tax-only, physical-presence rule on a blank slate, that rule's defense has always depended on *stare decisis*. *See* 504 U.S. at 311. But there is a critical difference between this case and *Quill* in that respect. *Quill* did articulate a "physical-presence" rule and petitioner acknowledges that this Court must reject that rule to hold in its favor. But this Court did not (and could not) consider how its holding would apply to pervasive internet retail when it chose those particular words to articulate its ruling because internet retail did not exist. In *Quill*, by contrast, the factual premise was word-for-word identical to *Bellas Hess*, *see supra* p.7. *Stare decisis* accordingly has less force here because—while a lower court could not have made this distinction—this Court need not treat *Quill*'s 25-year-old description of the rule as requiring a "*physical* presence" as having rendered a

considered judgment on whether remote retail in the digital age is distinguishable from traditional catalog mailing.

Unlike with statutes—which cover the scope of their enacted text whether the legislature had certain scenarios in mind or not, *see Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)—the force of this Court's holdings derives from the "case or controversy" before it. Lower courts must follow a rule this Court articulates or the broad reasoning it employs to reach its holding. *See, e.g.*, *DMA II*, 814 F.3d at 1148-49 (Gorsuch, J., concurring) (noting broad deference owed to Supreme Court reasoning by lower courts). But particularly when this Court evaluates its own precedents, it is the force of the analogy between one case and another that governs the common-law method and the power of *stare decisis*, much more than the particular words this Court chooses to express itself. As Chief Justice Marshall explained:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821); *see also Heck v. Humphrey*, 512 U.S. 477, 482 (1994) (a precedent can be an "unreliable ... guide" where that "opinion had no cause to address, and did not carefully consider, the ... question before us today"); *Carroll v. Carroll's Lessee*, 57 U.S. (16 How.) 275, 287 (1854) ("[T]his court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.")

Judged from that standpoint, this Court now confronts a very different controversy from the one it considered in *Quill*. Both *Quill* and *Bellas Hess* expressed their factual holdings by reference to the limited nature of the seller's contacts with the State: According to *Quill*, *Bellas Hess* "stands for the proposition that a vendor whose *only* contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." 504 U.S. at 311 (emphasis added); *id.* at 315 (quoting *Bellas Hess* and again describing its bright-line rule the same way). That holding can be retained if this Court chooses. To abrogate the physical-presence requirement, this Court need not quarrel with the conclusion that catalog-only retailers lack a sufficient nexus to justify a collection requirement under *Complete Auto*. Whatever else is true of respondents, they cannot analogize themselves to analog-era catalog mailers or claim that their "'only connection with customers'" in South Dakota "'is by common carrier.'" *Id.* at 315.

Consider how different respondents are (and the modern Quill.com is) from Quill's 1990s office-supply business. Quill solicited customers in North Dakota

through periodic mailings, advertisements in national journals, and telephone calls. *See id.* at 302. That is miles away from how respondents interact with South Dakotans. As Justice Kennedy summarized the difference:

> Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront. .... Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.

DMA, 135 S. Ct. at 1135. Likewise, consider how distant the statute at issue here is from the North Dakota statute in *Quill*. The latter would have found nexus on the mere basis of *three advertisements* in the State, *see* 504 U.S. at 303, 313 n.6; the former requires a significant economic presence in the State's market. These are simply not questions this Court considered when, in *Quill*, it evaluated whether there had been a pure change in the law governing traditional mail-order houses between 1967 and 1992.

In short, the "virtual presence" now associated with large-scale internet retailers was inconceivable when *Quill* described the rule as a "physical presence" requirement decades ago. This Court thus should not treat the question presented here as one on which it has previously rendered considered judgment for purposes of *stare decisis*. Whatever was or remains true

of traditional catalog mailers, this Court can still recognize that its "physical presence" articulation has been rendered inapt, and that large-scale internet retailers like respondents are "present" in South Dakota in every way that counts. At a minimum, the dissimilarity between respondents and Quill—a factor that was absent as to the two catalog-mailers in *Quill* and *Bellas Hess*—makes *stare decisis* much weaker here than in *Quill* itself.

C. The burden of sales-tax collection is now marginal.

Those who hope to maintain the duty-free mirage that *Quill* provides to internet-only retailers will often argue that the "6,000-plus" tax jurisdictions that concerned the Court in *Quill* have now increased to something like 16,000, *see* Opp. 15-16—making collection compliance even more difficult and giving continued vitality to the physical-presence rule. This is numerical hocus pocus, and it ignores everything that technology and the States themselves have done to ease compliance burdens over the past 25 years. In reality, the same forces that unleashed respondents' business models as nationwide internet retailers have made these kinds of data-heavy logistics issues cheap and easy to solve.

Respondents' scary-looking number counts separate "tax jurisdictions" wherever rate variations are theoretically possible, even in the many States (like South Dakota) where sales-tax collection and audit functions are centralized at the state level. As of 2015, there were only six States that did not simplify com-

pliance in this way—Alabama, Alaska, Arizona, Colorado, Idaho, and Louisiana[13]—and Alabama recently left that group with a new simplified system. *See supra* p.14. Accordingly, for all purposes except determining a local rate, respondents' 16,000 jurisdictions statistic is off by something like 15,750 jurisdictions. *See* IPT Report, *supra* n.13, at 18 tbl.4.

Rate calculation, meanwhile, is now as easy as typing a shipping address into a search bar. (You can try it on this handy *worldwide* map that CSP "TaxCloud" provides for free: https://taxcloud.net/#Find-a-Rate.) And, notably, for remote retailers like respondents to ship goods that consumers order, consumers must already enter their digitally coded address, which the retailer can use to automatically calculate the applicable sales-tax rates using software that companies like TaxCloud provide and that interfaces directly with almost every online "shopping cart" program now in use. *See generally* https://www.youtube.com/watch?v=2aoElcxwtac.[14] In the internet age—where all required tax information, addresses, prices, and products are necessarily digitized just to make respondents' business models work—determining the applicable rate and collecting it as part of the same credit-card transaction is a trivial matter for any web-based program.

---

[13] *See* Inst. for Prof'ls in Taxation, *Locally Administered Sales and Use Taxes* (2016), http://www.ipt.org/iptdocs//Files/MiscForms/CompleteStudy.pdf.

[14] This 13-minute YouTube video from TaxCloud walks through the entire set-up process, details the many options available, and explains the circumstances in which TaxCloud will provide all compliance needs *for free*.

Accordingly, there are now a host of tax-compliance providers with programs that interface directly with e-commerce sites and automate the entire sales-tax process. *See supra* pp.14-15; CSP Br. Part A. One option—called "TaxJar"—will calculate the tax on a seller's every transaction and produce "Return-ready" reports for every State, with rates beginning at $17 for up to 1000 transactions per month. https://www.taxjar.com/pricing/plans/. And on a per-transaction basis, this rate (1.7 pennies per sale) is their *highest*: For the companies most likely to meet South Dakota's 200-transaction threshold, the rate falls to *three-tenths of a penny* per transaction. *Id.* If sellers do not want to file returns themselves based on these "return-ready reports," TaxJar provides an "AutoFile" service with rates starting at $20 per filing and falling from there. https://www.taxjar.com/autofile/#pricing. Other options are less expensive generally, or provide different pricing paradigms that may fit more cheaply and efficiently into any given seller's business model. *See* Yetter & Crosby at 579; CSP Br. Part B. And regardless of which option a seller chooses, the costs are miniscule compared to other costs associated with this business including credit-card interchange fees, shipping fees, inventory maintenance, and marketing.

Compliance burden complaints are also particularly egregious with respect to South Dakota. Because South Dakota has implemented the Streamlined Agreement, *see supra* pp.13-14, it not only simplified on a statewide basis, but also regularized its definitions and filing procedures with 23 other States. And, more importantly, that status makes collection and remittance service from the CSPs available to retailers *at no charge*. *See supra* p.14; SST Cert. Br. 12-13. If

a seller is willing to collect the tax in the Streamlined member States, the cost of that compliance is not just commensurate with ordinary business expenses—it's essentially zero.

In fact, respondents could arguably *make* money from a compliance-cost perspective by voluntarily collecting in South Dakota and other Streamlined States. That is because some CSPs (like TaxCloud) will charge nothing to automate the entire compliance process in a seller's *home* State—where it already has a physical presence—if sellers turn on automated compliance in the Streamlined states. *See* CSP Br. Part B; *supra* p.45 & n.14. Retailers also receive compensation from States for timely collection, and sellers can collect interest on the tax (or otherwise benefit from the float) between the time the tax is collected and remitted. *See generally* CSP Br. Part B. If the issue were only compliance costs (and not the improper appearance of duty-free pricing), voluntary nationwide compliance would now be a no-brainer. Yetter & Crosby at 579-80.

None of this is surprising: Because the compliance task is now a simple software operation, the marginal cost of adding one additional jurisdiction is tiny. And nearly every internet retailer already has a system for collecting sales tax integrated into their online shopping cart because they must collect in at least their home State. Thus, as Systemax's overnight compliance in this case demonstrates, it is likely that a mouse click is all that stands between respondents and collection.

D. Abrogating the physical-presence rule in this case raises no special problems of retroactive taxation.

There is also no need to fear the specter of retroactive tax liability that apparently concerned this Court in *Bellas Hess* and *Quill*. Critically, South Dakota avoided this issue by expressly prohibiting *any* retroactive taxation in S.B. 106, and this Court need not consider the issue here. But if this Court is concerned that eliminating the physical-presence rule will result in burdensome or punitive back-tax liability for respondents or other sellers in other States, there are both political and legal barriers that should prevent that specter from materializing.

Begin with the practical and political safeguards against retroactivity. South Dakota's law has already become a model for other States, *see* Pet. 8-11, and it expressly forbids retroactivity. *See* App. 3a (§5). If this Court were to bless it, most other States would likely follow suit. And they would have reason to do so apart from the certainty of surviving legal challenge: No State would want its sister States to impose retroactive liability on their own resident businesses.

Moreover, seeking back taxes would be barred in most States by existing state law. At present, laws or regulations in most States define nexus in terms of physical presence or existing constitutional limits and so do not authorize collection from out-of-state retailers like respondents. *See* App. 7a-8a.[15] States in that

---

[15] A comprehensive survey in this regard is difficult because *no State* presently mandates collection because of *Quill*, and no

posture create no special risk of retroactivity because state law itself would need to change before any tax became due.

State courts are thus likely to bar retroactivity themselves. Consider a recent example from Massachusetts. That State originally attempted to require out-of-state internet retailers to begin collecting by issuing a simple notice. But after a state administrative-law challenge and a skeptical reception in court, the State scrapped that effort and undertook to pass a new prospective regulation. *See* Claire Parker, *Out-of-State Internet Sellers Get Tax Reprieve, for Now*, Boston Globe (June 29, 2017), https://www.bostonglobe.com/business/2017/06/29/state-internet-sales-tax-gets-reprieve-for-now/IwtdxjX3YX8ZdBuzOLwMaK/story.html.

If these safeguards all fail, Congress could also step in. A decision by this Court abrogating the Court-created physical-presence rule in no way limits what Congress can accomplish with its affirmative powers under the Commerce Clause. In the unlikely scenario where States attempted to impose retroactive liability, there would be a powerful constituency for congressional intervention. And unlike the *status quo*, where the States must beg Congress to devolve its own power back to the States, *see infra* pp.53-54, Congress would be in its ordinary role of solving a pressing problem in interstate commerce, and have an incentive to act to protect its constituents.

State has intimated any interest at all in seeking retroactive liability. Nonetheless, Appendix B, *infra*, sets out the (at least) 40 States in which we have identified a state law, regulation, recent change, or incorporation of existing constitutional limits that appears to exclude any threat of retroactive liability.

There is even a strong argument that, if all else fails, *Complete Auto* itself bars retroactive liability. That is because any item respondents *previously* sold has already been taxed once: Any relevant State will have required the purchaser to pay a use tax because the seller (under *Quill*) did not collect the sales tax. *See supra* p.3 n.1. To be sure, most consumers do not pay their use taxes, but the States have no way of knowing what use taxes were paid on what items in the past. And in any event, constitutional doctrine cannot ignore the fact that a tax *was* already imposed on the sale as a matter of law by any State that might now try to retroactively tax the sale again. That means the State is double-taxing only the items already sold by out-of-state retailers—a discriminatory treatment that may itself violate the dormant commerce clause. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("[S]tate laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"); *Complete Auto*, 430 U.S. at 279 (same); *see also* Daniel Hemel, *There Is No Retroactivity Concern with Overruling Quill*, Medium (Jan. 28, 2018), https://medium.com/whatever-source-derived/there-is-no-retroactivity-concern-with-overruling-quill-f6623da6a2d7 (advancing this argument in detail).

Finally, doctrinal changes since *Quill* now make clear that overturning *Bellas Hess* would create no special problems of unforeseen tax liability—an evident concern in *Quill* itself. *See* 504 U.S. at 318 n.10. Normally, we worry about courts changing their rules because it is the only way that someone might be pe-

nalized for something that was previously legal or deprived of property in which they previously had a settled expectation. *See* U.S. Const. art. I, §§9-10, amends. V, XIV (forbidding state and federal legislatures from passing *ex post facto* laws or taking property without just compensation). Because retroactive changes in judicial doctrine can seem to have those effects, reliance interests can sometimes recommend against a change in precedent.

But this Court clarified after *Quill* that such reliance is inappropriate in the taxing context. In *United States v. Carlton*, 512 U.S. 26, 30-31 (1994), it held that even *legislatures* can change tax laws retroactively. If taxpayers cannot assume that the tax laws themselves will change only on a prospective basis, they cannot rely on judicial doctrines about those laws to be any more fixed. Put otherwise, in this narrow context, overturning the physical-presence rule creates only the same risk of retroactivity that any taxpayer faces every day under *Carlton*, and should give the Court no particular pause.

III. *Stare Decisis* Does Not Justify Retaining The Physical-Presence Rule.

Key reasons to abrogate the physical-presence rule notwithstanding the force of *stare decisis* are laid out above. It is nonetheless worth noting that many more of the "special justifications" this Court has articulated for overturning precedent are present in this case. *See Kimble*, 135 S. Ct. at 2409; *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring).

1. *Changed Circumstances.* This Court is far more likely to revise precedents when the justification is "an important change in circumstances in the outside world." *Arizona v. Gant*, 556 U.S. 332, 358 (2009)

(Alito, J., dissenting) (citing, *inter alia*, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality)). And here, the case for abrogating the physical-presence rule depends far more on a dramatic change of factual circumstances than on the argument that *Quill* was wrong when it was decided. *See supra* Part I.C.

Indeed, *stare decisis* should be particularly weak here because *Quill itself* was based on policy judgments about then-present facts. *See supra* pp.8, 28. Using the example of the Sherman Act, this Court has recently explained that *stare decisis* is at its weakest when the relevant area of law is explicitly based on economic judgments that can evolve with greater scientific understanding or changing commercial circumstances. *See Kimble*, 135 S. Ct. at 2412-13. As *Quill* explained, the dormant commerce clause is generally dependent on economic policy judgment. *See* 504 U.S. at 312 ("[T]he Commerce Clause and its nexus requirement are informed ... by structural concerns about the effects of state regulation on the national economy."). And *Quill* thus based its retention of the physical-presence rule on the judgment that it would "foster[] investment by businesses and individuals" far more than it would harm States or inefficiently disrupt interstate commerce and the national economy. *Id.* at 316. The explosion of internet retail and the falling costs of compliance have together rendered these economic conclusions unsound. *See supra* pp.9-15. As the *amici* economists and tax professors have put it, overturning *Quill*'s factually contingent conclusion "'in light of sounder economic reasoning'" thus takes the decision "'on [its] own terms.'" Professors' Cert. Br. 8 (quoting *Kimble*, 135 S. Ct. at 2413).

2. *Constitutional Rule.* It is also "this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality); *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]dherence to precedent is not rigidly required in constitutional cases[.]"). *Quill* is plainly a constitutional holding, so this factor likewise supports petitioner here.

To be sure, *Quill* suggests that *stare decisis* might have more force here than in the typical constitutional case because, in this rare instance, Congress can abrogate the Court's holding. *See* 504 U.S. at 318. But as this Court recently clarified, the lower constitutional standard applies to "judge-made rule[s]," even when they are technically subject to congressional reconsideration. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). The Constitution enumerates the limited powers of Congress, *see* U.S. Const. art. I, §8, and explicitly reserves all other powers for the States by default, *see id.* amend. X. *Quill* disturbs that design, and while Congress could *moot* that effect by passing affirmative legislation to devolve power back to the States, that would not *fix* the way *Quill*'s holding warps the separation of powers in the first place.

The Founders well understood that no branch of government could be trusted to just give its powers away. If an error of this Court misallocated a presidential power to Congress by default, it would not treat that error as statutory for *stare decisis* purposes just because Congress could give it back. Given the emphasis supplied by the Tenth Amendment, this

Court should not treat errors in the federal/state separation of powers any more forgivingly than errors among the federal branches.

This is especially true because, as 25 years of congressional inaction following *Quill*'s invitation have shown, *see* 504 U.S. at 318, the default rule can make all the difference. Congress has little incentive to act here because it would be (or *appear* to be) authorizing new or greater tax collections from its constituents, while receiving none of the revenue in return. And even if Congress did act, whatever compromise legislation emerged would bear the fingerprints of how the physical-presence rule changed the default and forced the States to beg or bargain for their powers back. The dormant commerce clause is a court-fashioned constitutional doctrine, and this Court is responsible for correcting its distortionary effects—as demonstrated by the correction this Court made in *Complete Auto* itself. *See* 430 U.S. at 288-89.

3. *Reliance*. As to the important question of reliance interests, there is a marked difference between today and 1992. In *Quill*, this Court expressed concern that the physical-presence requirement had "become part of the basic framework of a sizable industry," attributing the growth of mail-order in part to *Bellas Hess*'s "bright-line exemption from state taxation." 504 U.S. at 316-17. Today, however, there are three reasons to discount such claims of reliance.

First, while *Quill* postulated that a "bright-line exemption from state taxation" had "become part of the basic framework" of the mail-order industry, *id.*, there *is no exemption* from state taxation for interstate sales. Instead, the tax is still owed (as a use tax), and *Quill* only prevents the State from making the remote

retailer *collect* it. *See DMA*, 135 S. Ct. at 1127. This important point is often overlooked because remote sellers frequently (and deceptively) advertise their sales as "no tax." *See* App. 4a (§8(3)). As Wayfair puts it on its website: "One of the best things about buying through Wayfair is that we do not have to charge sales tax."[16] But this is not a *legitimate* reliance interest; no one is entitled to rely on how their business model benefits from (or even encourages) widespread tax avoidance. A proper accounting of the physical-presence rule's legitimate reliance interests is limited to concerns about collection costs, which have fallen precipitously. *See supra* Part II.C.

As then-Judge Gorsuch explained, a second, critical difference in reliance interests between today and 1992 stems from *Quill* itself, which essentially invited States to impose other, no-less-burdensome requirements on out-of-state retailers. *See supra* p.25; *DMA II*, 814 F.3d at 1151. When an exception is so isolated from the doctrine and so does not cover similar burdens imposed in similar situations, it often disappears as "reliance interests never form ... or erode over time." *Id.* Accordingly, "*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Id.*

Finally, *Quill* itself warns any reasonably attentive seller against blind reliance on its lasting vitality. Beyond recognizing its tension with contemporary

---

[16] Wayfair.com, Ordering Information, https://www.wayfair.com/customerservice/ordering_info.php?rtype=7&redir=sales+tax#tax (last visited Feb. 26, 2018).

doctrine, *Quill* repeatedly employs temporary formulations, indicating that the time to abandon *Bellas Hess* may yet come. *See, e.g.*, 504 U.S. at 318 (noting *stare decisis* factor recommends "'withholding our hand, at least for now'"); *id.* ("[W]e disagree ... that the time has come to renounce the bright-line test of *Bellas Hess*."). In fact, in jettisoning *Bellas Hess*'s due-process holding, *Quill* expressly invited Congress to enact "legislation that would 'overrule' the *Bellas Hess* rule." *Id.* It would be unwise to rely heavily on a rule Congress might dissolve with this Court's blessing, or this Court might soon dissolve itself. And as this Court has explained since *Quill*, rules about taxes in particular are "not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Carlton*, 512 U.S. at 33.

4. *Constant Criticism & Inconsistency.* It also "weigh[s] in favor of reconsideration" when a precedent "has 'been questioned by Members of the Court in later decisions and has defied consistent application by the lower courts.'" *Pearson*, 555 U.S. at 235 (alteration omitted). *Quill* has been quite criticized—particularly recently—in this Court and the lower courts. *See supra* pp.20, 24-27. And to the extent *Quill* has been applied consistently in the lower courts, it is only by radically constraining that decision to its precise facts. *See supra* p.26. This makes *Quill* "a positive detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989): While its application has been consistently narrow, that comes at the cost of making dormant-commerce-clause doctrine consistently inconsistent.

Indeed, *ad hoc* exceptions like *Quill* often become incoherent and "unworkable" precisely because they

unmoored from other doctrinal guideposts. *See supra* pp.26-27. And *Quill* certainly is an "island," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring)—"the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*." *Kimble*, 135 S. Ct. at 2411. In recent Terms, this Court has confirmed that it is appropriate to overrule a case, even after it has been reaffirmed once on *stare decisis* grounds, where it "has become even more of an outlier," and the Court finds it necessary to "'erase th[e] anomaly.'" *Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring). This Court has done its best to limit expansive judicial policymaking under the dormant commerce clause—at least outside the core ends of avoiding discrimination and double taxation. *See, e.g.*, *McBurney v. Young*, 569 U.S. 221, 235-37 (2013) (rejecting dormant-commerce-clause challenge). The physical-presence exception undermines that effort, particularly because it *causes* discrimination and undue burdens of the kind the clause would ordinarily condemn. *See supra* pp.32-34.

Relatedly, because it is such an outlier, this Court can excise *Quill* with complete confidence that it will not confound Commerce-Clause doctrine in any way. No subsequent holding for the last 25 years has depended on *Quill* or its physical-presence rule. *Quill* is merely a vestige of other, already-expired precedents, and has no place in contemporary doctrine.

5. *Experience & Workability*. Finally, *Quill* is a case where "experience has pointed up the precedent's shortcomings," *Pearson*, 555 U.S. at 233, and demonstrated that *Quill*'s supposedly bright-line rule is now increasingly "unworkable," *see, e.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). *Quill*'s fundamental

premise was that, at the very least, its bright-line, physical-presence rule would be an easily administered safe-harbor. But that has turned out to be incorrect; since *Quill*, questions about the limits of the physical-presence rule have multiplied. *See supra* pp.31-32. And that phenomenon will only grow worse if this Court retains the rule here, given how badly non-collection is hurting the States, and how much success they have had in redefining physical presence or rendering it "insubstantial." *Supra* p.26.

Indeed, this is the best reason of all to be rid of the physical-presence rule and to affirm South Dakota's economic-nexus approach. Taking *Quill* on its own terms, South Dakota's statute fares far better in achieving *Quill*'s own goals. The rule it employs guarantees that the retailer's relationship to the State and its market is "substantial" (as *Complete Auto* requires), based on a legally and economically meaningful measure. This Court has been particularly willing to reconsider an old rule when, in contemporary context, it becomes "an increasingly unjustifiable anomaly" that "produce[s] litigation-spawning confusion in an area that should be easily susceptible of more workable solutions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404 (1970). South Dakota's law offers a far "more workable solution" to the problems *Quill* wanted to solve: Its line is bright, its safe-harbor is economically relevant in avoiding undue burdens, and it does not discourage businesses from participating in interstate commerce through physical investment or local job creation. The sales-tax-only, physical-presence exception to *Complete Auto* should thus be abrogated, and South Dakota's law upheld.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Jeanne Jeong
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

February 26, 2018

APPENDIX

APPENDIX A

S.B. 106, 91st Legis. Assemb. Session (S.D. 2016)

AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis.

The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes, penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

(1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;

(2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;

(3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers actively market sales as tax free or no sales tax transactions;

(4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;

(5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

(8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.

APPENDIX B

States with statutes that do not permit collection from out-of-state retailers or expressly forbid retroactivity: 19

- **Alaska** (no sales tax); **Delaware** (no sales tax); **Hawaii** (Haw. Rev. Stat. §237-22(a)); **Indiana** (House Enrolled Act No. 1129 (2017)); **Iowa** (Iowa Code §423.30); **Louisiana** (La. Rev. Stat. Ann. §47:305); **Maine** (Me. Rev. Stat. Ann. § 1754-B); **Minnesota** (Minn. Stat. §297A.66, Subd. 2(a)); Minn. Stat. §297A.77 ; Minn. R. §8130.2500, subpart 1); **Missouri** (Mo. Code Regs. 10-114.100); **Montana** (no sales tax); **New Hampshire** (no sales tax); **New Mexico** (NMSA 1978 §7-9-10); **Oregon** (no sales tax); **South Carolina** (S.C. Code Ann. §12-36-1340); **South Dakota** (S.B. 106 (2016)); **Tennessee** (S.B. 53/H.B. 261, 110th General Assembly; Notice 17-12 (2017)); **Utah** (Utah Code Ann. §59-12-107(2)(a)(iii); Utah Informational Publication No. 37, 03/01/2016); **Vermont** (Vt. Stat. Ann. §9701); **Wyoming** (H.B. 19 (2017))

States with regulations or official guidance that require out-of-state retailers to have a physical presence for collection to apply: 7

- **Arizona** (Arizona Transaction Privilege Tax Ruling No. 16-1, 09/20/2016); **California** (California SBE Information Publication No. 77, 11/01/2015); **Colorado** (Colorado FYI Tax Publication No. Sales 5, 04/01/2013); **Florida** (*Share Int'l, Inc.*, 676 So. 2d. 1362 (Fl. 1996); Florida Technical Assistance Advisement No. 06A-31, 10/24/2006); **Michigan** (Michigan Revenue Administrative

Bulletin 1999-1, 05/12/1999); **New Jersey** (NJ Division of Taxation Technical Bulletin, No. TB-78, 07/30/2015); **Texas** (Texas Tax Pub. 94-108, 11/01/2016)

States where recent changes in law or rule have been enacted to permit collection from out-of-state retailers, implying that its preexisting law did not so permit: 8

- **Alabama** (Revenue Rule 810-6-2-.90.03); **Arkansas** (Ark. Code Ann. §26-53-121; Ark. Code Ann. §26-53-124(a)(1)(B)); **Massachusetts** (830 CMR 64H.1.7); **Mississippi** (Miss. Administrative Code §35.IV.3.09(100); Miss. Administrative Code §35.IV.3.09(103)); **Ohio** (Ohio Rev. Code Ann. §5741.01); **Pennsylvania** (Act 43 (H.B. 542)); **Rhode Island** (R.I. Gen. Laws §44-18.2-2(4); Notice: To All Non-Collecting Retailers, R.I. Div. of Taxation, Notice 2017-09, 08/04/2017)); **Washington** (HB 2163, Ch. 28, Laws of 2017)

States where statute or law incorporates constitutional standards or existing U.S. Supreme Court decisions: 6

- **Georgia** (O.C.G.A. §48-8-1); **Idaho** (Idaho Code §63-3611); **Kansas** (Kan. Stat. Ann. §79-3705c; Kan. Admin. Regs. §92-20-7(e)); **Nevada** (NRS 372.724); **West Virginia** (Code of State Rules §110-15-2.78); **Wisconsin** (Wis. Admin. Code Tax 11.97)

No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

RESPONDENTS' BRIEF

GEORGE S. ISAACSON
Counsel of Record
MARTIN I. EISENSTEIN
MATTHEW P. SCHAEFER
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
(207) 786-3566
gisaacson@brannlaw.com
meisenstein@brannlaw.com
mschaefer@brannlaw.com

Counsel for Respondents

March 28, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Should the Court abrogate the physical presence standard of "substantial nexus" for state sales and use taxes, reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents Wayfair Inc. and Overstock.com, Inc. each states that:

1. It has no parent corporation.

2. No publicly held corporation owns 10 percent or more of its stock.

Respondent Newegg Inc. states that:

1. It has the following parent corporation, Digital Grid (Hong Kong) Technology Co., Ltd.

2. No publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
JURISDICTION	8
STATEMENT	8
I. Extent Of Ecommerce	9
II. History Of Remote Sales/Use Tax Treatment	10
A. 1967: *Bellas Hess*	11
B. 1992: *Quill*	13
C. 1997-2000: ACEC And NTA Project	13
D. 2002 To The Present: SSUTA To The GAO	17
III. South Dakota Sales Tax	22
IV. Proceedings Below	23
SUMMARY OF ARGUMENT	24
ARGUMENT	27
I. There Is No Special Justification For Overruling *Quill*	27
A. Retailers Have Justifiably Continued To Rely On *Quill*	28
1. Retailers Were Entitled To Take This Court At Its Word	29

TABLE OF CONTENTS – Continued

Page

2. Reliance In Light Of Continued Compliance Burdens Is Plainly Reasonable 30

a. Sales Tax Software Does Not Eliminate The Compliance Burdens 30

b. Sales Tax Software Adds To The High Costs Of Compliance 36

B. *Quill* Was Correctly Decided 39

C. *Quill* Has Not Been Undermined By Later Decisions 42

D. The Physical Presence Standard Is Not Unworkable 44

E. Changed Circumstances Do Not Warrant Overturning *Quill* 46

1. Changes In Market Conditions Do Not Alter The Existence Of Unconstitutional Burdens On Interstate Commerce 46

2. The Amount Of Uncollected Tax Is Far Lower Than Previously Estimated And Diminishing Rapidly 47

F. No Other Standard Provides A More Workable Rule 53

1. "Economic Presence" Thresholds Are Fundamentally Flawed 54

2. *Pike* Balancing Cannot Work 57

TABLE OF CONTENTS – Continued

Page

II. Congress Remains The Proper Body To Address Whether, And In What Manner, To Alter The *Quill* Rule 59

III. Overruling *Quill* Presents The Risk Of Crippling Retroactive Liability For Retailers In Over 30 States 62

CONCLUSION 66

APPENDIX A: State Sales Tax Laws A-1

APPENDIX B: State Statutes of Limitation When No Tax Return Was Filed (for states with potential retroactivity) B-1

APPENDIX C: Letter Dated Nov. 17, 2017, from The Connecticut DRS to The Swiss Colony, LLC C-1

APPENDIX D: Examples of TaxCloud Lookup Errors for South Dakota D-1

TABLE OF AUTHORITIES

Page

CASES

Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992) 43

Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 63

Capital One Bank v. Comm'r of Revenue, 899 N.E.2d 76 (Mass.), *cert. denied*, 557 U.S. 919 (2009) 41

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 64

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 11, 43

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 42, 43, 61

Comptroller of the Treasury v. Wynne, 135 S.Ct. 1787 (2015) 42, 61

Dep't of Revenue v. Davis, 553 U.S. 328 (2008) 26, 57, 58

Direct Mktg. Ass'n v. Brohl, 135 S.Ct. 1124 (2015) 43

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939) 11

Gen. Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944) 11

Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) 7, 62, 63, 65

Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010) 42

TABLE OF AUTHORITIES – Continued

Page

In re Appeal of Intercard, Inc., 14 P.3d 1111 (Kan. 2000) 44

In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi, 82 P.3d 804 (Haw. 2004) 44

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 62, 63

KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011) 41

Kimble v. Marvel Entm't, LLC, 135 S.Ct. 2401 (2015) 27, 59, 60

Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) 62

MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16 (2008) 42

Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014) ..... *passim*

Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967) ..... *passim*

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551 (1977) 11, 43

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 10

Newegg Inc. v. Ala. Dep't of Revenue, Ala. Tax Tribunal No. S 16-613 36

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) 8

TABLE OF AUTHORITIES – Continued

Page

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 28

Payne v. Tennessee, 501 U.S. 808 (1991) 28

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 26, 57, 58

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 65

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 10, 11

Standard Pressed Steel Co. v. Wash. Dep't of Revenue, 419 U.S. 560 (1975) 11

State by and through Heitcamp v. Quill Corp., 470 N.W.2d 203 (1991), *aff'd in part and rev'd in part, Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) 9

Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226 (W.Va. 2006), *cert. denied sub nom., FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007) 41

Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue, 483 U.S. 232 (1987) 11

United States v. Carlton, 512 U.S. 26 (1994) 65

Washington v. Gen. Motors Corp., 406 U.S. 109 (1972) 8

Wis. Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214 (1992) 44

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

47 U.S.C. § 151 (note) 14
H.R. 2193, 115th Cong. (2017-2018) 60
H.R. 2887, 115th Cong. (2017-2018) 60
P.L. 105-277, Sec. 1101(a)(2) (1998) 14
P.L. 105-277, Sec. 1102(a), (g) (1998) 14
P.L. 105-277, Sec. 1104(8)(a)(ii) (1998) 14
P.L. 114-125, Sec. 922(a) (2016) 14
S. 976, 115th Cong. (2017-2018) 60

STATE STATUTES

Cal. Rev. & Tax. Code § 6204 62
Mo. Rev. Stat. § 144.049 32
N.M. Stat. Ann. § 7-9-95 32
N.Y. Tax Law § 1133(a) 62
SDCL § 10-45-2 ..... 23, 57
SDCL § 10-45-2.4 23
SDCL § 10-45-4 23
SDCL § 10-45-5 23
SDCL § 10-45-22 23
SDCL ch. 10-64 23
SDCL § 10-64-1(10) 23
SDCL § 10-64-2 23

TABLE OF AUTHORITIES – Continued

Page

SDCL § 10-64-6 ..... 7, 63

Wash. Rev. Code § 82.08.053(2) 55

OTHER MATERIALS

Absolunet, *Top Ten Ecommerce Trends for 2018*, https://absolunet.com/en/top-10-ecommerce-trends-will-impact-retailers-2018/ 52

Advisory Commission on Electronic Commerce, *Report to Congress* (Apr. 2000) 1

Joseph Bishop-Henchman, *State Sales Tax Jurisdictions Approach 10,000* (Mar. 24, 2014), https://taxfoundation.org/state-sales-tax-jurisdictions-approach-10000/ 20

Black Friday Got Blacker for Users of Automatic Sales Tax Software, Sales Tax Data Link (Dec. 2, 2015), http://www.salestaxdatalink.com/blog/black-friday-got-blacker-for-users-of-automatic-sales-tax-software 34, 35

Ike Brannon, Michelle Hanlon, Erin Miller, *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – an Economic Analysis* (Mar. 2018), http://ssrn.com/abstract=3140948 40

European Commission, *Modernising VAT for cross-border B2C e-commerce* (Dec. 1, 2016), https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_757_en.pdf 61

TABLE OF AUTHORITIES – Continued

Page

Federation of Tax Administrators, *Sales Tax Rates and Vendor Discounts* (Jan. 1, 2018), https://www.taxadmin.org/assets/docs/Research/Rates/vendors.pdf 38

Tonya Garcia, *Amazon accounted for 60% of US online sales growth in 2015*, MarketWatch (May 3, 2016), http://www.marketwatch.com/story/amazon-accounted-for-60-of-online-sales-growth-in-2015-2016-05-03 50

Robert W. Goodlatte, *Statement of Chairman Robert W. Goodlatte* (Dec. 4, 2017), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf 59

Billy Hamilton, *Home Sweet Taxing Unit*, 56 State Tax Notes 217 (Apr. 19, 2010) 35

Institute for Professionals in Taxation, *Locally Administered Sales and Use Taxes* (2016) 19

Chris Isadore, *Amazon to start collecting state sales taxes everywhere*, CNN (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html 2, 49

Naomi Jagoda, *Supreme Court to hear online sales tax case*, The Hill (Jan. 12, 2018), http://thehill.com/policy/finance/368788-supreme-court-to-hear-online-sales-tax-case 6

TABLE OF AUTHORITIES – Continued

Page

Terence Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, cnsnews.com (Mar. 22, 2018), https://www.cnsnews.com/news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hits-records-2017.pdf 52

Paige Jones, *Congressional Paralysis Unlikely to End in Time to Tackle Online Sales*, 87 State Tax Notes 432 (Jan. 29, 2018) 6

Larry Kavanagh, *Expert Report Concerning the Costs and Burdens for Remote Sellers to Comply with Sales and Use Tax Collection Obligations Imposed by Jurisdictions Throughout the United States, Including Alabama* (Aug. 28, 2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf 37

MEC Global, *Spotlight on Webrooming* (May 2016), http://www.wpp.com/wpp/marketing/consumerinsights/spotlight-on-webrooming/ 51

Robert J. Moore, *How Many Ecommerce Companies Are There?*, blog.rjmetrics.com (June 18, 2014), https://blog.rjmetrics.com/2014/06/ecommerce-companies-are-there/ 37

National Tax Association Communications and Electronic Commerce Tax Project, *Final Report* (Sept. 7, 1999) 15, 17, 31

N.Y. Dep't of Tax. & Fin., Bulletin TB-ST-530 33

TABLE OF AUTHORITIES – Continued

Page

Leslie A. Pappas, *Amazon to Collect Tax on Third-Party Sales in Pennsylvania*, BloombergBNA (Mar. 5, 2018), https://www.bna.com/amazon-collect-tax-n57982089523/ 49

PwC, *The race for relevance, Total Retail 2016: United States* (Feb. 2016) 51

Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.R.Rep. No. 565, 89th Cong., 1st Sess. (1965) 12

Ernan Roman, *Webrooming vs. Showrooming: Are You Engaging Both Types of Shoppers?*, CustomerThink (Feb. 23, 2017), http://customerthink.com/webrooming-vs-showrooming-are-you-engaging-both-types-of-shoppers/ 52

Alina Selyukh, *Overstock chairman has political missions in Washington DC and Utah*, Reuters (Aug. 11, 2015) 26

Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich. L. Rev. 895 (1992) 13

Sara Spivey, *Consumers have spoken: 2016 is the year of "webrooming,"* Marketing Land (July 29, 2016), http://marketingland.com/consumers-spoken-2016-year-webrooming-180125 50

TABLE OF AUTHORITIES – Continued

Page

Statement of Scott Peterson, former Director of the South Dakota Department of Revenue and former Executive Director of the SSUTA Governing Board, now Vice President U.S. Tax Policy, Avalara (Dec. 1, 2017), https://www.sana-commerce.com/us/blog-us/sales-tax-e-commerce-challenges/ 29

Statista, https://www.statista.com/statistics/304929/us-online-shopping-order-value/ 54

Janet Stilson, *Study Shows Prevalence 'Webrooming,'* Adweek (May 14, 2014), http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/ 51

Streamlined Sales and Use Tax Agreement, Adopted November 12, 2002 and Amended Through December 19, 2017, http://www.streamlinedsalestax.org/index.php?page=modules ... 5, 18, 31

Streamlined Sales Tax Governing Board, Inc., *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us 5, 18

Streamlined Sales Tax Governing Board, Inc., *Streamlined Sales Tax Master Presentation* (Aug. 1, 2011) http://www.streamlinedsalestax.org/index.php?page=governing-board-presentation 20

John A. Swain and Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, National Tax Journal, Vol. LVIII, No. 3 (Sept. 2005) 20

TABLE OF AUTHORITIES – Continued

Page

United States Census Bureau, American Fact Finder, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=STC_2016_00A1&prodType=table 53

U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales 4th Quarter 2017* (Feb. 16, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf 9

United States Government Accountability Office, *SALES TAXES: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (Nov. 2017) ..... *passim*

Arthur Zaczkiewicz, *Amazon, Wal-Mart, and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/ 50

INTRODUCTION

In its quest to convince the Court to abrogate the physical presence standard of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the State has not overcome a basic truth: state sales and use tax systems remain inordinately complex and burdensome during the Internet era, just as they were before it began. In 2000, when policymakers perceived the potential for the Internet to revolutionize commerce, the congressionally-authorized Advisory Commission on Electronic Commerce ("ACEC") issued the States a clear directive: "substantial simplification and reform of the current tax systems" is a necessary precursor to the expansion of state taxing authority over remote sellers. Advisory Commission on Electronic Commerce, *Report to Congress* (Apr. 2000) ("ACEC Report") at 2. "Our system of federalism mandates that the burden of producing such a system falls on the states," the Commission concluded. *Id.* Today, state sales tax systems are, on the whole, even more complex.

As South Dakota rushed this case through the state court system, the United States General Accountability Office ("GAO") was conducting a detailed, fifteen-month study of the consequences if the physical presence rule were eliminated through federal legislation. The GAO examined the impact of such a change on state sales tax revenues and the resulting burdens that would be imposed on remote sellers by the nation's 12,000 state and local sales tax jurisdictions. *See* United States Government Accountability Office, *SALES TAXES: States Could Gain Revenue from Expanded Authority,*

but Businesses Are Likely to Experience Compliance Costs (Nov. 2017) ("GAO Report").[1] Notably, the State omits any reference to the GAO Report in its brief. The GAO's factual findings, however, refute each of the core contentions of the State's extended policy argument for abandoning the physical presence standard, demonstrating that there is no "special justification" for overruling *Quill* under established principles of *stare decisis*. *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2036 (2014).

First, rather than confirming widespread undercollection of state sales taxes, the GAO found that the States already receive tax on between 75 and 80% of *all* remote sales, and a *higher* percentage on sales by Internet retailers. GAO Report at 8-9, 39-44. In sharp contrast to the over $33 billion in annual uncollected sales tax claimed by the State (Pet. Br. at 35), the GAO concluded that the actual amount was *only about one-quarter to one-third as much*, or between $8.5 and $13.4 billion in 2017. GAO Report at 11-12. Importantly, the GAO Report is consistent with other market trends that indicate the level of uncollected sales tax is steadily declining, not increasing – most notably, as a result of the initiation of nationwide sales tax collection by Internet giant Amazon.com. Chris Isadore, *Amazon to start collecting state sales taxes everywhere*, CNN (Mar. 29, 2017) ("Isadore"), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

---

[1] The GAO Report was not issued publicly until December 18, 2017, eleven days *after* Respondents filed their brief in opposition to the State's petition.

Second, and even more significantly, the GAO Report undercuts the State's erroneous claim that sales tax collection software is the "silver bullet" to eliminate the burdens of multi-state compliance. The State offers no independent, third-party study regarding the burdens of compliance, and instead relies on promotional materials and a journal article prepared by the very firms that stand to profit most if *Quill* is overruled, for its claim that sales tax software cures all ills. The nonpartisan GAO found, in contrast, that the costs of sales tax compliance are manifold and significant: software installation, implementation, and integration; mapping of thousands of products to software categories; per-transaction software licensing fees; internal staffing and administrative costs; legal fees incurred in distant jurisdictions in connection with assessments and audits; and professional fees for keeping up to date on changes in the laws of thousands of taxing jurisdictions. *See generally* GAO Report at 15-27. Simply put, software "licensing fees are only one of multiple costs required to collect sales taxes in multiple states." *Id.* at 19.

Third, the GAO Report demonstrates that the State misperceives both the economic rationale and practical effects of the *Quill* standard. The fundamental calculus of the *Quill* Court was that the aggregate burdens associated with imposing multi-state tax collection on remote sellers were sufficiently great, and sufficiently harmful to the national economy, to warrant the retention of a rule that relieved certain retailers from collecting sales tax, while requiring other

vendors to comply. 504 U.S. at 313 and n.6. The GAO Report, together with other analyses, shows that these burdens remain high, while uncollected sales/use tax revenue nationwide is far lower than projected, and declining.

Overruling *Quill* would cause direct harm to those businesses most in need of its protection. The GAO concluded that state sales tax collection would prove particularly burdensome for smaller and medium-sized retailers that lack internal systems for multi-state tax compliance. GAO Report at 17. The largest Internet retailers, meanwhile, *already* collect the tax at rates approaching traditional bricks-and-mortar sellers. The GAO found tax collection among the top 100 Internet retailers is *between 87 and 96 percent*. *Id.* at 41. The so-called non-collectors are primarily small and medium-size companies, especially start-ups and regionally remote businesses for whom the Internet has enabled access to a national marketplace. Imposing the disparate requirements of 12,000 tax jurisdictions on such companies would effectively be a barricade across the Internet superhighway for thousands of companies, who would need to curtail their ambitions and limit their prospective markets. While South Dakota points to its own, self-imposed sales threshold of $100,000 for requiring sales tax compliance, its parallel threshold of 200 transactions would capture small sellers with far lower sales, and nothing would prevent other states from adopting even lower thresholds.

The State and several amici point to the Streamlined Sales and Use Tax Agreement ("SSUTA") as having

achieved the goal of greater uniformity and standardization of tax administration. The 202-page Agreement (including five appendices) is the product of a fifteen-year effort. It demonstrates the deep complexity of state tax systems and the extensive range of issues requiring simplification across states. *See* Streamlined Sales and Use Tax Agreement, Adopted November 12, 2002 and Amended Through December 19, 2017, http://www.streamlinedsalestax.org/index.php?page=modules. The SSUTA is to be commended, as a good faith, if incomplete, effort towards simplification. If all states had voluntarily adopted its provisions, the burdens on interstate commerce might be dramatically reduced. The problem, however, is that the signatories to the SSUTA, which include South Dakota, are states with only one-third of the nation's population. Streamlined Sales Tax Governing Board, Inc., *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us. The largest states, including California, Texas, New York, Florida, Illinois, and Pennsylvania, all refused to join, leaving the national system, as a whole, exceedingly complex.

The Respondents – indeed the entire direct marketing industry – are not unmindful of the interests the states have in obtaining sales/use tax revenue on transactions involving their residents, even if the states have mischaracterized the nature and dimension of this issue. The appropriate approach should be one that provides a balanced solution – simplification of sales tax administration in return for expanded state tax authority. Congress has the means to craft

such legislation and is actively considering such measures. *See generally* Brief of Amicus Curiae Robert W. Goodlatte, et al., in Opposition to the Petition (Dec. 4, 2017). Overruling *Quill*, without addressing the burdens on remote sellers, would produce adverse consequences and the potential for substantial market disruption. In fact, South Dakota's sole Congressperson has cautioned what the impact of overruling *Quill* would be in the absence of federal legislation: "If the Supreme Court rules in South Dakota's favor, it could become a marketplace free-for-all. A South Dakota small business, for instance, could be forced to comply with 1,000 different tax structures nationwide without the tools necessary to do so." *See* Naomi Jagoda, *Supreme Court to hear online sales tax case*, The Hill (Jan. 12, 2018) (quoting U.S. Rep. Kristi Noem (R.-S.D.)), http://thehill.com/policy/finance/368788-supreme-court-to-hear-online-sales-tax-case.

If *Quill* is overruled, the states will have no incentive to seek compromise federal legislation. Freed of Commerce Clause restraint on their taxing authority, states will oppose any congressionally-mandated restrictions on their cross-border taxing power. As one high-ranking state official acknowledged, "If the Supreme Court Rules in South Dakota's favor, effectively overturning the *Quill* decision, 'I don't see why states would want Congress to do anything.'" *See* Paige Jones, *Congressional Paralysis Unlikely to End in Time to Tackle Online Sales*, 87 State Tax Notes 432 (Jan. 29, 2018) (quoting Max Behlke, Director of Budget and Tax Policy for the National Conference of State

Legislatures). Moreover, there would be no requirement for states that have joined the SSUTA to remain members, let alone for other states to simplify their laws.

Of critical concern, overturning the physical presence standard would expose thousands of businesses that have relied upon it to crippling, retroactive liability for uncollected tax. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect . . . ") (ellipses added). Over 30 states have statutes already on the books requiring tax collection by sellers without a physical presence. *See* Appendix A. Only *Quill* stands in the way of states enforcing those laws. While South Dakota has disavowed such a backward-looking remedy in its statute (*see* SDCL §§ 10-64-6), other states have informed this Court that they may choose "to apply their laws retroactively." Brief for Colorado and 40 Other States, et al. ("States' Br."), at 19. A number of states have *already* begun to pursue back taxes based on an "economic presence" theory in anticipation of this Court overruling *Quill*. *See, e.g.*, Appendix C (letter dated Nov. 17, 2017, from the Connecticut DRS to The Swiss Colony, LLC). In most states, there is no statute of limitations for tax assessments against companies that did not file a sales tax return. *See* Appendix B.

A dispassionate analysis, like the one provided by the GAO, shows that current conditions do not reflect a crisis, although overruling *Quill* without needed

simplification may precipitate one. Abrogating *Quill* requires special justification. *Bay Mills*, 134 S.Ct. at 2036. None exists. Proper regulation of interstate commerce, as a matter of national economic policy, falls to Congress. The ruling of the South Dakota Supreme Court should be affirmed.

JURISDICTION

Even with regard to "important questions of vital national importance," *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 112 (1972), the Court carefully guards its jurisdiction against disputes in need of factual development. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498-99 (1971) (this Court is an "inappropriate forum" for addressing cases that have enjoyed no development in the lower courts). In choosing to "fast-track" its appeal through the South Dakota court system without a factual record, the Petitioner has caused doubts about the proper exercise of this Court's jurisdiction. *See also* Respondent's Brief in Opposition to Petition for a Writ of Certiorari ("Resp. Br. in Opp.") at 5-6, 12-18.

STATEMENT

The Petitioner presents a lengthy policy argument that *Quill* should be overruled. An extended statement is required to set the record straight.

I. Extent Of Ecommerce.

A restored perspective regarding the volume of retail ecommerce is in order. Electronic commerce, while growing rapidly, still represents only 9 percent of all retail sales, or about $453 billion. U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales 4th Quarter 2017* (Feb. 16, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. Traditional retail, which is also growing steadily, continues to comprise over 90 percent of the total market. Figures in the trillions of dollars for ecommerce, such as the $5.71 trillion figure cited in the Brief of Retail Litigation Center, Inc., et al. ("RLC Br."), at 5-6, include manufacturing and wholesale sales, which are *not* subject to state sales tax and are not relevant to this case. *See* Brief for the United States ("U.S. Br.") at 19-20. At the individual firm level, the largest traditional retailer, Wal-Mart, remains more than four times as large as Amazon.com, by far the biggest ecommerce seller. (Both collect sales tax on their Internet sales.) In fact, relevant data indicate that retail ecommerce comprises a smaller percentage of total retail sales today than catalog sales did in 1992 when *Quill* was decided. *State by and through Heitcamp v. Quill Corp.*, 470 N.W.2d 203, 209 (1991) ("mail order accounted for more than 15 percent of total sales nationally"), *aff'd in part and rev'd in part in Quill*, 504 U.S. 298. If ecommerce is a retail "leviathan," then traditional retail remains a colossus.

II. History Of Remote Sales/Use Tax Treatment.

The State insists that the physical presence rule is a relic of a bygone era, whose justifications lie on the far side of the "digital divide." Pet. Br. at 11. In fact, the justifiable concerns about unduly burdensome tax systems that animated the Court's decisions in *Bellas Hess* and *Quill* represent a continuing problem that spans both eras, and one that has generated even more intense interest among policymakers after the birth of the Internet. The continued consensus is that simplification of state sales tax systems must remain a paramount objective for any solution to the difficult policy questions that underlie whether, and under what conditions, to permit expanded state taxing authority over remote sales transactions.

As a constitutional matter, the restriction on a state's authority to compel collection of sales taxes by a company that lacks a physical presence in the state is long-standing. When, in 1967, the Court expressly recognized the "sharp distinction" between retailers with "outlets, solicitors, or property within a State" and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," the Court relied upon cases dating back to 1941. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 757-58 (1967) (citing *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)). Indeed, the Supreme Court has never held, in any case, that a sales, use, or comparable tax could be imposed upon a retailer that lacks a physical presence in a state. To the

contrary, a direct physical presence in the state, or in-state activities conducted by, or on behalf of, an out-of-state retailer, has been the hallmark of the Court's state tax decisions for decades. *See, e.g.*, *Quill*, 504 U.S. at 313-18; *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987) (third-party sales representative engaged in substantial activities in the state establishes nexus); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (an "interstate business must have a substantial nexus with the State before *any* tax may be levied on it") (italics in original); *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556-58 (1977) (local office creates nexus) (surveying cases); *Standard Pressed Steel Co. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-63 (1975) (in-state employee creates nexus); *Scripto*, 362 U.S. at 211 (1960) (ten sales representatives soliciting orders in the state); *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 337-38 (1944) (traveling sales agents sent into the state); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 65-66 (1939) (in-state sales agents soliciting sales). What occurs inside a state's borders has always been the critical foundation for a state's taxing and regulatory authority; in short, borders matter.

A. 1967: *Bellas Hess*.

In applying this established principle in *Bellas Hess*, the Court was concerned that the national economy would suffer if the more than 2,300 state and local jurisdictions that imposed a sales tax were free to require tax collection by out-of-state businesses. Finding that the "impediments" to the conduct of interstate

commerce would be "neither imaginary nor remote," the Court explained:

> For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [an] interstate business in a virtual welter of complicated obligations. . . .

386 U.S. at 759-60 (internal footnotes omitted and brackets added). In reaching this conclusion, the Court quoted the Congressional Report on which it relied for its findings. "[I]t is clear that, if just the localities which now impose the tax were to realize anything like their potential . . . the recordkeeping task of multistate sellers would be clearly intolerable." *Id.* at 759 n.14 (citing Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.R.Rep. No. 565, 89th Cong., 1st Sess. (1965), at 882) (brackets and ellipses added). Indeed, the multiplicity of jurisdictions, with their varying rates, tax bases, and requirements, is unique to the state and local sales tax system. No other form of taxation presents this same array and diversity of tax obligations.

B. 1992: *Quill.*

By 1992, the situation had significantly worsened. The number of taxing jurisdictions had soared to over 6,000. *Quill*, 504 U.S. at 313 n.6. The Court explained how North Dakota's attempt to compel tax reporting by an out-of-state retailer "illustrates well" the ways in which a use tax collection obligation could burden interstate commerce, because every jurisdiction could then follow suit. *Id.* The problem was not merely an issue of dozens of different rates, but also of different substantive requirements. Indeed, "even neighboring jurisdictions within the same state impose different classifications and rates, collect their own taxes separately, impose separate documentation requirements (such as the use of their own certificates attesting to tax exemption or that taxes have been paid), and conduct their own audits." Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich. L. Rev. 895, 925-926 (1992) (cited by the Court in *Quill*, 504 U.S. at 313 n.6).

This was the sales tax system in place when Jeff Bezos began selling books over the Internet from his garage a few years later. But as electronic commerce quickly expanded, the complexity of state and local sales tax regimes only continued to increase.

C. 1997-2000: ACEC And NTA Project.

Policymakers soon took note of the inherent incompatibility between state sales tax systems and modern electronic commerce. In 1998, Congress enacted the

Internet Tax Freedom Act. *See* 47 U.S.C. § 151 note (made permanent in 2016, P.L. 114-125, Sec. 922(a)) ("ITFA"). Through the ITFA, Congress explicitly limited the authority of states and localities to impose "multiple or discriminatory taxes" upon electronic commerce, including sales tax collection obligations, that targeted transactions conducted online. P.L. 105-277, ITFA §§ 1101(a)(2), 1104(8)(a)(ii) (1998).

Congressional focus was not, however, limited to preventing discrimination. Through the ITFA, Congress established the Advisory Commission on Electronic Commerce, comprised of three executive branch officials, eight state and local government representatives, and eight businesspeople representing ecommerce companies, telecommunications carriers, and local retailers, with a broad mandate to study federal, state and local, and international taxation of transactions using the Internet. *Id.* §§ 1102(a), (g). The Commission conducted formal meetings, gathered information, interviewed experts, and heard from witnesses on all sides of the issues concerning taxation of ecommerce.

In its Report to Congress, issued in April 2000, the ACEC emphasized the fundamental complexity of state and local tax systems, and the need for simplification. ACEC Report at 2. The ACEC took note that there were over 7,500 state and local governments that levied a sales tax in 2000. *Id.* at 17. Admonishing states that it "should not be presumed that the collection of sales and use taxes on Internet transactions is an inevitability," the ACEC stressed the necessity of "substantial simplification and reform of the current tax

systems if they are to continue to remain viable in the 21st century." *Id.* at 2. In recommending that the "hallmark of the system should be simplicity, efficiency and fairness," the ACEC concluded:

> Our system of federalism mandates that the burden of producing such a system falls on the states. The proposals adopted by a majority of the Commissioners suggest giving the states five years to simplify their state and local transaction tax systems in a manner which would equalize the burdens of tax collection for local and remote sellers. . . . By eliminating any disparate burden on interstate commerce, states will have a pathway toward a system that extends their collection of existing state taxes to remote sellers.

Id. (ellipses added).

Concurrent with the work of the congressionally-authorized ACEC, the National Tax Association undertook its own Communications and Electronic Commerce Tax Project ("NTA Project"). *See* NTA Project, *Final Report* (Sept. 7, 1999) ("NTA Report"). Initiated in August 1997, the NTA Project brought together over 70 representatives of state and local governments (including representatives of the NGA, NCSL, FTA, MTC and NLC, all participating amici here), the business community, professional organizations, and academia to explore solutions to the state and local challenges presented by electronic commerce. NTA Report at 2. The NTA Project issued a consensus recommendation for simplification – that there should be

only one sales/use tax rate per state, for all commerce. The NTA Project also generated "a number of simplification suggestions that could reasonably seem to be implemented and make a significant reduction in the burden of sales tax administration." NTA Report, Executive Summary at ii, vi.

Notably, the NTA Project determined that "[s]*implification of the current sales and use tax administration is critical*, regardless of whether consideration is given to extending the duty to collect to certain remote sellers." *Id.* at vii (italics added).

The NTA's focus on state and local sales taxes allowed it to explore, in even greater detail than the ACEC, the complexities of the national sales tax system. Its review is telling. The NTA Report addressed the following areas in need of simplification: differing registration forms and requirements (*id.* at 54); multiple tax returns and differing filing and remittance requirements (*id.* at 55-56); inconsistent rules for bad debts and other deductions (*id.* at 56-58); varying refund claim procedures (*id.* at 59); widely differing standards and recordkeeping requirements for documenting and administering exempt sales (*id.* at 59-62); consumer payments by check and potential vendor liability for underpayment (*id.* at 62-63); inconsistent tax treatment of shipping charges, including taxability, administration, and measure (*id.* at 64); burdensome and expensive audits in multiple jurisdictions (*id.* at 64-66); cumbersome assessment and appeals processes (*id.* at 66-68); and inadequate vendor compensation for

the costs of compliance, including none at all in nearly 20 states (*id.* at 69-70).

The NTA was unequivocal in its assessment of the steps necessary to give consideration to extending the duty to collect sales tax to remote sellers:

> State and local sales taxes and their administration are confusing and burdensome. The complexity of today's sales tax arises from the interaction between the sovereignty of states in our federal system and the limitations imposed on that sovereignty by the U.S. Constitution in support of a national market. In current circumstances, the states should reexamine and coordinate their decentralized tax systems to reduce administrative burdens.

NTA Report at 49.

D. 2002 To The Present: SSUTA To The GAO.

The Streamlined Sales and Use Tax Project grew directly out of the NTA Project. It reflected a "hybrid" approach under which "[i]nterested states could develop a multistate tax compact creating a harmonized tax system," so that Congress could determine whether to authorize participating states to require sales tax collection by remote sellers. *Id.* at 80. Such a system, while recognizing state autonomy, would retain Congress' "appropriate control over the jurisdictional reach of state tax systems and protect interstate commerce from undue burdens due to inconsistent state tax practices." *Id.*

The Streamlined Project crafted the terms of a comprehensive agreement that was adopted in November 2002. The SSUTA's avowed purpose is "to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102. Today there are 24 member states which together comprise approximately 31 percent of the population. Streamlined Sales Tax Governing Board, *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us.

Like the NTA Project, the SSUTA illustrates the complexity and variability of state sales tax systems across the United States. By its own account, the SSUTA addresses ten different general subject areas of state sales tax systems: state level administration of tax collections; uniformity in state and local tax bases; uniformity of tax definitions; centralized registration; simplification of state and local tax rates; uniform "sourcing" rules; simplified administration of exemptions; simplified returns; simplified tax remittances; and consumer privacy. *Id.* Within these broader subject areas, the agreement covers topics of bedeviling complexity for multi-state sellers, such as sales tax "holidays;" tax "caps" and thresholds limiting, or triggering, sales tax on particular products; "bundled" transactions in which products and services subject to different tax treatments are sold together; and special rules for digital products. *See* SSUTA, Art. III.

The SSUTA requires 202 pages to address all of the complexities. It has five appendices, including "libraries" of definitions, interpretations, and tax administration

practices. *Id.* Apps. C, D, and E. It has been amended dozens of times and numerous working groups address the many, varied, and complex issues of tax administration that arise.

The SSUTA simplification effort has yielded some dividends. The SSUTA has attracted over 3,800 registrants, many of them multi-channel retailers or remote sellers collecting tax on Internet or catalog sales that have agreed to collect tax in the SSUTA states. *See* Brief for *Amicus Curiae* Streamlined Sales Tax Governing Board, Inc. at 9.

But by the most important measure – state participation – the SSUTA has failed in its objective to simplify the complexity and burdens of state tax systems nationwide. States representing nearly seventy percent of the United States population are *not* members of the SSUTA. None of the several largest states – California, Texas, New York, Florida, Illinois, Pennsylvania – are members. None of the states with local "home rule" jurisdictions, which generate the greatest levels of complexity and compliance burden[2] – including

---

[2] "There are complexities associated with collecting local sales taxes under any regime, even those that are administered by a state agency. Locally administered sales taxes represent a special case in this regard because a taxpayer is required to interact separately with each local government with which it is required to file and because the locally administered taxes often differ materially from the counterpart state tax and from one another, even within the same state." Institute for Professionals in Taxation, *Locally Administered Sales and Use Taxes* (2016), at 4.

Alabama, Alaska, Arizona, Colorado, Idaho, and Louisiana – are members.

As a result, the commendable simplification measures promoted through the SSUTA have not appreciably alleviated the burdens that would be imposed upon remote sellers in the absence of the *Quill* rule. To the contrary, overall complexity has continued to grow. In September 2005, leading commentators assessing the prospects of the SSUTA noted that "structural flaws in the [sales] tax – present since its inception – are increasingly highlighted by an ever expanding global, service-oriented, and digital economy. Preeminent among these flaws has been the complexity of compliance with a multiplicity of non-uniform state and local sales tax regimes." John A. Swain and Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, National Tax Journal, Vol. LVIII, No.3 (Sept. 2005), at 605. Six years later, the Executive Director of the SSUTA declared that "[c]ompliance with sales tax laws by multi-state corporations is too complex." *Streamlined Sales Tax Master Presentation* (Aug. 1, 2011), at 4, http://www.streamlinedsalestax.org/index.php?page=governing-board-presentation. And in 2014, the number of state and local tax jurisdictions reached 10,000. Joseph Bishop-Henchman, *State Sales Tax Jurisdictions Approach 10,000* (Mar. 24, 2014), https://taxfoundation.org/state-sales-tax-jurisdictions-approach-10000/.

In 2016, two United States Senators asked the GAO to study the remote sales tax issue. GAO Report at 1. Over a fifteen-month period, the GAO conducted

independent research and interviewed officials from state revenue agencies, subject matter specialists, trade associations, and a wide variety of retailers making remote sales, regarding the real-world experience of sales tax collection. *Id.* at 2-3. In December 2017, it published its Report.

The GAO began by noting that across the 46 states (including the District of Columbia) that have a sales tax, the estimated number of local jurisdictions is as high as 12,000. *Id.* at 3. It found that the cost of both collecting and remitting sales tax rises as a company faces increased exposure to additional tax jurisdictions. *Id.* at 16. Furthermore, "[a]s the number of jurisdictions for which a business collects taxes increases, the amount of administrative work also increases." *Id.*

The GAO found that the burdens go far beyond buying sales tax compliance software, making it no "cure-all" for retailers' compliance burdens. Moreover, the initial costs of software set-up are high, especially for businesses not already using software for multistate tax collection. *Id.* at 17. Retailers need to engage in expensive "mapping," coding, customization, and system integration, which requires, among other things, coding all of a retailer's products for applicable taxation categories. *Id.* at 17-18.

The GAO also found substantial costs *not* related to software implementation and integration. Multistate sellers may be under perpetual audit, especially in non-SSUTA states. "A representative from the tax

department of one company with nexus in most states said that auditors return every few years to audit the company and that they are currently contending with 8 to 10 audits from different tax authorities." *Id.* at 21. Moreover, some audits last for years. *See id.* (referencing a business that had just dealt with an expensive, three-year audit). Remote sellers reported that they simply do not have the resources to comply with similar audits from multiple jurisdictions. *Id.*

In sum, the GAO Report tells a very different story about the burdens of multi-state tax compliance in the modern economy than the Petitioner describes in its brief. The states have not collectively responded to the advice and direction of the congressionally-sponsored ACEC and the nonpartisan NTA by simplifying and making more uniform their tax systems. The GAO's findings demonstrate that, substantively and practically, the complex and burdensome nature of the U.S. sales tax system that existed in 1992, compounded by the ever-expanding number of tax jurisdictions, still exists today. In arguing that remote sellers can now easily and inexpensively comply with nationwide sales tax obligations, neither South Dakota nor its amici even mention the GAO Report.

III. South Dakota Sales Tax.

The South Dakota sales tax is imposed upon "the privilege of engaging in business as a retailer," measured by the gross receipts from sales of tangible personal property, products transferred electronically, and

services. SDCL §§ 10-45-2, 10-45-2.4, 10-45-4, 10-45-5. There is no provision expressly requiring collection of the tax, but retailers "may add the tax imposed by this chapter to the price of their product or service." *Id.* § 10-45-22.

In March 2016, South Dakota enacted Senate Bill 106, "An act to provide for the collection of sales taxes from certain remote sellers" (the "Act"), now codified at SDCL chapter 10-64. The Act amended the sales tax code to require any seller that does not have a physical presence in the state to report sales tax based on statutory thresholds of $100,000 in sales or 200 transactions for delivery into South Dakota in the previous or current calendar year. *Id.* § 10-64-2. In devising these standards, the legislature found that "a decision from the Supreme Court of the United States abrogating its existing doctrine" would be necessary for the Act to be enforced. *Id.* § 10-64-1(10).

IV. Proceedings Below.

The State filed suit in April 2016, targeting the Respondents while conceding they were acting lawfully in not collecting sales tax. *See id.*; Complaint ¶ 24. In their Joint Answer, the Respondents admitted that each of them: (a) lacks a physical presence in South Dakota; (b) had gross revenue in 2015 from South Dakota sales in excess of $100,000, and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (c) is not registered to collect South Dakota sales tax. The Respondents

denied all other factual assertions in the Complaint, including the "legislative findings" that supported the Act. Defendants' Joint Answer ¶¶ 43-50. No other facts are established by the proceedings below. *See* Resp. Br. in Opp., Addenda A & B (Statement of Undisputed Material Facts and the State's response).

In March 2017, the circuit court awarded summary judgment to the Respondents on the grounds that the Act is directly at odds with *Quill*. Pet. App. B. On September 13, 2017, the South Dakota Supreme Court, finding "no distinction between the collection obligations invalidated in *Quill* and those imposed by Senate Bill 106," affirmed the entry of judgment for the Respondents. Pet. App. A.

SUMMARY OF ARGUMENT

Under the well-established doctrine of *stare decisis*, overruling *Quill* requires "special justification." *Bay Mills*, 134 S.Ct. at 2036. Multiple factors demonstrate that the State cannot meet this high burden.

As the State acknowledges, reliance by remote sellers on the physical presence standard based on concerns about the inordinate burdens of multi-state tax compliance is "legitimate." Pet. Br. at 55. Contrary to the State's contention, inadequate sales tax software and faulty tax rate "look-up" tables do not eliminate the most costly and burdensome tasks of compliance required by the excessively complicated U.S. sales tax

system. Moreover, software adds new expenses to the process.

The *Quill* Court did not misunderstand the clear economic calculus before it. Rather, it made a considered judgment that the aggregate burdens of nationwide sales tax collection, and their impact on the national economy, justified the retention of the physical presence rule. That economic assessment still makes sense today and is not minimized by the State's flawed assumption that the real-world burdens of multi-state sales tax compliance do not exist.

No decision of this Court has ever questioned the holding of *Quill*; in fact, the Court has cited it favorably since 1992. Likewise, no lower court has questioned *Quill's* conclusions with regard to state sales/use taxes, as opposed to other kinds of taxes that impose lesser compliance burdens. Indeed, the physical presence test is straightforward and readily applied in the vast majority of circumstances. Limited litigation regarding *de minimis* physical presence does not undermine the rule's "workability."

Changed conditions in the retail marketplace also cannot justify the abrogation of the physical presence rule where the constitutionally-significant conditions – undue burdens derived from excessively complicated state sales tax systems – remain unchanged. The State, moreover, mischaracterizes market conditions and trends that show, contrary to the State's hyperbolic predictions, that uncollected revenues are far lower than previously estimated and *declining*, as

electronic commerce is increasingly dominated by large, tax-collecting, omni-channel retailers.

Neither alternate standard presented by the State and its amici is viable. Individual state sales and transaction thresholds, like those contained in the Act, would be the antithesis of a settled rule and would eliminate any meaningful limit on state taxing authority. In addition, the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is incompatible with the nationwide focus required for assessing the impact of inconsistent state sales tax regimes on interstate commerce. Courts are ill-equipped to perform the complex economic analyses such a test would require. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 353-56 (2008) (rejecting *Pike* balancing due to the "unsuitability of the judicial process and judicial forums" for predicting the economic consequences of changes to established market rules).

Instead, Congress is the institution best-suited to resolve the competing interests in remote sales tax collection and to select the proper policy outcome – a goal that the Respondents and almost all remote sellers support. Alina Selyukh, *Overstock chairman has political missions in Washington DC and Utah*, Reuters (Aug. 11, 2015) (discussing Overstock's support for federal legislation to address the "patchwork of laws that just makes it hard to do business"). Overruling *Quill* would complicate, if not prevent, a congressional solution. Absent the physical presence standard, the states would no longer be interested in compromise. Jones, 87 State Tax Notes 432. The potential for severe economic

disruption is great. Small businesses seeking access to a national market, not the massive multi-channel retailers that already report sales tax across the country, will be harmed most by the new compliance burdens, new barriers to entry, and new obstacles to growth.

Overruling *Quill* also presents even "thorn[ier] questions concerning the retroactive application" of sales taxes than were present in *Quill*. 504 U.S. at 318 n.10 (brackets added). Over 30 states have laws that would support state efforts to impose retroactive liability on sellers that relied upon *Quill*. *See* App. A. Some states are already seeking to impose back taxes on sellers with no physical presence, in anticipation of *Quill* being overruled. *E.g.*, App. C. The States have acknowledged to the Court that they may pursue such claims. No meaningful impediment would stand in their way – but Congress can craft legislation that would allow states that simplify and make more uniform their systems to require prospective collection.

ARGUMENT

I. There Is No Special Justification For Overruling *Quill*.

The doctrine of *stare decisis* is "a foundation stone of the rule of law." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015) (quoting *Bay Mills*, 134 S.Ct. at 2036). Adherence to prior precedent is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles,

fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Bay Mills*, 134 S.Ct. at 2036 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). A party arguing that precedent should be overruled must therefore show that there is "special justification" for abrogating the decision. *Id.* (citation omitted).

Furthermore, as Justice Scalia noted in *Quill*, *stare decisis* applies with enhanced strength with respect to the Court's dormant Commerce Clause decisions because Congress "remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Since the legislative branch "exercises primary authority in this area," *stare decisis* has "special force." *Bay Mills*, 134 S.Ct. at 2036 (citing *Patterson*, 401 U.S. at 172-73) (addressing issue of tribal sovereign immunity).

A. Retailers Have Justifiably Continued To Rely On *Quill*.

There can be no doubt that remote sellers employing a wide range of direct marketing methods (catalog/mail order, television/infomercial, telemarketing, Internet) have continued to rely upon *Quill*. And with good reason. As South Dakota's own former, long-time Director of Revenue recently acknowledged, state and local sales tax compliance involves differing rules for "what gets taxed, how much tax to apply, and how to file a return and pay the tax," all of which "greatly

increases the complexity." Statement of Scott Peterson, former Director of the South Dakota Department of Revenue and former Executive Director of the SSUTA Governing Board, now Vice President U.S. Tax Policy, Avalara (Dec. 1, 2017), https://www.sana-commerce.com/us/blog-us/sales-tax-e-commerce-challenges/.

Perhaps most importantly, the physical presence rule has permitted start-ups and small businesses to use the Internet as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nationwide sales tax collection.

2. Retailers Were Entitled To Take This Court At Its Word.

The State concedes that retailers have a legitimate reliance interest with respect to inordinate compliance costs, Pet. Br. at 55, but argues that remote sellers should have divined from *dicta* in *Quill*, as well as from congressional authority to legislate in this area, and from the independent obligation of consumers to self-report use tax, that the physical presence standard for sales tax collection could not last. *Id.* at 54-55. These arguments would counsel parties to distrust the rule of law, but Justice Scalia has already provided the answer to such weightless contentions in his concurrence in *Quill*. It would be fundamentally incompatible with *stare decisis* to "demand that private parties anticipate" the overruling of precedent and to "visit economic hardship upon those who took us at our

word." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) ("reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance") (italics in original).

2. Reliance In Light Of Continued Compliance Burdens Is Plainly Reasonable.

The State admits that reliance on *Quill* is proper – indeed, "legitimate" – if the burdens of multi-state tax collection remain excessive. Pet. Br. at 55. This admission is telling, because every considered assessment in the Internet era (ACEC, NTA, SSUTA, GAO) has concluded that sales tax systems remain exceedingly complex. The concerns regarding undue burden that animated the decision in *Bellas Hess* and its retention in *Quill* are as valid today as they were in 1967 and 1992.

a. Sales Tax Software Does Not Eliminate The Compliance Burdens.

The State acknowledges that the number of tax jurisdictions continues to grow and does not dispute that they have disparate substantive and administrative requirements. The only response that the State presents to such inordinate complexity is software. In effect, no matter how monstrously complex the states choose to make their sales tax codes, software (or, perhaps, cloud computing) is the "silver bullet" to slay the beast.

Even the proponents of the "super-software-fix" do not argue that software reduces the complexity. Instead, they argue that software makes complexity irrelevant. While sales tax software and tax rate "look-up" tables may help remote sellers address one discrete issue, they present a range of costs of their own, and fail to address many of the most burdensome aspects of multi-jurisdiction tax collection. Indeed, software alone barely scratches the surface.

The NTA Report and the SSUTA demonstrate the shortcomings of software as a purported solution to the burdens of compliance with 12,000 jurisdictions nationwide. Challenges unaddressed by software include: varying and complex rules for "sourcing" products and, in particular, services, to the proper jurisdiction; non-uniform product definitions across states, and even within states for those having "home rule" jurisdictions; special tax "caps" and thresholds for particular products; different provisions for defining, substantiating, and taxing "bundled" transactions; specific requirements for proof of, and record keeping for, exempt transactions; inconsistent rules for bad debts and deductions; varying refund claim procedures; complexities associated with consumer payments by check;[3] inconsistent tax treatment of shipping charges; and cumbersome and expensive audits and appeal processes. *See generally* SSUTA, Art. III; NTA Report at 54-70.

---

[3] *See Amicus Curiae* Brief of American Catalog Mailers Association in Opposition to the Petition (Dec. 7, 2017), at 7 ("On average 11% of catalog purchases are paid by check, and some catalog sellers receive checks for more than 30% of their sales.").

A few examples illustrate the point. Twelve states have adopted sales tax "holidays," short term exemptions from tax for selected categories. In at least three states, however, local jurisdictions within the state can opt out of participation in the holiday, so the exemptions may apply for only certain localities. Even more daunting, different states apply the exemption to different categories and subcategories, and further define the same general categories and subcategories differently. States differ as to whether the holiday applies to the time of the order, time of the shipment, or time of the payment. Specific "back-to-school" tax holidays are authorized in several states; some cover clothing but exclude clothing accessories; some include footwear, while others do not; some include school supplies, but define the covered products differently; many set caps on the maximum exempt amount of purchases of particular products. The variations are nearly endless. *See, e.g.*, Mo. Rev. Stat. § 144.049; N.M. Stat. Ann. § 7-9-95.

State and local taxes often treat the same transaction differently. Take the tax treatment of clothing in New York, which has 84 local sales tax jurisdictions:

> Clothing, footwear, and items used to make or repair exempt clothing sold for less than $110 per item or pair are exempt from the New York State 4% sales tax, the local tax in localities that provide the exemption, and the ⅜% Metropolitan Commuter Transportation

> District (MCTD) tax within exempt localities in the MCTD.

N.Y. Dep't of Tax. & Fin., Bulletin TB-ST-530. Put simply, items of clothing and footwear costing under $110 are exempt from New York's 4% state sales tax. However, local jurisdictions can require merchants to charge local sales tax on clothing costing less than $110. Under this provision, if *Quill* is overruled and a small woolen garments manufacturer in Minnesota sells a sweater to a buyer in New York City, which follows the state tax exclusion for clothing, no sales tax is charged. However, the same sale to a customer in White Plains, in Westchester County, must include the 4% local sales tax, because Westchester is among the majority of New York counties that does not exempt clothing under $110. Westchester County also charges the 0.375% MCTD tax. So for this transaction, the Minnesota seller would not charge its customer the 4% New York state sales tax, but it would charge the 4% local sales tax rate and the 0.375% MCTD tax.

It gets more confusing if the Minnesota company sells a sweater for $100 and a coat for $150 as part of the same transaction. On a sale to a Manhattan customer, there would be zero sales tax on the sweater, but the full New York City sales tax rate of 8.875% would apply to the coat. On a sale of those same items delivered to a buyer in White Plains, the seller must charge the 4% Westchester County tax and the 0.375% MCTD rate on both items, and would be required to charge 4% New York state sales tax on the coat. There is no software solution for this compliance obstacle. A remote

seller would need to code and compute manually the applicable tax and hope it does so correctly.

The administration of exemption certificates is another challenge. In order to avoid the obligation to collect tax on an exempt purchase, a retailer must obtain the proper form of tax exempt certificate from the purchaser. Categories of tax exempt sales include sales-for-resale, sales to exempt purchasers (such as charities and schools), and sales of products for an exempt use (such as a specific agricultural or manufacturing purpose), among others. With the exception of sales-for-resale, each of these categories is likely to be defined differently from state to state. In addition, while there are some multi-state certificates accepted in certain states, many states require their own, particular forms be used to substantiate the exempt purchase.

Beyond the many problems left unaddressed altogether, there are other shortcomings of sales tax software. Like any complex product, software includes errors and occasionally breaks down, potentially with dramatic consequences. Avalara, arguably the market leader in sales tax compliance software, suffered a software failure on one of the busiest shopping days of the year – the Friday after Thanksgiving. *See Black Friday Got Blacker for Users of Automatic Sales Tax Software*, Sales Tax DataLink (Dec. 2, 2015), http://www.salestaxdatalink.com/blog/black-friday-got-blacker-for-users-of-automatic-sales-tax-software. Retailers reported that the "software created error messages during check out so frequently that many sellers had to turn the

software off," preventing tax collection and exposing them to liability. *Id.*

The State touts the free, tax rate "look-up" service offered by TaxCloud as accurately providing the sales tax rate for any address in the United States based on a simple search. Pet. Br. at 45 (inviting one to "try it"). In fact, it takes only a few moments to discover that TaxCloud is rife with errors. For example, TaxCloud's look-up function produces incorrect sales tax rates for addresses across South Dakota, including for the State Capitol Building (500 E. Capitol Avenue in Pierre) and the well-known Wall Drug Store (500 Main Street in Wall). *See* Appendix D (examples of TaxCloud errors in South Dakota). If TaxCloud generates multiple errors for South Dakota on a cursory review, it is certain to produce thousands of errors nationwide.

The problem, of course, is that the incredible number and variation of local taxing jurisdictions – including not only cities and counties, but also parishes, stadium districts, transportation districts, water districts, scientific and cultural facilities districts, and police jurisdictions, among others – often do not correspond with zip codes or even municipal or county boundaries, making tax compliance difficult, at best. *See* Billy Hamilton, *Home Sweet Taxing Unit*, 56 State Tax Notes 217-22 (Apr. 19, 2010) (addressing the challenges associated with local taxing jurisdictions).

b. Sales Tax Software Adds To The High Costs Of Compliance.

Sales tax software also adds new categories of expense. At best, it tends to convert requirements that were previously impractical into tasks that are extremely expensive. The GAO Report is instructive. In addition to license fees and "labor-intensive product-mapping work" just to get the process started, there are integration costs. GAO Report at 17-20. Moreover, "businesses using customized software or software that is not in common use may see higher costs to integrate these systems." *Id.* at 18. Merely using software may prove surprisingly expensive. Since each time an online customer changes goods in a shopping cart, a new look-up request must be made to the remote software provider's database, "businesses must account for both completed transactions as well as how often customers change" products in the website's shopping cart. *Id.* at 19. "Our market research found licensing costs . . . as high as $200,000 per year for unlimited information requests." *Id.* (ellipses added).

Other analyses demonstrate that the implementation and integration of sales tax software, as well as the ongoing license and maintenance costs for such a product, are extremely high. Respondent Newegg submitted an expert report concerning the costs of compliance in a tax appeal it filed to contest an assessment of use tax under Alabama's 2016 "economic nexus" rule. *Newegg v. Ala. Dep't of Revenue*, Ala. Tax Tribunal No. S 16-613 ("*Newegg v. Ala. DOR*"). The report explains that sales tax software is not "plug-and-play"

but involves considerable expense for a retailer to adapt new software to its existing systems and maintain over time. Newegg's expert projected the average cost for a small to medium-sized business for implementation and integration of software at between $80,000 and $270,000. Larry Kavanagh, *Expert Report* (Aug. 28, 2017), available at https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf. The report describes even higher costs for a larger retailer, like Overstock or Newegg. *Id.* On an annual basis, the report estimates costs for a small to medium-size retailer of $57,500 to $260,000.

There are approximately 90,000 online retailers of meaningful scale (over $1 million in sales) in the United States. Robert J. Moore, *How Many Ecommerce Companies Are There?* (June 18, 2014), https://blog.rjmetrics.com/2014/06/18/how-many-ecommerce-companies-are-there/. At these levels of expense, assuming 90,000 affected retailers and $150,000 in annual costs, the aggregate burden associated with managing the tax collection and remittance function (a total of $13.5 billion) is enormous, even before adding the costs of administration and audit defense.

The so-called "free" software that the State and its amici reference in their briefs is primarily, if not exclusively, associated with the SSUTA states, because the SSUTA allows software providers to become "certified" and receive compensation from the participating states based on the taxes collected and remitted using the certified software. The SSUTA, however, does not cover integration costs or compensate retailers for the

time they must devote to implementing and maintaining such software, or for lost sales they suffer when the software does not function properly. Still, this provision for compensation represents a reasonable, if partial, simplification measure. The problem is evident, however: given the SSUTA's limited membership, no such provision is made by states representing nearly 70 percent of the population.

Although South Dakota claims that other states provide vendor discounts to compensate retailers for tax compliance costs, the amounts are generally very low (1 to 3 percent of tax collected) and subject to caps that leave them woefully short of a retailer's actual costs. Federation of Tax Administrators, *Sales Tax Rates and Vendor Discounts* (Jan. 1, 2018), https://www.taxadmin.org/assets/docs/Research/Rates/vendors.pdf. South Dakota's rate, for example, is 1.5 percent of the tax collected, subject to a $70 per month cap. *Id.*

None of this expense accounts for the largest potential cost if retailers are required to report tax in every state and hundreds of "home rule" local jurisdictions: audits, assessments, and appeals. If *Quill* is overruled, multi-state retailers can expect multiple simultaneous audits. *See* GAO Report at 21. Responding to audits and assessments requires companies to incur the cost of outside professionals, such as accountants and attorneys in distant states, a potentially crippling expense for small businesses, in particular.

B. *Quill* Was Correctly Decided.

This Court adopted the physical presence standard in *Bellas Hess* by a 6-3 majority, and reaffirmed it by an 8-1 majority in *Quill*. Although each decision drew a dissent, the logic of the decisions is sound: due to the complexity of state sales tax systems, nationwide tax compliance would impose an undue burden on interstate commerce. This conclusion, supported in *Bellas Hess* by a recent congressional report, and reaffirmed in *Quill* by the mushrooming of local jurisdictions, prompted the Court to require that a company must be physically present in a jurisdiction in order to be subject to that government's tax requirements. *See Bellas Hess*, 386 U.S. at 759-60 and n.14 (citing H.R.Rep. No. 565 (1965)); *Quill*, 504 U.S. at 313-18 and n.6. In *Quill*, that fundamental logic was further reinforced by the important values of *stare decisis*. 504 U.S. at 317-18.

The State attacks the economics of *Quill*, but it fails to credit properly – or simply assumes away – the economic significance for the national market of the collective burdens of state and local tax compliance. *Quill*, 504 U.S. at 312 (nexus for Commerce Clause purposes concerns structural effects on the national economy, not the treatment of individual retailers). The *Quill* rule is not based on "shaky economic reasoning." *See Kimble*, 135 S.Ct. at 2412. The *Quill* Court fully understood the argument that protecting remote sellers from sales tax obligations in states where they have no physical presence purportedly gives them a price advantage over in-state retailers. 504 U.S. at 304

n.2 (referencing the lower court's conclusion that the physical presence standard affords a competitive advantage to out-of-state businesses). The question was whether the burdens of nationwide use tax collection would, in counterpoise, unduly burden such sellers and hinder interstate commerce. The Court concluded that they would.

The State's theoretical argument that the physical presence rule discourages cross-border investment is refuted by the market itself. Today, online retailers face intense pressures to meet the requirements of consumers who demand local presence by a retailer for product access, avoidance of shipping charges, and easy returns. *Infra* at 46-49; Ike Brannon, Michelle Hanlon, Erin Miller, *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – an Economic Analysis* (March 2018) ("Brannon"), ¶ 34 ("local presence is a key ingredient for providing the competitive customer experience that consumers now demand"), http://ssrn.com/abstract=3140948. Far from avoiding investment, "nearly every successful retailer is racing to be local." Brannon, ¶ 31. Amazon serves as the primary example, but there are many others. *See, e.g.*, Brief of International Council of Shopping Centers, et al., at 14 (detailing online businesses establishing brick-and-mortar locations).

Notably, lower courts have not questioned the validity of the *Quill* standard for sales taxes, or its economic analysis, but rather have declined to apply the physical presence rule to other types of taxes, precisely because such taxes impose lower compliance burdens

on out-of-state companies. *See, e.g.*, *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 325 (Iowa 2010) ("the burden of state income taxation, however, is substantially less" than the burden of collecting and remitting sales tax), *cert. denied*, 565 U.S. 817 (2011); *Capital One Bank v. Comm'r of Revenue*, 899 N.E.2d 76, 85 (Mass.) ("the collection of franchise and income taxes did not appear to cause similar compliance burdens" in comparison with sales tax), *cert. denied*, 557 U.S. 919 (2009); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 233-34 (W.Va. 2006) (the burden of sales tax collection is greater than franchise/income taxes and "demands knowledge of a multitude of administrative regulations"), *cert. denied sub nom.*, *FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007). Underlying *Quill's ratio decidendi* is the recognition that nationwide sales tax compliance would unduly burden remote sellers engaged in interstate commerce, and damage the national economy as a result. The physical presence standard minimizes those burdens and serves to promote a national market in which new entrants do not face unreasonable barriers to entry, small and medium-size companies can reach consumers throughout the country, and larger players are not subject to inconsistent and excessive regulation in hundreds or thousands of jurisdictions based merely on having customers there.

C. *Quill* Has Not Been Undermined By Later Decisions.

Quill's doctrinal underpinnings have not eroded. To begin with, *Quill* itself affirmed the Court's decision in *Bellas Hess*, against an attack nearly identical to that leveled by the State here. Moreover, no post-*Quill* decision of this Court has undermined its holding, and the State points to none. *See* Pet. Br. at 24-27.

The Court has in recent years favorably referenced the physical presence standard for use taxes in rejecting a locality's effort to use a federal statute to circumvent the *Quill* rule. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 17 (2010) (city improperly sought to impose civil liability on remote seller under RICO for uncollected use taxes that the company "had no obligation to collect, remit, or pay"); *id.* at 18 (Ginsburg, J., concurring) (noting that the Commerce Clause prohibits the imposition of a use tax collection obligation on an out-of-state seller with no physical presence, citing *Quill* and *Bellas Hess*). In addition, the Court has on more than one occasion cited with approval *Quill's* ruling that the Commerce Clause establishes limitations on state taxing power that differ from the basic requirements of due process. *Comptroller of the Treasury v. Wynne*, 135 S.Ct. 1787, 1798-99 (2015); *Mead-Westvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008).

The State instead argues that *Quill* is inconsistent with the Court's pre-*Quill* jurisprudence, in particular the Court's seminal decision in *Complete Auto Transit,*

Inc. v. Brady, 430 U.S. 274 (1977). *See* Pet. Br. at 22-24. To begin with, all of those arguments were addressed, and rejected, by the Court in *Quill*. 504 U.S. at 313-18; *see also Bay Mills*, 134 S.Ct. at 2037 ("all the State musters are retreads of assertions we have rejected before").

South Dakota and various *amici* assert that the Court should question whether nexus with the taxpayer, as opposed to the transaction, is even properly part of constitutional analysis. Pet. Br. at 22. The argument is a non-starter. After recognizing, again, in *Bellas Hess* – based on a long line of precedents – the "sharp distinction" between retailers with a physical presence in the state and those without, the Court reiterated it in *National Geographic*, three months after issuing *Complete Auto*. *See Nat'l Geographic*, 430 U.S. at 559 (discussing *Bellas Hess*). Four years later, the Court was unequivocal: "the interstate business must have a substantial nexus with the State before *any* tax may be levied on it." *Commonwealth Edison*, 453 U.S. at 626 (italics in original); *see also Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778 (1992) (noting that nexus with the activity is a requirement in addition to nexus with "the actor the State seeks to tax") (citing *Quill*). The principle was confirmed most recently in *Direct Mkg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1127 (2015) ("under our negative Commerce Clause precedents, Colorado may not require retailers who lack a physical presence in the State to collect these taxes on behalf of the Department").

D. The Physical Presence Standard Is Not Unworkable.

The *Quill* rule is not difficult to apply. If a company is physically present in a state, directly or through third-parties acting on its behalf to make a market for sales in the state, then the company may be required to collect the state's sales tax. *See,* supra at 11 listing cases. If neither the company nor a third party acting for it is physically present in the state, the State may not compel an out-of-state entity to collect use tax. *Quill*, 504 U.S. at 314-18. For the overwhelming majority of businesses and the vast majority of circumstances, the rule is clear and its application straightforward.

This is not to say that the rule forecloses all litigation regarding its reach. Lower courts have, for example, differed over the question of when a demonstrable, but minimal, physical presence is sufficient to create nexus. *E.g.*, *In re Appeal of Intercard, Inc.*, 14 P.3d 1111, 1122-23 (Kan. 2000) (sporadic employee visits over four years insufficient for nexus); *In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 813-14 (Haw. 2004) (annual three-day customer visits creates nexus). But the recognition of a *de minimis* standard has always been an acknowledged caveat to the "bright line," physical presence test and does not make it "unworkable" in any sense. *Quill*, 504 U.S. at 315 n.8; *see also Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*,

505 U.S. 214, 231 (1992) (state authority to require payment of income tax by remote sellers is subject to a *de minimis* standard). Businesses often must determine whether or not a minimal level of activity will subject them to legal requirements or regulation, such as licensure, permitting, reporting, or disclosure requirements.

Although courts will inevitably be called upon to resolve such disputes when a business' assessment of its obligations differs from the State's, litigation concerning the proper interpretation and application of the physical presence standard after *Quill* has been relatively infrequent. A search on Westlaw among all state courts for the terms "physical presence" and "sales tax" or "use tax" in the same decision turns up fewer than 50 reported decisions from state courts concerning the contours of the physical presence standard for sales/use tax over the 25 years since *Quill* was decided,[4] or less than two reported decisions per year across the entire nation.

---

[4] The search returns 86 reported decisions since May 1992, but 32 of those decisions concerned state taxes other than sales and use taxes, despite including a reference to those taxes. Several more include the specified search terms without the issue of a company's physical presence being presented for decision. In addition, some cases involve more than one reported decision within the same appeal.

E. Changed Circumstances Do Not Warrant Overturning *Quill*.

1. Changes In Market Conditions Do Not Alter The Existence Of Unconstitutional Burdens On Interstate Commerce.

While it is evident that the development of the Internet has resulted in significant changes in the retail marketplace since 1992, rapid evolution of the retail market has been accompanied by the continued, even increasing, complexity of state sales tax systems. In other words, while market conditions have changed, the constitutionally-significant conditions that formed the basis for the Court's decisions in *Bellas Hess/Quill* have not changed.

The Court has already squarely rejected the argument that changes in dynamic market factors provide special justification for overruling precedent where the underlying constitutional violation persists. *Bay Mills*, 134 S.Ct. at 2037 (rejecting increase in commercial activity as grounds for disregarding *stare decisis*). Indeed, nearly identical claims regarding the development of remote commerce were made by North Dakota in 1992, in seeking the abrogation of *Bellas Hess*. *See Quill*, 504 U.S. at 303-04, 313-18. By some measures, the market changes then were even more dramatic.

Retail mail order sales had grown from $2.4 billion in 1967 to over $180 billion when the Court heard argument in *Quill*, or more than 75-fold. *See Quill Corp.*, 470 N.W.2d at 209. In contrast, total retail sales, including business-to-business ("B2B") sales, through all

remote sales channels are today about four to five times as large as in 1992. *See* GAO Report at 9, 35. The North Dakota Supreme Court stressed the "tremendous social, economic, commercial, and legal innovations of the past quarter-century" and the creation of "revolutionary communications abilities and marketing methods which were undreamed of," in rejecting the application of the *Bellas Hess* rule to the state statute in that case. *Quill*, 470 N.W.2d at 208 (internal quotations omitted). It stressed Quill's many contacts with the state, including its distribution of 24 tons of catalogs annually to North Dakota residents and its level of sales ($1 million/300 customers) as creating an "economic presence" that justified imposing a use tax collection obligation on Quill. *Id.* at 218-19. This Court rejected those arguments. *Quill*, 504 U.S. at 311-12.

2. The Amount Of Uncollected Tax Is Far Lower Than Previously Estimated And Diminishing Rapidly.

The State uses the rapid expansion of electronic commerce to argue that the amount of uncollected tax on Internet sales is spiraling out-of-control. Pet. Br. at 35. The estimates relied upon by the states have been exaggerated for years. Even more significantly, developments in the marketplace have already rendered the states' claims about lost revenue out-of-date. Both the GAO Report, which includes a specific review of the tax collection practices for every one of the top 1,000 Internet retailers (GAO Report at 41-42), as well as other market data, demonstrate that the State's estimates of

uncollected sales tax nationwide are as much as four times too high. The perceived problem of "lost" use tax is diminishing considerably, due to market forces.

The exaggerated lost revenue claims of the State and its amici derive, ultimately, from a single source: a study done in 2009 (based on 2006 data) by professors at the University of Tennessee ("Tennessee Study"), which was updated in 2012 (using 2009 data). *See* Pet. Br. at 34-35. Once thought by many to be the "gold standard" for estimating uncollected use tax on remote sales, the Tennessee Study has proven no more valuable than tin.

To begin with, the Tennessee Study, on close inspection, has been shown to have many methodological flaws. The Tennessee Study's lead author, Professor William Fox, recently admitted during a deposition in Newegg's Alabama proceeding that the Tennessee Study was paid for by groups committed to overturning *Quill*. *See Newegg v. Ala. DOR*, Appellants' Motion to Exclude Expert Report and Testimony of William F. Fox (Nov. 8, 2017), at 12 (the 2009 Tennessee Study was funded by the Governing Board of the SSUTA and the unpublished, 2012 update was paid for by the Retail Industry Leaders Association). In addition, the Tennessee Study was based on taxability data gathered exclusively from state revenue officials that was woefully incomplete. *Id.* at 12-13 (officials from only 29 states participated, two-thirds of whom were from SSUTA states). The figures used in the Tennessee Study for total electronic commerce also included the "vast number" of non-consumer (largely non-taxable)

B2B transactions that make up the majority of electronic commerce (91.9 percent of ecommerce in 2012 was B2B). *Id.* at 11. The Tennessee Study, however, "did not have any specific data on the B2B companies and their tax behavior." *Id.*

Even more importantly, there have been dramatic changes in the online marketplace with regard to sales tax collection since the Tennessee Study was conducted. Most notably, when the study was published, Amazon.com collected sales tax in only five states (Kansas, Kentucky, New York, North Dakota, and Washington), but now collects sales tax in every state that imposes a sales tax. *See supra*, Isadore. The trend, moreover, is toward even greater sales tax collection by Amazon, which recently committed to commence tax collection on third-party sales on its website for states that adopt laws requiring it. Leslie A. Pappas, *Amazon to Collect Tax on Third-Party Sales in Pennsylvania*, BloombergBNA (Mar. 5, 2018), https://www.bna.com/amazon-collect-tax-n57982089523/; *see* GAO Report at 12 (estimating the largest portion of uncollected sales tax derives from marketplace sales).

Amazon's role in remote sales tax collection is huge, but the market forces contributing to increased sales tax collection on Internet sales are much broader. Online retail is now dominated by larger retailers that collect sales tax. Brannon, ¶ 82 ("most competitive 'online' retailers have trended toward an omnichannel approach consisting of both an internet presence and a local presence. . . . Previous forecasts of potential revenue gains from a tax on internet sales failed to predict

this trend, and thus overstated the impact of the sales tax on remote retailers."). The GAO found that states already receive sales/use tax on between 87 and 96 percent of sales by the top 100 online retailers. GAO Report at 41. Along with Amazon, the large, "omni-channel" retailers that collect state and local sales taxes control the great majority of the Internet marketplace. *See* Arthur Zaczkiewicz, *Amazon, Wal-Mart, and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/. Indeed, 19 of the top 20 Internet retailers already collect sales tax in most or all states (*see id.*), as the GAO's research bears out. Moreover, Amazon alone accounts for 60 percent of online sales growth. Tonya Garcia, *Amazon accounted for 60% of US online sales growth in 2015*, MarketWatch (May 3, 2016), http://www.marketwatch.com/story/amazon-accounted-for-60-of-online-sales-growth-in-2015-2016-05-03.

In addition, there are ever-increasing market pressures from consumers for retailers to have a local presence so that customers can access their goods directly, avoid shipping charges, and make returns easily. Consumers prefer to see a product in person before they buy, increasing the pressure for retailers to offer a multi-channel shopping experience. Sara Spivey, *Consumers have spoken: 2016 is the year of "webrooming,"* Marketing Land (July 29, 2016), http://marketingland.com/consumers-spoken-2016-year-webrooming-180125; Brannon, ¶ 21 ("Shoppers increasingly demand an

'omni-channel' experience, enabling them to switch seamlessly across both web-based solutions and physical outfits."). These market pressures result in greater sales tax collection – whether in-store, or online – by the large multi-channel retailers that increasingly dominate the retail marketplace.

A number of the State's amici decry the practice of "showrooming," in which a customer goes to a local store to learn about a product, only to then purchase the product online, perhaps free of sales tax. *See, e.g.*, RLC Br., at 16. Recent studies prove that "showrooming" is dwarfed by precisely the opposite phenomenon ("webrooming"), in which consumers use a website to research a product and obtain customer reviews, and then go to a store to purchase it. MEC Global, *Spotlight on Webrooming* (May 2016), at 4 (consumers are five times more likely to engage in webrooming), http://www.wpp.com/wpp/marketing/consumerinsights/spotlight-on-webrooming/. Forester Research estimated that by 2017, the volume of in-store retail purchases attributable to "webrooming" would be $1.8 trillion, nearly five times the volume of *all* consumer ecommerce. *See* Janet Stilson, *Study Shows Prevalence 'Webrooming,'* Adweek (May 14, 2014) (citing Forester study), http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/.

A comprehensive study conducted in 2016 showed that convenience, not tax avoidance, was a far greater reason why consumers chose to shop online. PwC, *The race for relevance, Total Retail 2016: United States* (Feb. 2016) at 10. Moreover, remote sellers have always

operated at a fundamental cost *disadvantage* to local businesses, because "remote sellers must charge or absorb shipping and handling fees in order to deliver their products to the customer." Brannon, ¶ 15. Consumers place a premium on both the avoidance of shipping fees and immediate access to products they want to buy, putting online-only sellers at a disadvantage compared to local big-box retailers. *See* Ernan Roman, *Webrooming vs. Showrooming: Are You Engaging Both Types of Shoppers?*, CustomerThink (Feb. 23, 2017), http://customerthink.com/webrooming-vs-showrooming-are-you-engaging-both-types-of-shoppers/. These factors demonstrate why the natural growth pattern for emerging online sellers is to establish a local retail presence as their sales increase. Absolunet, *Top Ten Ecommerce Trends for 2018*, ¶ 1 ("Online ('pureplay') merchants will grow their physical footprint as consumers continue to place a premium on both the versatility and depth of online shopping and the convenience of buying, picking up and returning items locally.").

The decreasing level of uncollected sales tax puts the overstated claims of the State in a new light. The GAO estimates the uncollected sales tax for 2017 at between 2 and 4 percent of general sales and gross receipts tax revenues,[5] but the amount is a much smaller

---

[5] According to the Central Bureau, state sales tax revenues grew every year from 2013-2016, reaching record levels in 2017. *See* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=STC_2016_00A1&prodType=table; Terence Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, cnsnews.com (Mar. 22, 2018), https://www.cnsnews.com/

portion of state and local government finances overall. Nationwide, the GAO's estimate of $8.5 to $13.4 billion represents about 0.26% to 0.48% of state and local government expenditures (using 2014 expenditures of $3.626 trillion). *See* United States Census Bureau, American Fact Finder, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SLF_2014_00A1&prodType=table. For South Dakota, whose annual expenditures are on the order of $7.25 billion, the portion of the GAO's estimates attributable to the state are approximately 0.46% to 0.65% of direct expenditures. *Id.* Uncollected sales tax is a small fraction of total government finances, and declining.

F. No Other Standard Provides A More Workable Rule.

The State and its amici argue for the replacement of the physical presence standard by one of two alternative tests: (1) South Dakota's $100,000 sales or 200 transactions statutory thresholds; or (2) the balancing test of *Pike*. Neither test is a workable alternative for preventing the burdens associated with multi-state sales tax collection.

---

news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hit-records-2017.

1. "Economic Presence" Thresholds Are Fundamentally Flawed.

The State asserts that the Act's economic thresholds are clear, fair, and more economically sound than the physical presence test, and thus a superior means for addressing the burdens on interstate commerce. The dramatic flaws with its approach are, however, readily apparent.

First, although the State touts the $100,000 threshold as reflective of a retailer with substantial national sales, that threshold is undercut by the alternative threshold of 200 transactions. The average value of an Internet order is approximately $84. *See* Statista, https://www.statista.com/statistics/304929/us-online-shopping-order-value/. At that level, a retailer with 200 South Dakota sales would have receipts of only $16,800. Many retailers, especially small sellers, would have lower order values and lower total sales. The statute will sweep in many small businesses.

Second, the thresholds are set by the State itself. The Legislature might reduce the level of required revenues or transactions at any time. Another state or locality may select a lower threshold. Far from a standard of heightened clarity, retailers could confront hundreds of different thresholds across states and "home rule" jurisdictions that could change with the whim of each new legislature, board of selectpersons, or group of county commissioners. Non-uniformity of thresholds – not a single, nationwide constitutional standard –

would be the result. Business planning and settled expectations would be disrupted.

In fact, that is precisely what state and local government officials advocate. "Determining the level of economic activity sufficient to create an economic nexus should be left to the State legislatures, as *this determination is a highly individualized and context-specific inquiry.*" Brief for National Governors Association, et al., at 8 (italics added). Indeed, states have already adopted different thresholds for the imposition of tax collection obligations on remote sellers, some as low as $10,000 and 100 transactions. *See* Wash. Rev. Code § 82.08.053(2) ($10,000 in sales); App. C (100 transactions in Connecticut). Rather than reducing burdens on interstate commerce, "economic presence" standards would increase them. States and localities cannot, consistent with the dormant Commerce Clause, be left to set the limits on their own authority.

Third, thresholds based on sales or transactions would create perverse economic and regulatory incentives. With state tax authority extended to any seller crossing a specified threshold, state and local government officials would have no reason to simplify their tax systems to lessen the burden of compliance on remote sellers. The hard work of the SSUTA would be quickly undone, as simplification and uniformity would seem a needless surrender of autonomy. Moreover, with no lessening of the compliance burdens, remote sellers would have incentives to avoid selling to customers in the most challenging jurisdictions.

Fourth, rather than minimizing litigation, new kinds of litigation would ensue. Retailers would be prompted to challenge the "highly individualized and context-specific" thresholds of different jurisdictions, based on their particular circumstances. The relative burdens may vary across different industries and market segments (*e.g.*, heavy equipment sellers vs. software providers), prompting even more particularized suits. Not only the level of the thresholds, but their application to specific sellers could be subject to interpretation and dispute.

Fifth, the "sourcing" of retail services transactions – now a much larger portion of the economy than retail sales of goods – is a highly perplexing and contentious area of state sales tax law, for which an economic threshold is particularly ill-suited. *See* Brief of David Frutchman as *Amicus Curiae* Supporting Neither Party at 15 ("sourcing and apportioning of sales of services presents a series of complications unparalleled in sales of tangible personal property"). Whether a particular service transaction, or what portion of it (in cases of multiple users in different locations), should be assigned to a state for purposes of the sales threshold could be difficult to determine. South Dakota already taxes services; other states are sure to follow, given the massive potential for revenue from retail services. *Id.* at 5, 20-23. Sourcing of digital products is equally difficult. In sum, economic thresholds are incompatible with the modern economy – which is increasingly digital, service-oriented, and global – absent significant simplification and uniformity of state tax systems.

2. *Pike* Balancing Cannot Work.

While the State does not propose that the Court adopt the balancing test set forth in *Pike*, numerous amici do. The *Pike* test is fundamentally unworkable for addressing the burdens of state sales tax collection. *See Davis*, 553 U.S. at 353-56 (Court is ill-suited to perform complex balancing and economic analyses).

The suggestion by some amici that the Court should analyze the case under *Pike* because sales tax collection is more like a regulatory requirement than a tax payment obligation should be rejected out of hand.[6] *Pike* demands a focus on the "local interest involved" in comparison to the burdens on interstate commerce. 397 U.S. at 142. As the Court recognized in *Bellas Hess* and *Quill*, however, the widespread adoption of sales taxes nationwide requires examination of the aggregate burdens on the national economy of imposing sales tax collection obligations across thousands of

---

[6] The United States supports a "virtual presence" theory of nexus for ecommerce vendors that is advocated by neither the Petitioner nor any other amici, and further suggests that the Court should rely on *Pike* to determine the constitutionality of a state law imposing a tax collection obligation on any remote seller. U.S. Br., at 17-24. The United States misapprehends the nature of South Dakota's sales tax, however. *Compare* SDCL § 10-45-2 (sales tax is imposed on the "privilege of engaging in business as a retailer") *with* U.S. Br., at 17 (South Dakota does not "impose a tax liability on the retailer itself"). Also, applying *Quill* to traditional remote sellers, but not Internet vendors, as proposed by the Solicitor General, would violate the ITFA, which expressly forbids "discriminatory taxes on electronic commerce."

potential taxing jurisdictions. Such an analysis is incompatible with *Pike*.

The Court has recognized *Pike's* limitations for making difficult cost-benefit analyses and predicting market effects:

> What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.

Davis, 553 U.S. at 355; *see also id.* at 360 (Scalia, J., concurring) (*Pike* balancing is like "deciding whether three apples are better than six tangerines"). For that reason, the Court noted, Congress is the proper forum for such analyses because it "has some hope of acquiring more complete information than adversary trials may produce, and an elected legislature is the preferable institution for incurring the economic risks of any alteration in the way things have traditionally been done." *Id.* at 356. That principle applies strongly in this case, and defeats any argument for the use of the *Pike* test.

II. Congress Remains The Proper Body To Address Whether, And In What Manner, To Alter The *Quill* Rule.

In *Quill*, the Court noted that Congress has the ultimate authority for regulation of interstate commerce, and could change the physical presence standard reaffirmed by the Court if it chose. 504 U.S. at 318-19. The State bemoans congressional inaction (Pet. Br. at 54), but it mischaracterizes the efforts of Congress. For over 20 years, beginning with the adoption of the ITFA and the establishment of the ACEC, and with particular intensity over the past four sessions, Congress has engaged in extensive debate and careful consideration of the proper standards for allowing states to require remote sales tax collection. *See generally* Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement") (describing the "thousands of hours" invested in developing the Committee's proposed "compromise solution"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf; Addendum to Brief of Amicus Curiae of Four United States Senators ("Senators' Brief") (detailing bills and hearings concerning remote sales tax collection). It would be illogical to conclude that because Congress has repeatedly *declined* to change the *Quill* physical presence rule, this Court should now overrule it. *See Kimble*, 135 S.Ct. at 2409-10 (citation omitted) ("long congressional acquiescence" further amplifies the effect of *stare decisis*).

Currently before Congress are three bills that address the remote sales tax collection issue: (1) Marketplace

Fairness Act of 2017, S. 976, 115th Cong. (2017-2018), a version of which passed the Senate in 2013; (2) Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017-2018); and (3) No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018). In addition, the House Judiciary Committee, the committee with jurisdiction concerning proposals for increased state taxing authority over interstate commerce, has developed a set of Principles on Internet Sales Tax, https://judiciary.house.gov/press-release/house-judiciary-committee-releases-principles-on-internet-sales-tax/, and has worked in pursuit of a compromise bill that will address the competing concerns and balance the diverse interests with regard to this complex issue. *See* Goodlatte Statement.

In light of Congress' role in regulating interstate commerce, "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government." *Quill*, 504 U.S. at 318-19. It is only Congress, and not the States or the courts, that has the institutional expertise to weigh the national implications of expanded state taxing authority and to craft legislation that will ensure state tax obligations do not unduly burden interstate commerce. *Kimble*, 135 S.Ct. at 2414 (Congress has the capacity to assess the complexities of the issue and the ability to select the "policy fix, among many conceivable ones, that will optimally serve the public interest.").

Other governments wrestling with the burdens of cross-border tax collection in the Internet era have recognized the need for a comprehensive, legislative

solution to simplify compliance. The European Union has identified VAT compliance for only 28 member countries as being a major impediment to the growth of cross-border e-commerce. In response, the European Commission has proposed a major simplification of VAT administration. European Commission, *Modernising VAT for cross-border B2C e-commerce* (Dec. 1, 2016), https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_757_en.pdf. The plan calls for a single compliance regime for online sellers. At a time when the EU is acting to *remove* tax compliance burdens on cross-border Internet sellers, the Petitioner and its amici seek to *impose* extensive new compliance requirements on the most open, accessible, and dynamic sector of the U.S. economy.

Moreover, the inability of Congress, so far, to reach consensus is attributable, in no small part, to the refusal of the majority of sales tax states and localities to accept any simplification measures not devised by the states themselves.[7] The pursuit of this litigation by

---

[7] The Petitioner objects that *Quill* requires states to "beg" Congress to return their sovereign taxing powers. Pet. at 53-54. The State misconstrues the scope of its authority. "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce *without congressional approval*, [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Wynne*, 135 S.Ct. at 1794 (italics and brackets added). *Quill* no more seizes power from the State than *Complete Auto* does; both recognize that state tax authority is subject to constitutional limitations. *Quill*, 504 U.S. at 311, 314 (consistent with *Complete Auto*, *Quill* "furthers the ends of the dormant Commerce Clause").

South Dakota has effectively halted compromise negotiations on legislation that would promote simplification, creating an obstacle to Congress achieving a solution that would advance the interests of all sides to the debate.

III. Overruling *Quill* Presents The Risk Of Crippling Retroactive Liability For Retailers In Over 30 States.

It is well-established that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Harper*, 509 U.S. at 90. Indeed, the fundamental rule of "retrospective operation" has "governed 'judicial decisions . . . for near a thousand years.'" *Harper*, 509 U.S. at 94 (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). "Unlike a legislature, we do not promulgate new rules to be applied prospectively only." *James B. Beam*, 501 U.S. at 547 (Blackmun, J., concurring) (internal quotation omitted).

A ruling abrogating *Quill* would subject remote sellers to potential retroactive liability in at least 30 states, and potentially hundreds of localities. It is a nearly uniform principle of sales tax law that a seller who is properly charged with the obligation to collect sales tax but fails to do so becomes liable for the uncollected tax. *E.g.*, Cal. Rev. & Tax. Code § 6204; N.Y. Tax

Law § 1133(a). Attached as Appendix A is a listing of those states whose laws would require retailers with no physical presence to collect sales taxes, but for *Quill*. In nearly all such states, there is no statute of limitations foreclosing an assessment against a non-filing retailer. *See* App. B.

South Dakota's choice to forego its remedy for back taxes in the event that the Court were to overrule *Quill*, SDCL § 10-64-6, will not limit the retroactive application of such a ruling with respect to other state and local jurisdictions. The issue of remedy is determined with reference to state law. *James B. Beam*, 501 U.S. at 535; *see also Harper*, 509 U.S. at 102 (a state is "free to choose which form of relief it will provide"). Other states and "home rule" localities are free to determine their own remedial approach if the physical presence rule is overturned. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (the Court's determination of constitutionality applies to similar statutes in other States "whether occurring before or after our decision"). The amicus brief of the States in support of South Dakota makes no representation that the states will not pursue remote sellers for back tax liability and, instead, acknowledges that states may seek to impose their laws retroactively. States' Br. at 19.

Indeed, although the Petitioner professes to be unaware of it (Pet. Br. at 20), some states have openly begun to pursue retroactive tax liability in anticipation of *Quill* being overruled. The Connecticut Department of Revenue Services ("DRS") has sent notices to

retailers without a physical presence in the state asserting liability for three years of back taxes, on the theory that the physical presence rule no longer prevents the state from compelling use tax collection by out-of-state sellers who have had more than 100 annual sales transactions with Connecticut customers. *See* App. C. Alabama issued an assessment against Newegg under Alabama's "economic presence" rule asserting six-figure liability for uncollected sales tax. *See* GAO Report at 23 (Alabama Department of Revenue "acknowledges that this action has the potential to allow retroactive enforcement"). In addition, the Massachusetts Department of Revenue recently sent Notices of Intent to Assess to multiple Internet retailers with no physical presence, asserting tax liability starting in October 2017.

There is no meaningful limitation preventing other states from seeking retroactive liability if *Quill* is abrogated. Apart from raw speculation regarding potential obstacles, South Dakota points only to the theory that retroactive liability would be barred as "double taxation" since purchasers are required to self-report use tax when sales tax is not collected. Pet. Br. at 50. The argument is specious. If courts are to assume that purchasers self-report use tax, the entire basis for seeking to compel retailers to collect sales tax evaporates.

No precedent bars the imposition of retroactive liability if the Court overrules *Quill*. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), cited by certain amici, now

has at most only narrow application, and was called into question by both *Harper* and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (noting petitioner's concession that "*Harper* overruled *Chevron Oil*" concerning selective, prospective-only adjudication). Several amici, and the State, cite *United States v. Carlton*, 512 U.S. 26 (1994), but its analysis concerning retroactive tax legislation is inapposite here, and the Petitioner argues instead that *Carlton* establishes that taxpayers have no right to protection against retroactive tax laws, *in any context*. Pet. Br. at 51.

The ancient physician's oath, "first, do no harm" is wise counsel here. Affirming the physical presence doctrine protects remote sellers and the national economy from the substantial risks and uncertainties of upending an established standard. The *Quill* rule should remain in place, while Congress formulates legislation to balance the interests of states, remote sellers, and a healthy economy.

CONCLUSION

The decision of the South Dakota Supreme Court should be affirmed.

Respectfully submitted,

GEORGE S. ISAACSON
Counsel of Record
MARTIN I. EISENSTEIN
MATTHEW P. SCHAEFER
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
(207) 786-3566
gisaacson@brannlaw.com
meisenstein@brannlaw.com
mschaefer@brannlaw.com
Counsel for Respondents

March 28, 2018

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

REPLY BRIEF

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Jeanne Jeong
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

QUESTION PRESENTED

Should this Court abrogate *Quill*'s sales-tax-only, physical-presence requirement?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REPLY 1

I. The Physical-Presence Rule Is An Isolated And Outdated Doctrinal Error 4

A. The physical-presence rule is indefensible ... 4

B. Changed circumstances merit radically limiting or eliminating the physical-presence rule 7

II. The Undisputed Facts Of This Case Demonstrate *Quill*'s Dramatic Overbreadth 11

III. *Quill* Is Increasingly Unworkable 14

IV. Respondents Overstate The Costs Of Nationwide Compliance 17

V. Respect For Congress's Role Requires Abrogating The Physical-Presence Rule 21

VI. Respondents' Retroactivity Concerns Are Overstated 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 2, 13, 22, 23

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 1, 21

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) ..... *passim*

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 2, 6

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 1, 4

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.,
386 U.S. 753 (1967) 4, 5, 7, 11

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization,
430 U.S. 551 (1977) 15

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 2, 13, 21, 22

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

United States v. Wells,
519 U.S. 482 (1997) 22

Constitutional Provisions

U.S. Const. amend. X 22

Statutes

47 U.S.C. §151 note 23
Ind. Code §6-2.5-9-9(e) 24
830 Mass. Code Regs. §64H.1.7 15
Me. Stat. tit. 36, §1951-B(7) 24
Miss. Admin. Code §35-IV-3.09 24
Ohio Rev. Code Ann. §5741.01(I)(2)(h) 15

Other Authorities

Fed'n of Tax Adm'rs, *State Apportionment of Corporate Income* (2018), https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf 6

Sanjay Gupta & Lillian Mills, *Does Disconformity in State Corporate Income Tax Systems Affect Compliance Cost Burdens?*, Nat'l Tax J. 355 (June 2003) 5

H.R. 2887, 115th Cong. (2017) 22

Nat'l Cent. for Educ. Statistics, Fast Facts, https://nces.ed.gov/fastfacts/display.asp? id=372 8

S.D. Bureau of Fin. & Mgmt., *Budget in Brief, Fiscal Year 2018*, https://bfm.sd.gov/budget/BiB/SD_BIB_FY2018.pdf 8

S.D. Dep't of Revenue, Sales Tax Rates by Address, https://apps.sd.gov/rv25taxmatch/main.aspx 20

Statement of Joseph Guttentag, Andrew Pincus, & Robert Novick, http://govinfo.library.unt.edu/ecommerce/gnp.pdf 23

Streamlined Sales and Use Tax Agreement (2017), http://www.streamlinedsalestax.org/index.php?page=modules 20

U.S. Census Bureau, *2017 Annual Survey of State Tax Collections* (Mar. 29, 2018), https://www2.census.gov/programs-surveys/stc/tables/2017/2017-stc-category.xlsx 8

U.S. Census Bureau, *Estimates of Monthly Retail: 1992-2018*, https://www.census.gov/retail/mrts/www/mrtssales92-present.xls 9

U.S. Gov't Accountability Office, GAO-18-114, Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (2017) ..... *passim*

REPLY

The question presented is whether the sales-tax-only, physical-presence rule from *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)—developed for cases about mail-order catalogs—should apply in the era of internet retail. It should not. As the United States explains (at 24-28, 32), modern e-commerce lies so far from the facts this Court contemplated in *Quill* that it can resolve this case (and essentially all others) by merely limiting *Quill* to its mail-order circumstances. And even if this Court determines that *Quill*'s unconsidered use of "*physical* presence" to describe its mail-order exception must exclude an online presence unimaginable in 1992, the radical change in circumstances suffices, alone and along with other factors, to merit reconsidering and rejecting *Quill*'s arbitrary rule. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

Respondents do not meaningfully dispute that the physical-presence rule is doctrinally adrift. Their three-page merits defense (at 39-41) cites no other cases supporting a physical-presence requirement and there are none. Respondents rely instead on policy arguments even they later (convincingly) call "unsuitabl[e]" for judicial assessment. *See* Br. 57-58 (citing *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008)). *Quill*'s rule is as isolated and indefensible as it appears—"the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015).

The heart of respondents' argument is thus neither dormant-commerce-clause caselaw nor even *stare decisis* jurisprudence, but rather an extended tax-

policy argument that it remains too hard for e-commerce retailers to collect local sales taxes. This is a non sequitur: Respondents do not attempt to explain how *physical presence* limits—or even relates to—the compliance costs they decry. Respondents thus say nothing to then-Judge Gorsuch's point that, even under *Quill*, States are free to impose equal or greater compliance burdens through other taxes, or under regimes requiring sales-tax reporting rather than collection, or upon otherwise identical retailers with some "artificial" form of physical presence. *See* Br. vi (omitting *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016)).

Meanwhile, respondents cannot dispute that *they* could easily comply everywhere, or that everyone could comply easily enough in *South Dakota*. Instead, they defend *Quill* only by alleging that other, pint-sized retailers might face outsized costs under some hypothetically burdensome economic-presence regime in another State. *See, e.g.*, Br. 30, 37-38, 54-56. This supposes other States will (for some reason) enact such burdensome economic-presence laws and pursue small handfuls of tax dollars from small sellers, and then ignores that courts will still scrutinize those regimes using the flexible approach this Court applies to *every other* undue-burden claim under the dormant commerce clause. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). It likewise neglects that, however this Court rules, Congress will retain all its powers to address any concerns with the resulting system through affirmative Commerce Clause legislation. In the meantime, however, *Quill*'s erroneous bright-line rule is concededly depriving the States of tens of

billions in revenue because it shelters not only hypothetically burdened small sellers, but real, billion-dollar retailers like respondents, even in States imposing no burdens at all.

Respondents evidently hope that airing apparent factual disputes here will convince this Court to do nothing, but these disputes are a *symptom* of *Quill*, not a reason to keep it. No factual record could be developed in this or any future case because *Quill*'s bright-line rule makes every fact apart from physical presence irrelevant. The only way to make the real facts about compliance costs matter would be to abrogate *Quill*'s rule and authorize as-applied challenges under normal dormant-commerce-clause doctrines.

Meanwhile, although respondents and their congressional *amici* argue that this case turns on assessments best left to the political branches, it is respondents—not the States—who seek continued judicial intervention via *Quill*'s rule. If this Court believes (as it should) that this issue involves high-level policy disputes better left to Congress, it should not continue directing lower courts to strike down every state law that fails the physical-presence test, no matter how reasonable. Put otherwise, allowing the democratic process to manage interstate commerce requires upholding reasonable regimes like South Dakota's and eliminating bright-line constitutional prohibitions founded entirely on judicial policy judgments—particularly judgments made long before anyone could imagine internet commerce itself.

ARGUMENT

I. The Physical-Presence Rule Is An Isolated And Outdated Doctrinal Error.

This Court should severely limit or abrogate *Quill* for two simple and largely undisputed reasons: (1) *Quill*'s sales-tax-only, physical-presence rule is inconsistent with doctrine; and (2) *Quill* was decided under radically different circumstances and now has consequences this Court could not have foreseen when it described its holding as requiring "physical" presence. *See DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). The latter point suffices either to interpret "physical presence" to encompass the pervasive e-commerce *Quill* could not consider, or otherwise to abrogate the physical-presence rule altogether.

A. The physical-presence rule is indefensible.

Respondents essentially concede that *Quill* is doctrinally adrift. Their token merits argument (at 39-41) cites no other case that endorses a physical-presence requirement, builds favorably upon *Quill* or *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), or explains doctrinally how a physical-presence line could possibly separate constitutionally acceptable from unacceptable burdens. That amply demonstrates that *Quill*'s rule is an isolated relic from a bygone era of presence-focused due-process jurisprudence—a "doctrinal dinosaur or legal last-man-standing." *Kimble*, 135 S. Ct. at 2411.

In fact, while respondents make much ado about the costs of collecting local taxes, they fail in three ways to dispute that *Quill*'s rule deals arbitrarily with those purported burdens.

First, respondents do not explain how physical presence turns unduly heavy burdens into reasonable ones. It obviously does not. Respondents concede that such minor and unrelated presences as an in-state administrative office, single in-state employee, traveling salesmen, or three-day annual trip suffice for nexus under *Quill*. *See* Br. 11, 44. Yet these contacts have no plausible relationship to compliance costs whatsoever.

Second, respondents do not answer the question: "What makes this obligation different from all other obligations?" No other tax law, no matter how burdensome, is governed by *Quill*'s bright-line rule. Respondents thus concede, without discussion, then-Judge Gorsuch's point that present doctrine allows States to impose identical burdens on interstate commerce so long as they avoid the precise collection obligation at issue in *Bellas Hess* and *Quill*. *See supra* p.2. As the opening brief explained (at 15), many of the same complications respondents decry are equally present—or *more*—in laws like Colorado's now-upheld reporting regime.

While respondents suggest (at 41) that sales-tax compliance costs exceed those of other taxes, that is demonstrably incorrect. Multi-state income-tax compliance costs "the largest 1000 firms ... from $290 to 335 million" annually, and involves similar complications including the "sourcing" complexities, tax-base discrepancies, attention to shifting rules, and risks of simultaneous audits respondents bemoan. *See* Sanjay Gupta & Lillian Mills, *Does Disconformity in State Corporate Income Tax Systems Affect Compliance Cost Burdens?*, Nat'l Tax J. 355, 357-60 (June 2003). Indeed, the prevailing apportionment rule for corporate

income tax in most States is based on in-state sales, just like a sales tax. Fed'n of Tax Adm'rs, *State Apportionment of Corporate Income* (2018), https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf.

Third, having identified only complications associated with collecting *local* sales tax in "12,000 jurisdictions," respondents do not explain why that supports *Quill*'s rule requiring in-*state* physical presence. *See* U.S. Br. 23 & n.7. From respondents' own vantage, *Quill*'s rule is both overbroad and under-protective—a bright line that cuts nowhere near the source of respondents' complaints.

These three omissions limit respondents to defending *Quill* as helping to at least relieve "certain" retailers of a cost of doing business many of their indistinguishable competitors must bear. *See* Br. 3. But this is a backwards basis for retaining a rule under the dormant commerce clause, which is "all about preventing discrimination between firms." *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring).

Similarly, respondents overlook that this doctrine protects interstate *commerce*, not *companies*. As the *amici* professors note, if States demanded (as they could) that their residents file detailed use-tax returns tracking every internet transaction on pain of audit, the burden on interstate commerce would surely increase. Professors' Br. 18-21. Indeed, that might effectively shutter internet retail altogether. Asking sellers to collect a concededly valid tax thus promotes interstate commerce relative to concededly valid alternatives. That cannot be unconstitutional.

Meanwhile, respondents say nothing about the many recognized distortions and inefficiencies *Quill* causes to interstate commerce and investment. *See* Opening Br. 32-37. Respondents' own favored view of the facts (at 4, 49-51) is that most traditional retailers must shoulder the same state and *local* sales-tax obligations they decry, while competing through the same online distribution channels, based on the wholly arbitrary fact that some have a footprint in one corner of States as large as California. That is not only unfair, it necessarily discourages interstate investments that would otherwise be made in local stores, jobs, and business models. *See, e.g.*, Retail Litig. Ctr. Br. 7-9. Whatever *Quill* protects, it's not interstate commerce as such.

B. Changed circumstances merit radically limiting or eliminating the physical-presence rule.

Petitioner has also established changed circumstances that warrant interpreting *Quill* narrowly or eliminating it altogether. This Court could not consider the pervasive presence of modern e-commerce when it described the required presence as "physical" in *Quill*. That alone distinguishes this case from one in which a petitioner asks this Court to overrule a decision whose considered judgment he dislikes, simply because he hopes a new Court will provide a new result. It also distinguishes *Quill* itself, which involved only the expansion of mail-order retail following *Bellas Hess*, not an entirely unanticipated phenomenon like modern e-commerce. *Contra* Resp. Br. 42, 46-47.

The dramatic and unanticipated growth of e-commerce causes *Quill* to inflict far greater harm on States than the *Quill* Court could have imagined.

Even the GAO Report[1] on which respondents heavily rely (at 47-50) puts the losses at somewhere between $8.5 and $13.4 billion annually—a number respondents concede (at 49) would be far higher absent a recent policy change from Amazon. That is enough to add nearly $1,000 in education funding for every public high-school student in the country,[2] or fund significant increases in policing, infrastructure, and health care spending.

The GAO Report explains (at 12-13) that these harms fall disproportionately on smaller-population States, like South Dakota, where fewer companies have or need physical presence. GAO estimates South Dakota's losses at $33 to $47 million—in line with the Governor's $50 million estimate, and at least 50% higher than respondents ventured. *See id.* at 49; Opening Br. 35. That sum approximates South Dakota's entire budgets for critical functions like the judicial system ($44.3 million), child services ($45.1 million), and public safety ($58.4 million). *See* S.D. Bureau of Fin. & Mgmt., *Budget in Brief, Fiscal Year 2018*, at 10, 25, 35, https://bfm.sd.gov/budget/BiB/SD_BIB_FY2018.pdf.[3]

---

[1] U.S. Gov't Accountability Office, GAO-18-114, Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (2017).

[2] Nat'l Cent. for Educ. Statistics, Fast Facts, https://nces.ed.gov/fastfacts/display.asp?id=372.

[3] Respondents' figures (at 53) count federal funds that flow through the State for federal programs in the State's "expenditures" to deflate the apparent impact. $50 million is nearly 3% of *total* revenue. U.S. Census Bureau, *2017 Annual Survey of State Tax Collections*, tbl. 1 (Mar. 29, 2018), https://www2.census.gov/programs-surveys/stc/tables/2017/2017-stc-category.xlsx.

And, especially outside the largest States, these losses have likely grown. In *DMA*, Justice Kennedy expressed concern that Colorado had lost $170 million to non-collection. *See* 135 S. Ct. at 1135. Even with Amazon's compliance, GAO estimates (at 48) that Colorado may have lost up to *$262 million* in 2017. Unanticipated and serious harm to sovereign States—and with them, public services and local communities—was the core concern that animated Justice Kennedy's call to reconsider *Quill*. *See id.* It is "special justification" enough to eliminate a wholly arbitrary constitutional rule.

Respondents' attempt to minimize *Quill*'s harmful effects on the States requires a questionable use of statistics to reach strongly counterintuitive results that begins on the very first page of their "statement." Respondents aver, for example, that "retail ecommerce comprises a smaller percentage of total retail sales today than catalog sales did in 1992 when *Quill* was decided." Br. 9. This seems impossible because it is. While respondents mix and match non-comparable sources, the U.S. Census Bureau—whose data respondents used to calculate e-commerce's market share at 9% and "growing rapidly"—pegs 1992 catalog sales at only 1.9% of retail. U.S. Census Bureau, *Estimates of Monthly Retail: 1992-2018*, https://www.census.gov/retail/mrts/www/mrtssales92-present.xls (cells O68 and O9, sheet 1992).

Likewise, while respondents repeatedly invoke GAO's finding that 87%-96% of sales tax is collected among the top 100 online retailers, this cuts *against* their argument. As they acknowledge (at 49-50), most of this collection comes from the new e-commerce channels of traditional brick-and-mortar retailers,

who were already collecting on those same sales when they were previously made in their stores. Moreover, e-commerce has shuttered many such retailers' storefronts, and the harm will only increase as others fail—a result the *Quill* rule itself promotes. *See* Int'l Council of Shopping Ctrs. Br. 6-8 (collecting studies).

In any event, multi-state collection falls dramatically outside the top 100 e-retailers. Respondents note (at 37) that there are more than *90,000* internet retailers each making over $1 million in sales. But even the next "900 companies were far less likely to have nexus ... in all or most states," and about half collect in only one. GAO Report 42. Meanwhile, GAO found that the collection rate in the booming "e-marketplace" sector, which includes increasingly prevalent vehicles for third-party sellers like "eBay, Etsy, and Amazon Marketplace," is as low as 14%. *Id.* at 10.

Ultimately, no one who has ever ordered anything from a smartphone can doubt that the internet has changed commerce immeasurably. This is clear from lived experience; from the GAO Report; and from amicus briefs by disinterested academics (Professors' Br. 10-20), taxpayer groups that have never before supported a State (Tax Foundation Br. 4), and software providers performing functions inconceivable when *Quill* was decided (Nat'l Ass'n of Certified Service Providers' (CSP) Br. 6-28).

The extent of this change provides the Court with two ways to uphold South Dakota's law here. First, as petitioner's brief explained (at 40-44) and the Solicitor General argues (at 24-28), it allows this Court to address the problems Justice Kennedy correctly identified in *DMA* without squarely overruling *Quill* if it prefers. *Quill* made no considered judgment to extend

Bellas Hess's mail-order exception to such radically different circumstances when it described that case as requiring "physical" presence—a term *Bellas Hess* did not use. *See* U.S. Br. 25. This Court has never expanded on *Quill* or interpreted the contours of "physical" presence (*contra* Resp. Br. 42). It can thus interpret that standard as broad enough to encompass the inescapable presence of internet retailers "via cell phones, tablets, and laptops" that it had no opportunity to consider in 1992—largely limiting *Quill* to its mail-order holding. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (explaining that, today, "a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term"). And because virtually every retailer has an e-commerce channel—because yesterday's Quill is today's Quill.com—this would resolve almost all cases (including respondents') while eliminating substantial *stare decisis* concerns.

Second, if the Court concludes that the physical-presence rule must go—even with respect to catalog mailers—the radically different consequences *Quill*'s rule now creates would be sufficient "special justification" alone to reconsider and overrule it. Either way, the Court should reverse and hold that "Senate Bill 106 and similar state-tax-collection requirements are permissible" under the dormant commerce clause. U.S. Br. 10, 34.

II. The Undisputed Facts Of This Case Demonstrate *Quill*'s Dramatic Overbreadth.

Respondents' brief is dedicated to articulating ways that sales-tax compliance in other States might be burdensome on other, smaller retailers. These complaints do not relate to South Dakota's law (which

imposes few burdens on anyone), or to respondents (who are huge). This shows that *Quill* is far too overbroad to retain. This Court has doctrines that will defend small out-of-state firms against unduly burdensome regimes, should the need arise. It has no need for a rule that also holds South Dakota's eminently reasonable regime unconstitutional, providing a blanket judicial tax shelter to billion-dollar companies even in States where they face no burdens at all.

Respondents concede (as they must) that South Dakota has both radically simplified sales tax-compliance and enacted a reasonable economic-nexus threshold. *See* Br. 5, 37-38 (acknowledging "[Streamlined Sales and Use Tax Agreement (SSUTA)] is to be commended," and simplification via *free* compliance software is "reasonable"). In fact, although respondents avoid mentioning it, South Dakota has implemented *all* of the GAO's recommendations for minimizing compliance costs, including "simplification rules for collection and remittance in multiple states, small business exemptions for businesses under a certain size, transition periods for businesses to come into compliance, and limitations on lookback periods." GAO Report 24.

Accordingly, respondents' sole complaints are that not all States are SSUTA members, Br. 38, and that not all will enact the same economic thresholds, *id.* at 54-56—matters that have nothing to do with South Dakota. This permits them to raise a cloud of apparent fact and policy disputes untethered to this case or its parties. As demonstrated below, petitioner has the better of these disputes. *See infra* p.17-20. But, more importantly, the anomaly of parties disputing legislative facts in this Court that were not (and could not

have been) litigated below is proof that *Quill* must go, not a reason to keep it.

The record was minimal here because, with *Quill* on the books, South Dakota could not prevail on any set of facts. Even if every fact the Legislature found were true, and compliance would save respondents money, *Quill* makes those facts immaterial.

Conversely, constitutional controversies like this one would look far more normal without *Quill*. If this Court abrogates the bright-line physical-presence rule in favor of the flexible dormant-commerce-clause tests it applies in every other context, it will not mean anything goes. *Contra* Resp. Br. 30 (suggesting petitioner must prove software eliminates all compliance burdens "no matter how monstrously complex the states choose to make their sales tax codes"). Instead, the factual allegations respondents raise about hypothetical compliance burdens would be analyzed the way they should be analyzed—in as-applied challenges raised by litigants with standing to raise them. For example, the way to adjudicate respondents' complaints about the alleged compliance costs New York's laws impose on "a small woolen garments manufacturer in Minnesota," *id.* at 33, is in a lawsuit between New York and a "small woolen garments manufacturer in Minnesota."

Importantly, approving South Dakota's statute under the ordinary tests from *Pike* and *Complete Auto* will more likely moot than unleash respondents' concern (at 55) that the States will henceforth give up on simplification while enacting absurdly low economic-presence thresholds. States have done the opposite thus far, *see* Opening Br. 13-14, 44-45; several have even copied South Dakota's model precisely. Pet. 8.

And, in the unlikely event that some States do otherwise *and* those regimes survive judicial scrutiny, Congress can exercise its Commerce Clause powers to enact legislation targeted at any problems as they actually materialize. That is a far better course than continuing to use hypothetical concerns to strike down in advance even reasonable state statutes presenting none of the concerns those hypotheticals raise.

III. *Quill* Is Increasingly Unworkable.

The opening brief explained that, while *Quill* purports to provide a bright-line rule, its arbitrariness combines with present market conditions in ways that make it ever murkier and more dangerous. The GAO Report powerfully illustrates this threat by relating a recent episode in which a seller "unknowingly" formed a physical-presence nexus because a "popular marketplace provider" stored that seller's inventory in an in-state warehouse. GAO Report 23-24. Under *Quill*'s odd rule, that unintentional, minor, and arbitrary physical presence suffices. So this business, which could be tiny, "received an assessment for back taxes, interest, and penalties dating back to when the property was first stored in the State." *Id.* at 24. The Report notes six similar cases that have arisen since. *Id.*

This is but one example of an ever-growing problem: In the digital economy, the physical-presence rule increasingly functions more like a hidden trap than a well-lit shelter. The courts will now face questions about whether sufficient physical presence arises from using local computer servers for webhosting; providing apps to in-state users that facilitate sales; hiring coders who unexpectedly work on their laptops in other States; installing in-state cookies on customers' computers; or other "physical" but logically arbitrary

connections like the inventory episode. *See, e.g.*, 830 Mass. Code Regs. §64H.1.7; Ohio Rev. Code Ann. §5741.01(I)(2)(h); Opening Br. 30 (citing Arizona guidance on independent contractors). And those courts will have no useful tools to analyze those questions because the bright-line rule is admittedly disconnected from underlying constitutional principles. *See* Opening Br. 26. If taxpayers guess wrong—or otherwise create a physical presence by mistake—they will owe back taxes they did not anticipate and never collected. Nonetheless, while respondents repeatedly worry about small sellers, they reject South Dakota's rule *looking to the seller's size* in favor of one where a Mount Rushmore visit might yield unexpected liability.

The modern muddling of *Quill*'s rule is evident in respondents' own brief. Respondents must admit that the States already have different takes on physical presence, including permissible but complicated click-through nexus and affiliate rules. *See* Pet. 8-11. So respondents re-conceptualize *Quill*'s bright-line rule as permitting collection obligations where "a company is physically present in a state, directly *or through third-parties acting on its behalf to make a market for sales in the state*." Br. 44 (emphasis added). The source of respondents' new, italicized caveat is unclear. Certainly, this Court has never articulated a limitation like it; it has said that physical connections unrelated to sales can suffice. *See Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977). And even if respondents have found the right "bright" line (doubtful), it is not easily applied to contemporary conditions. *Contra* Br. 44. Does hiring an in-state company to design a mobile sales app create a "third-party acting on [the seller's] behalf to make a

market for sales in the state"? Lower courts cannot know where to begin answering that question.

Respondents' counterargument that, since *Quill*, there have been only fifty state-court cases "reported" on Westlaw disputing the contours of the physical-presence standard is deeply flawed. Even that number would be underwhelming for a rule whose only virtue is its supposed clarity. But that number is also incorrect and misleading. Correctly run, respondents' own search produces well over 200 hits,[4] along with over 920 hits in Westlaw's "Administrative Decisions and Guidance" database—where tax disputes are more likely found. Even these numbers are understated because Westlaw's state-level databases are incomplete,[5] and most tax disputes are resolved by agreement without any recorded proceedings at all.

More disputes should be expected if this Court reaffirms *Quill* and state courts must (somehow) search out the minimum "physical" presence that suffices as revenue-starved States start pushing the envelope. That process will be far less workable—and poses far greater risks of crippling back-tax liability on unwitting sellers—than upholding South Dakota's reasonable approach.

---

[4] We searched the "All States" database using adv:("use tax" OR "sales tax") AND "physical presence."

[5] Westlaw lacks many state-court decisions (let alone tax-court decisions). In South Dakota, it provides only Supreme Court cases.

IV. Respondents Overstate The Costs Of Nationwide Compliance.

Petitioner explained above why respondents' efforts to inflate the burdens of tax-collection compliance—which occupies the bulk of their brief (at 28-38)—cannot justify retaining *Quill*. That said, respondents' assertions are also wrong.

The most obvious evidence of respondents' error is a fact they tout themselves—namely, that other retailers already successfully collect most sales tax owed on e-commerce sales. *See* Br. 2, 50. This vividly demonstrates that respondents' indistinguishable (or much smaller) peers can conquer easily enough the burden of complying with sales-tax collection in "12,000 jurisdictions," and that any burdens that do exist only make *Quill*'s rule more unfair and discriminatory. Experience and common sense confirm that most sellers—like respondents' competitors and their former co-defendant Systemax, Opening Br. 17—can comply at reasonable expense and in short order.

The GAO Report does not show otherwise. Commissioned by two senators from non-sales-tax States, it endeavored only to "identify the types of costs and challenges that businesses will likely face if required to collect," GAO Report 2, and its limited conclusion was only that "*some* businesses would *likely* incur several *types* of costs." *Id.* at 15 (emphasis added). In fact, this Report's compliance-cost section mostly recounts what was (predictably) said in interviews with a "non-generalizable" set of "businesses or their representatives." *Id.* at 2. Respondents nonetheless overread this Report by readily mixing costs and complications facing only the largest retailers with expressed concerns for small companies and start-ups. The Report

concludes, unsurprisingly, that there will be some costs and variations among businesses, but the burdens of compliance scale up with the size and maturity of the firms at issue—just as one would hope.

Respondents' cherry-picking of the Report can be quite egregious. For example, they suggest multistate tax-compliance software will be exceedingly expensive for small sellers because the GAO found "licensing costs ... as high as $200,000 per year for unlimited information requests." Br. 36 (quoting GAO Report 19). That ellipsis excludes GAO's finding of "licensing costs **as low as $12 per month for up to 30 information requests**." GAO Report 19.

As common sense suggests, small companies and fresh start-ups will not face anything resembling Amazonian expenses on "unlimited" licenses. In fact, they would be lucky if they did. Respondents do not dispute that one prominent provider (TaxJar) charges tenths of a penny per transaction to large-scale users. *See* Opening Br. 46). That makes a $200,000 bill likely only for firms with something approaching *one hundred million transactions* a year. Pricing models vary, *see* CSP Br. 26, but will surely be affordable at any scale because these software vendors have low marginal costs and many competitors.

The GAO likewise confirms that most of the "integration" and "product-mapping" costs respondents identify are an issue for large, legacy retailers trying to adapt old systems to a new technological world, not small, e-commerce start-ups. New starts likely use off-the-shelf "shopping cart" programs to power their websites, rather than designing custom software from scratch. The GAO explains that (as common sense again suggests) "integration with these common

business systems is generally the least expensive and *may come at no cost to the business*" according to industry participants. GAO Report 18 (emphasis added).

Likewise, while "mapping of thousands of products," Resp. Br. 3, might sometimes be labor-intensive, only the largest e-commerce retailers sell "thousands of products." Most sell one product or a handful of related product types: eye-glasses (WarbyParker.com); mattresses (Casper.com); jewelry (BlueNile.com) or the like. And most sellers must already tag all their products for sales-tax software to facilitate collection in their home States. CSP Br. 16; GAO Report 15 (explaining that those with existing software can "easily" expand). Again, respondents' sources only confirm the commonsense intuition that the basic software or tax-compliance work here will mirror (or even free-ride on) sellers' other business expenses, not cripple them with new, undue burdens.

Respondents also try (at 31-34) to demonstrate that software cannot solve problems like tax holidays or product-specific rules, but anyone who has used modern cloud-based services from Google Maps to Westlaw knows respondents are selling them short. And, in fact, the CSPs explain that software now "automatically calculates and collects taxes for retailers—with all local rates, *tax holidays*, and *specific exemptions* instantaneously factored-in," CSP Br. 2 (emphasis added), handling even the very New York clothing rules respondents highlight as impossible to solve. *Compare* Resp. Br. 32-33, *with* CSP Br. 18.

Respondents try to undermine confidence in such solutions by identifying a handful of errors in TaxCloud's look-up map. Br. 35. But this argument

misses in three illuminating ways. First, because TaxCloud is a CSP, anyone using it to collect and remit in South Dakota would be *fully indemnified*. SSUTA §306 (2017), http://www.streamlinedsalestax.org/index.php?page=modules. Second, the (few) errors involve the system defaulting to a *lower* tax rate, which is what the SSUTA requires *for retailers' own benefit*. *Id.* §305(F). And third, respondents identified these errors—in "only a few moments," Br. 35—by using South Dakota's *own convenient map*.[6] Respondents' argument only demonstrates that modern web-based systems work, in only "moments," to facilitate the collection process and protect retailers should errors arise.

Respondents also raise "multiple simultaneous audits" as the "largest potential cost." Br. 38. GAO's ultimate conclusion was that "it is unknown how frequently businesses might have to contend with concurrent audits." GAO Report 21. It separately concluded that States were unlikely to expand budgets to implement new taxing authority, which suggests audits will not meaningfully increase. *See id.* at 27-30. Meanwhile, companies *already* face a risk of simultaneous income-tax or other audits from any States in which they have nexus under the same tests that would apply to sales taxes going forward, *see supra* p.5-6, making the marginal audit risk negligible. And the GAO confirms, again, the commonsense conclusion that these audits are far more likely for businesses far bigger than the small sellers for which respondents profess concern. GAO Report 20-21.

---

[6] *See* https://apps.sd.gov/rv25taxmatch/main.aspx.

V. Respect For Congress's Role Requires Abrogating The Physical-Presence Rule.

Although respondents misunderstand the GAO Report's import, they are correct that designing the proper policy responses to such factfinding efforts is better suited to the political branches than the courts. They have backwards, however, what it would mean to leave such matters to Congress. Respondents' position is that this Court should retain *Quill* and continue directing lower courts to strike down every single state law that does not meet the physical-presence requirement, no matter how reasonable, until a federal bill saying otherwise obtains bicameral and presidential approval. This is the literal opposite of leaving the matter to Congress.

It is particularly ironic in this regard for respondents to invoke *Davis*, 553 U.S. 328, as support for keeping *Quill* in lieu of *Pike*'s more flexible test. The key point made by both *Davis*'s majority, *id.* at 355-56, and Justice Scalia's concurrence, *id.* at 360, was that, because judges lack the competence or institutional authority to strike complex policy balances, courts should hesitate before using a constitutional rule built on judicial policy judgments to *invalidate* state regulations—particularly where Congress has stayed silent. That, of course, is South Dakota's point. Congress has not said laws like South Dakota's should be stricken; rather, respondents seek that relief based only on a judge-made rule that is, in turn, founded entirely upon policy judgments this Court reached before e-commerce even existed.

Respondents' congressional *amici* make a similar mistake in asking this Court to "defer" to Congress and "reaffirm" Congress's "ultimate power" over

interstate commerce. *See, e.g.*, Sen. Cruz et al. Br. i; Rep. Goodlatte et al. Br. 4. Whichever way this Court rules, Congress will retain its "ultimate power" over interstate commerce, and courts will owe total deference to any judgments Congress actually enacts. The question is whether, absent congressional enactments, the States should have the flexible authority conveyed by *Pike* and *Complete Auto*, or the arbitrarily circumscribed capacity *Quill*'s outlier rule provides. The Constitution tells us what happens to powers not "prohibited by it to the States" when nothing else occurs. U.S. Const. amend. X.

Relatedly, it is unfair to read Congress's failure to intervene as reflecting implicit support for *Quill*. True, bills to overrule *Quill* have failed (after passing the Senate), *see* Pet. Reply 7-8, but bills to codify *Quill* have failed too, with *far* less support. *See, e.g.*, H.R. 2887, 115th Cong. (2017). Moreover, *Quill* has now led the States to enact a patchwork of variable nexus requirements, reporting regimes, and other workarounds that are at least as burdensome as sales-tax laws, and Congress has not overruled those either. Congress's silence does not demonstrate approval of this incoherent status quo; more realistically, it shows that Congress is polarized, which makes it critical for this Court to get the constitutional default rule right. *See, e.g.*, *United States v. Wells*, 519 U.S. 482, 495-96 (1997) ("[T]he significance of ... inaction necessarily varies with the circumstances" and "'it is at best treacherous to find in congressional silence alone the adoption of a controlling rule'") (citation omitted).

The history of the "congressionally-authorized" committee report that respondents invoke demonstrates the problem. *See* Br. 1, 15. Recognizing that

this issue was contentious, Congress provided that "[n]o finding or recommendation shall be included in [this committee's] report unless agreed to by at least two-thirds of the members." 47 U.S.C. §151 note. The committee became so polarized that it could not make a single relevant finding. What respondents cite is the report the 10-8 majority produced unilaterally, yielding biting criticism from the commission's other members. *See, e.g.*, Statement of Joseph Guttentag, Andrew Pincus, & Robert Novick, http://govinfo.library.unt.edu/ecommerce/gnp.pdf. Again, all respondents' sources demonstrate is the deadlock that makes this Court's default rule so critical.

When respondents repeatedly fret (at 6, 26, 59-62) that States will lose their incentive to compromise absent *Quill*, they are speaking only from their own extended experience occupying that strategic vantage. What respondents seek to defend is not Congress's prerogatives, but their own power to get their preferred outcome by ensuring only that Congress does nothing—a veto they and their *amici* have wielded successfully for 26 years. *See* Pet. Reply 8-9.

VI. Respondents' Retroactivity Concerns Are Overstated.

South Dakota's statute expressly prohibits retroactive liability, so this Court need not decide any issue regarding retroactivity here. As the 44 attorneys general supporting petitioner note, however, there would be substantial constitutional barriers to their pursuit of retroactive enforcement under multiple doctrines. States' Br. 19-21. In fact, *Complete Auto* itself prohibits retroactive enforcement because of its discriminatory effect in this context, *see* Opening Br. 50—a point

respondents reject as "speculation" (at 64) without meaningful analysis.

More importantly, respondents ignore the plain evidence that these constitutional protections will likely never be tested. For example, they cite a page from the States' *amicus* brief as preserving the threat of retroactive enforcement when that brief invites this Court to *foreclose* it. *Compare* Resp. Br. 63, *with* States' Br. 19. Likewise, respondents' Appendix somehow concludes that several States with laws expressly *forbidding* retroactive application have "expressly authorize[d]" it. *See* App. A ¶1 (so describing both Ind. Code §6-2.5-9-9(e) ("An obligation to remit the gross retail tax ... may not be applied retroactively") and Me. Stat. tit. 36, §1951-B ("No retroactive application of tax")). Simply put, respondents are aggressively misreading the States' laws and legal positions against themselves.

In fact, the sole example respondents cite of any official anywhere threatening retroactive enforcement is one letter from a tax official in Connecticut suggesting the possibility of back-tax liability *only if* the retailer does not agree to begin collecting prospectively. *See* App. C. Meanwhile, Connecticut's attorney general has signed onto a brief acknowledging that such retroactive enforcement would raise constitutional concerns. More and more States are foreclosing retroactivity expressly with voluntary injunctions or legislation. *See, e.g.*, Miss. Admin. Code §35-IV-3.09; http://www.sos.ms.gov/adminsearch/ACProposed/00023022b.pdf (showing relevant amendments). The States are self-evidently hoping for prospective compliance, not trying to snatch up back taxes. And that is because the States know that, with or without *Quill*, unreasonable

actions in this realm will precipitate swift condemnation from Congress or from this Court's ordinary dormant commerce clause doctrines.

CONCLUSION

The decision below should be reversed and South Dakota's law upheld.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Jeanne Jeong
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

April 9, 2018

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA, PETITIONER

v.

WAYFAIR, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
ROBERT A. PARKER
Assistant to the Solicitor General
MARK B. STERN
NICOLAS Y. RILEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

South Dakota requires certain businesses that do not have a "physical presence in the state" to collect sales taxes on the goods and services they sell to South Dakota customers and to remit those taxes to the State. S.D. Codified Laws § 10-64-2 (Supp. 2017). The question presented is whether that requirement violates the dormant Commerce Clause.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 7
Argument:
South Dakota Senate Bill 106 and similar state-tax-collection requirements are permissible regulations of interstate commerce under the dormant Commerce Clause 10
A. The "safe harbor" rule adopted in *Quill* and *Bellas Hess* cannot be reconciled with this Court's broader dormant Commerce Clause jurisprudence 11
1. The *Quill* Court's "substantial nexus" analysis reflected a misapplication of the *Complete Auto* framework 13
2. Senate Bill 106 and similar state tax-collection requirements should be analyzed and sustained under the *Pike* balancing framework 17
B. This Court should not extend *Quill*'s rule to e-commerce 24
C. If this Court construes *Quill* to hold that only retailers with a physical presence in the taxing State can be required to collect state sales taxes from their customers, *Quill* should be overruled 28
D. Congress's authority to legislate in this area should not dissuade the Court from limiting or overruling *Quill* 32
Conclusion 34

TABLE OF AUTHORITIES

Cases:

American Trucking Ass'ns v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005) 1, 12

Cases—Continued: Page

Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564 (1997) 11, 31
City of Phila. v. *New Jersey*, 437 U.S. 617 (1978) 18
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) ..... *passim*
Comptroller of Treasury v. *Wynne*, 135 S. Ct. 1787 (2015) 1, 2, 12
Department of Revenue v. *Davis*, 553 U.S. 328 (2008) 11, 19
D. H. Holmes Co. v. *McNamara*, 486 U.S. 24 (1988) 14, 16, 17
Direct Mktg. Ass'n v. *Brohl*:
135 S. Ct. 1124 (2015) 20, 25
814 F.3d 1129 (10th Cir. 2016) 16, 29
Freeman v. *Hewit*, 329 U.S. 249 (1946) 2
General Motors Corp. v. *Tracy*, 519 U.S. 278 (1997) 2
Helvering v. *Hallock*, 309 U.S. 106 (1940) 30
Henneford v. *Silas Mason Co.*, 300 U.S. 577 (1937) 15
Leegin Creative Leather Prods., Inc. v. *PSKS, Inc.*, 551 U.S. 877 (2007) 31
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) 15, 16
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 32
Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954) 13, 18
National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967) ..... *passim*
National Geographic Soc'y v. *California Bd. of Equalization*, 430 U.S. 551 (1977) 18, 21, 28, 30
Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941) 22

Cases—Continued: Page

Oklahoma Tax Comm'n v. *Jefferson Lines, Inc.*, 514 U.S. 175 (1995) 15, 16, 17
Payne v. *Tennessee*, 501 U.S. 808 (1991) 30
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 8, 13, 19, 21, 23
Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) ..... *passim*
Scripto, Inc. v. *Carson*, 362 U.S. 207 (1960) 21
Spector Motor Serv., Inc. v. *O'Connor*, 340 U.S. 602 (1951) 2
Standard Pressed Steel Co. v. *Department of Revenue*, 419 U.S. 560 (1975) 21, 30
Trinova Corp. v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991) 14
United Haulers Ass'n v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) 19
United States v. *International Bus. Machs. Corp.*, 517 U.S. 843 (1996) 31

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) ..... *passim*
Amend. XIV (Due Process Clause) 2, 13
S.D. Codified Laws (Supp. 2017):
§ 10-45-2 5
§ 10-45-27.3 5
§ 10-46-4 (2010) 5
§ 10-64-1(1) 5, 6
§ 10-64-1(2) 6, 20
§ 10-64-1(10) 6
§ 10-64-2 6
§ 10-64-6 6

Statute—Continued: Page

2016 S.D. Sess. Laws 217-220 5

Miscellaneous:

Fleur Britten, *Brands Embrace An 'Augmented Reality'*, New York Times (Sept. 20, 2011), http://www.nytimes.com/2011/09/21/fashion/fashion-embraces-augmented-reality-technology.html 26

Chris Isidore, *Amazon to Start Collecting State Sales Taxes Everywhere*, CNNTech (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html 23

Nat'l Telecomms. & Info. Admin., U.S. Dep't of Commerce, *Continuing The Broadband Dialogue With States* (Apr. 29, 2016), https://www.ntia.doc.gov/blog/2016/continuing-broadband-dialogue-states 27

Nathan Olivarez-Giles, *With AR Shopping Apps Like These, You'll Never Leave Home Again; Gap, Amazon, Lowe's And Wayfair-View Demonstrate The Benefits Of Augmented Reality*, Wall Street Journal (Jan. 13, 2017), https://www.wsj.com/articles/with-ar-shopping-apps-like-these-youll-never-leave-home-again-1484318206 26

Streamlined Sales Tax Governing Bd., Inc., *Streamlined Sales and Use Tax Agreement* (2017), http://www.streamlinedsalestax.org/index.php?page=modules 22

U.S. Census Bureau, U.S. Dep't of Commerce:

E-Stats 2015: Measuring the Electronic Economy (May 24, 2017), https://www.census.gov/ content/dam/Census/library/publications/ 2017/econ/e15-estats.pdf 20

Miscellaneous—Continued: Page

Estimated Annual U.S. Retail Trade Sales—Total and E-Commerce: 1998-2015, http://www2.census.gov/retail/releases/current/arts/ecommerce.xls (last visited Mar. 5, 2018) 31

U.S. Census Bureau News: Quarterly Retail E-Commerce Sales (Feb. 16, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf 19, 31

Wayfair, *Wayfair's AR-Powered Shopping App Now Available to Tens of Millions of Consumers on iOS* (Sept. 19, 2017), http://s2.q4cdn.com/848638248/files/doc_news/Wayfairs-AR-Powered-Shopping-App-Now-Available-to-Tens-of-Millions-of-Consumers-on-iOS-11.pdf 26

YouTube:

Newegg Studios Live: The New 18-Core CPU in Action with Intel and ASUS, https://www.youtube.com/watch?v=eUitlrykACY (last visited Mar. 5, 2018) 26

Overstock.com—ios Augmented Reality, https://www.youtube.com/watch?v=BMtQ-8maWFk (last visited Mar. 5, 2018) 26

In the Supreme Court of the United States

No. 17-494

SOUTH DAKOTA, PETITIONER

v.

WAYFAIR, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the application of the dormant Commerce Clause to a state tax-collection requirement. The United States has a substantial interest in the Court's resolution of the question presented because the rules that govern in this area will significantly affect the functioning of the national economy and the States' financial stability. The United States has participated in past cases concerning the application of the dormant Commerce Clause to state tax laws. See *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787 (2015); *American Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005).

STATEMENT

1. The Commerce Clause empowers Congress to "regulate Commerce * * * among the several States." U.S. Const. Art. I, § 8, Cl. 3. Although "the Clause is framed as a positive grant of power to Congress," this

Court has construed it "to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015) (citation and internal quotation marks omitted). The dormant Commerce Clause prohibits state taxation or regulation "that discriminates against or unduly burdens interstate commerce." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997) (citations omitted).

2. In a series of cases from the 1940s and 1950s, this Court held that the Commerce Clause "by its own force created an area of trade free from interference by the States." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). The Court relied on that principle to broadly preclude the States "from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States," including by "imposing a direct tax on interstate sales," whether or not intrastate commerce was subject to the same restrictions. *Id.* at 252, 256; see *Spector Motor Serv., Inc.* v. *O'Connor*, 340 U.S. 602, 609-610 (1951) (forbidding States from levying "taxes upon the privilege of carrying on a business that was exclusively interstate in character") (emphasis omitted).

In *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967) (*Bellas Hess*), the Court held that a mail-order retailer who shipped catalogs and goods into Illinois could not be required to collect Illinois taxes on transactions with state residents because the retailer lacked the "minimum connection" to the State required by the dormant Commerce Clause as well as the Due Process Clause. *Id.* at 756, 758 (citation omitted). The Court adhered to "the sharp distinction

which [its prior] decisions ha[d] drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 758. Echoing the reasoning of *Freeman* and *Spector Motor Service*, the Court characterized mail-order transactions between in-state consumers and out-of-state sellers as "exclusively interstate in character," *id.* at 759, and concluded that "this is a domain where Congress alone has the power of regulation and control," *id.* at 760.

In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (*Complete Auto*), this Court overruled *Freeman* and *Spector Motor Service*. *Complete Auto* involved a dormant Commerce Clause challenge to the application of Mississippi's sales tax to the transportation of automobiles shipped to Mississippi from other States. *Id.* at 275-276. In upholding the application of the tax, the Court abandoned its earlier rule "that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id.* at 278. The Court observed that "[i]t was not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Id.* at 288 (citations omitted). The Court concluded that the constitutionality of state taxes on interstate commercial activities or transactions should be evaluated in light of "economic realities" and the "practical effect of the tax," rather than on the basis of formalistic distinctions between interstate and intrastate commerce. *Id.* at 278-279. To guide that inquiry, the Court adopted a four-factor test, under which a state tax should be "sustained * * * against Commerce Clause challenge when the tax

is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279.

In *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992) (*Quill*), this Court considered whether *Bellas Hess* should be overruled in light of *Complete Auto* and other intervening decisions. Like *Bellas Hess*, *Quill* presented the question whether an out-of-state retailer that delivered goods by mail or common carrier to customers located within the taxing State could constitutionally be required to collect and pay state taxes on those transactions. See *id.* at 302-303. The Court in *Quill* overruled *Bellas Hess*'s due-process holding. The Court explained that a mail-order business that "purposefully direct[s] its activities" at residents of a State by engaging in "continuous and widespread solicitation of business" there has a connection to the State that is sufficient for due-process purposes, "irrespective of [the business's] lack of physical presence" in the State. *Id.* at 308. The Court held, however, that the same connection was insufficient under the dormant Commerce Clause, and it reaffirmed the *Bellas Hess* "safe harbor" for businesses "whose only connection with customers in the taxing State is by common carrier or the United States mail." *Id.* at 315 (brackets and citation omitted).

In reaching that result, the *Quill* Court rejected the State's contention that *Bellas Hess*'s Commerce Clause analysis had been supplanted by *Complete Auto*. *Quill*, 504 U.S. at 313-315. Instead, the Court concluded that *Bellas Hess* was best understood to "stand[] for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required" by *Complete Auto*. *Id.* at

311. The Court acknowledged that this "bright-line rule"—which the Court described as a "physical-presence requirement," *id.* at 314, 317—was "artificial at its edges," treating mail-order businesses differently based on whether they maintained "a small sales force, plant, or office" in the taxing State. *Id.* at 315. The Court determined, however, that the *Bellas Hess* rule should be retained in light of its value to the mail-order industry and principles of stare decisis. *Id.* at 315-317.

3. Like many States, South Dakota imposes a tax on the sale of goods and services to "consumers or users" in the State. S.D. Codified Laws § 10-45-2 (Supp. 2017); see *id.* § 10-45-4 (2010). Sellers are generally responsible for collecting the tax from the consumer at the time of sale and then remitting the proceeds to the State. *Id.* § 10-45-27.3 (Supp. 2017). If a seller fails to collect the tax at the time of sale, however, the consumer is responsible for remitting the tax. *Id.* § 10-46-2 (Supp. 2017); see *id.* § 10-46-4 (2010).

In 2016, the South Dakota legislature enacted Senate Bill 106, "An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." 2016 S.D. Sess. Laws 217-220. As its title suggests, Senate Bill 106 is an effort to address the State's "inability to effectively collect" generally applicable sales taxes "from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota." S.D. Codified Laws § 10-64-1(1) (Supp. 2017). According to the statute's legislative findings, the obstacles to collecting those taxes have "seriously erod[ed] the sales tax base of th[e] state" and have "caus[ed] revenue losses and imminent harm * * * through the loss of critical funding for state

and local services." *Ibid.* The statute contains an additional finding that the State's inability to collect sales and use taxes from remote sellers is "especially serious * * * because the state has no income tax, and sales and use tax revenues are essential in funding state and local services." *Id.* § 10-64-1(2) (Supp. 2017).

Senate Bill 106 requires any business that "does not have a physical presence" in South Dakota to collect taxes on the sales of goods or services into the State "as if the seller had a physical presence in the state." S.D. Codified Laws § 10-64-2 (Supp. 2017). The statute exempts businesses that made fewer than 200 taxable transactions and received less than $100,000 in gross revenue in South Dakota in the preceding year. *Ibid.* It also provides that collection-and-remittance requirements cannot be imposed retroactively. *Id.* § 10-64-6 (Supp. 2017).

In enacting Senate Bill 106, the South Dakota legislature recognized that the "law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question." S.D. Codified Laws § 10-64-1(10) (Supp. 2017). Senate Bill 106 provides that, if the statute is challenged in court, it should "be appropriately stayed * * * until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine." *Ibid.*

4. South Dakota filed this action in state court seeking a declaration that Senate Bill 106 is valid and applicable to respondents, each of whom operates an online retail business. Pet. App. 9a-10a. Respondents moved for summary judgment on the ground that, under *Quill*,

they cannot be compelled to collect and remit South Dakota sales taxes because they lack a physical presence in South Dakota. *Id.* at 16a. In its summary-judgment response, South Dakota agreed with respondents that the State cannot enforce Senate Bill 106 unless this Court overrules *Quill*. *Ibid.* Based on that concession, the trial court granted summary judgment to respondents. *Id.* at 15a-18a.

The Supreme Court of South Dakota affirmed. Pet. App. 1a-14a. Based on the "undisputed facts and the Supreme Court's holdings in *Bellas Hess* and *Quill*," the court concluded that "Senate Bill 106 could not impose a valid obligation on [respondents] to collect and remit sales tax to this State because none of them had a physical presence in the state." *Id.* at 12a.

SUMMARY OF ARGUMENT

In light of Internet retailers' pervasive and continuous virtual presence in the States where their websites are accessible, the States have ample authority to require those retailers to collect state sales taxes owed by their customers. *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), should not be read to bar that result, both because the *Quill* Court did not and could not anticipate the development of modern e-commerce, and because *Quill*'s analysis was deeply flawed.

A. *Quill* reaffirmed the rule of *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), that the dormant Commerce Clause precludes a State from requiring an out-of-state mail-order retailer that communicates with its customers solely by mail or common carrier to collect state sales taxes on the purchase of goods by state residents. That bright-line rule, which lacks support in the Court's broader dormant Commerce Clause jurisprudence, is misconceived.

The Court in *Quill* misapplied *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which establishes a four-factor test for determining the validity of a state tax. *Quill* concluded that state-tax-collection requirements of the sort at issue here fail the first prong of that test because a mail-order retailer lacks a "substantial nexus" to the States in which it does business. That determination was flawed in its inception: the *Complete Auto* test addresses only the validity of a state tax, not the distinct question of who may be required to *collect* the tax. States indisputably may tax sales to state residents by out-of-state retailers. Laws of the sort at issue here, involving nondiscriminatory tax-collection requirements that impose only incidental burdens on commerce, are more appropriately analyzed under the general balancing framework set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

South Dakota Senate Bill 106 and similar laws are constitutional under that framework. Such laws confer significant benefits on States, including by ensuring the effective collection of revenue and avoiding market distortions that privilege out-of-state businesses over in-state ones. Those benefits are not clearly outweighed by any incidental burdens imposed on interstate commerce by enforcement of a uniform tax-collection obligation.

B. In light of the serious analytical flaws underlying the decision in *Quill*, this Court should limit that case to its precise holding, involving traditional mail-order retailers whose only connection to a State is by mail or common carrier. Although the courts below and the parties here construe *Quill* and *Bellas Hess* to impose a broader "physical-presence" requirement, neither case compels such a reading. Rather, those cases are more appropriately understood to be artifacts of their time,

reflecting economic conditions under which retailers who lacked a physical presence in a State were effectively constrained to communicate with customers by mail or common carrier. Neither decision could have foreseen the rise of modern e-commerce, through which Internet retailers can establish a pervasive and continuous presence—including by maintaining virtual storefronts that seek to replicate the experience of shopping in a physical store, available to every state resident 24 hours a day—even in States where they have no employees or physical property. This Court need not overrule *Quill* and *Bellas Hess*, but it should decline to extend them to the distinguishable context of e-commerce.

C. If the Court construes *Quill* and *Bellas Hess* to impose a physical-presence requirement that extends to Internet retailers, those decisions should be overruled. A physical-presence requirement lacks support in this Court's broader dormant Commerce Clause jurisprudence, bears no logical relationship to current economic conditions, and imposes intolerable burdens on the States' ability to collect tax revenue they are lawfully owed. Principles of stare decisis do not compel a contrary result. *Quill* is badly reasoned and has proved unworkable in the age of modern e-commerce. The nature of an Internet retailer's presence in the States where its website is accessible is different in kind from any type of "presence" that the Court could have anticipated when *Quill* and *Bellas Hess* were decided. And given the proliferation of such retailers, imposition of a physical-presence requirement would substantially impede state tax collection and would distort retailers' choices of appropriate business models.

D. As in other cases involving the dormant Commerce Clause, Congress may enact legislation that

overrides the default constitutional rules that govern state tax-collection requirements. But that is not a reason for this Court to decline to limit or overrule *Quill* and *Bellas Hess*. Congress's ability to regulate interstate commerce will be enhanced if this Court clarifies the appropriate default constitutional rule that will apply absent congressional intervention.

ARGUMENT

SOUTH DAKOTA SENATE BILL 106 AND SIMILAR STATE-TAX-COLLECTION REQUIREMENTS ARE PERMISSIBLE REGULATIONS OF INTERSTATE COMMERCE UNDER THE DORMANT COMMERCE CLAUSE

In *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), this Court held that an out-of-state retailer cannot be required to collect sales or use taxes owed by its customers if the retailer's "only connection with customers in the [taxing] State is by common carrier or the United States mail." *Quill*, 504 U.S. at 315 (quoting *Bellas Hess*, 386 U.S. at 758). Based on the *Quill* Court's references to that rule as a "physical-presence requirement," *id.* at 314, 317, the parties and the courts below read *Quill* to foreclose South Dakota from imposing state-tax-collection requirements on Internet retailers that operate commercial websites but have no employees or physical property located within the State. But respondents' pervasive and continuous virtual presence in South Dakota amply justifies the imposition of state-tax-collection requirements, and *Quill* need not and should not be understood to prevent that sensible result.

In our view, the *Quill* Court held only that an out-of-state retailer's delivery of catalogs and goods into the taxing State by mail or common carrier is not by itself

a sufficient ground for requiring the retailer to collect state taxes owed by its customers. *Quill*'s references to a "physical-presence requirement" are best understood not as a distinct holding of the Court, but simply as shorthand for the rule that deliveries by mail or common carrier are not enough. The Court that decided *Quill* did not and could not anticipate the development of Internet commerce, through which an out-of-state retailer can establish a continuous and pervasive presence in a State even though it has no employees or physical property located there.

The Court should resolve this case by making clear that an out-of-state Internet retailer's virtual presence within a State is a sufficient ground for requiring the retailer to collect sales or use taxes owed by its in-state customers. To establish that proposition, the Court need not disturb *Quill*'s holding that delivery of catalogs and goods by mail or common carrier is not by itself an adequate basis for imposing state-tax-collection duties. Alternatively, if the Court concludes that *Quill*'s binding precedential effect extends to Internet commerce, that decision should be overruled.

A. The "Safe Harbor" Rule Adopted In *Quill* And *Bellas Hess* Cannot Be Reconciled With This Court's Broader Dormant Commerce Clause Jurisprudence

The principal aim of this Court's modern dormant Commerce Clause jurisprudence is to prevent States from enacting protectionist measures that discriminate against or unjustifiably burden interstate commerce. *Department of Revenue* v. *Davis*, 553 U.S. 328, 337-338 (2008); see *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 577-578 (1997) (explaining that dormant Commerce Clause principles protect the

integrity of the national economy by preventing "'economic Balkanization' * * * and the retaliatory acts of other States that may follow") (citation omitted). State tax laws may violate those principles if they tax interstate transactions more heavily than intrastate ones, grant a "direct commercial advantage" to in-state businesses that is not enjoyed by out-of-state competitors, or subject interstate transactions to "multiple taxation." *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015) (citation omitted); see *American Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

Senate Bill 106, which requires in-state and out-of-state retailers to collect valid taxes due on the sale of goods to customers within the State, does not offend those principles. That law does not treat interstate and intrastate commerce differently in any respect. It grants in-state businesses no special protection from out-of-state competition, and it imposes no burden on out-of-state businesses that is not shared by their in-state counterparts. Instead, the law ensures that all retailers, regardless of how they solicit sales and deliver goods to customers within South Dakota, comply with a uniform obligation to assist the State in the collection of taxes that are lawfully due. An evenhanded regulation of that sort does not violate the dormant Commerce Clause.

The "safe harbor" rule of *Quill* and *Bellas Hess*, which creates a categorical exception to state-tax-collection requirements for out-of-state retailers who engage in commerce solely by mail or common carrier, cannot be reconciled with this Court's broader Commerce Clause jurisprudence. The *Quill* Court described that rule as reflecting a determination that an out-of-state retailer's delivery of catalogs and goods

into a State by mail or common carrier is insufficient to establish a "substantial nexus" to that State under *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). See *Quill*, 504 U.S. at 311. But *Complete Auto*'s four-part test is used to determine whether a State *may tax* particular events or transactions, and it is undisputed that South Dakota may tax interstate sales of the sort at issue here. To the extent that requiring out-of-state retailers to *collect* those taxes raises distinct dormant Commerce Clause concerns, those issues are appropriately analyzed not under *Complete Auto*, but under the general balancing framework for incidental burdens on commerce set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Analyzed under that framework, the South Dakota tax-collection requirements at issue here are consistent with the dormant Commerce Clause.[1]

1. The Quill *Court's "substantial nexus" analysis reflected a misapplication of the* Complete Auto *framework*

Under *Complete Auto*, a state tax imposed on interstate commerce will be sustained as long as it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate

---

[1] In addition to the limitations imposed by the dormant Commerce Clause, the Due Process Clause places constraints on a State's power to burden interstate commerce, including the requirement that a "minimum connection" exist "between a state and the person, property or transaction it seeks to tax." *Quill*, 504 U.S. at 305-306 (quoting *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345 (1954)). The Court in *Quill* made clear, however, that this requirement is satisfied when a mail-order retailer "is engaged in continuous and widespread solicitation of business within a State," notwithstanding its "lack of physical presence in the taxing State." *Id.* at 308.

against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. The Court in *Quill* stated that *Bellas Hess* is best understood to "concern[] the first" prong of the *Complete Auto* test, and to "stand[] for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." 504 U.S. at 311. That analysis was misconceived.

The Court's opinion in *Quill* elided the distinction between the State's authority to *impose* its sales tax on in-state customers and its authority to require out-of-state retailers to *collect* the tax. The Court's recitation of the facts explained that the dispute between the parties concerned whether the State could compel the out-of-state retailer to collect a use tax from its in-state customers. See 504 U.S. at 302-303. Read literally, however, other language in the opinion suggests that the taxability of the relevant sales was at issue. *Id.* at 315 (characterizing the *Bellas Hess* "safe harbor" as "the demarcation of a discrete realm of commercial activity *that is free from interstate taxation*") (emphasis added); *id.* at 316 (asserting that the *Bellas Hess* rule created a "bright-line *exemption from state taxation*") (emphasis added).

The *Complete Auto* test addresses the circumstances in which the Court will "sustain[] *a tax* against Commerce Clause challenge." 430 U.S. at 279 (emphasis added); see *D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 30 (1988) (explaining that *Complete Auto*'s "four-part formulation" is "used to evaluate the validity of state taxes vis-à-vis the Commerce Clause"); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 372

(1991) (same). The test's substantial-nexus requirement seeks to ensure that the "activity taxed" is "sufficiently connected to the State to justify a tax." *Complete Auto*, 430 U.S. at 287. The other prongs of the test likewise address features of state taxes themselves. See *ibid.* (explaining that the dormant Commerce Clause precludes a state "tax [that] is not fairly related to benefits provided the taxpayer, or that * * * discriminates against interstate commerce, or that * * * is not fairly apportioned").

The "activity" at issue in *Quill* was the delivery of goods to a customer in the taxing State and the concomitant transfer of title to the in-state customer. If that activity lacked the "substantial nexus" to the taxing State that *Complete Auto* requires, the logical consequence would be that a State could not tax it at all. But despite the language in *Quill* suggesting that taxability was at issue, and the Court's invocation of a four-part test that is used to determine the validity of state taxes, *Quill* does not appear to have spawned any meaningful uncertainty as to a State's power to require in-state customers to pay sales or use taxes on goods they receive by mail or common carrier from out-of-state retailers. "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State" under the *Complete Auto* test and its predecessors. *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995); see, *e.g.*, *id.* at 200 (upholding State tax on sales of interstate bus tickets); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 48-50 (1940) (same for tax on sales of coal by out-of-state seller); *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 582-583 (1937) (same for tax on use of

goods purchased from out-of-state seller). That rule applies "even when the parties to a sales contract specifically contemplate[] interstate movement of the goods either immediately before, or after, the transfer of ownership." *Jefferson Lines*, 514 U.S. at 187.

When an in-state customer purchases goods from an out-of-state supplier who ships the goods to the customer in interstate commerce, the State is entitled to tax the transaction because the "sale" is "a local activity, delivery of goods within the State upon their purchase for consumption." *McGoldrick*, 309 U.S. at 58; see *Jefferson Lines*, 514 U.S. at 187. The transfer of ownership of purchased goods within a State "is 'nexus' aplenty" under the *Complete Auto* framework. *Jefferson Lines*, 514 U.S. at 184 (quoting *D. H. Holmes*, 486 U.S. at 33). See *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1131-1132, 1143 (10th Cir. 2016) (construing *Quill* to preclude Colorado from imposing state-tax-collection duties on retailers that lack a "physical presence" in that State, while recognizing "the Colorado consumers' preexisting obligations to pay sales or use taxes whether they purchase goods from a collecting or non-collecting retailer"). Consistent with that understanding, there appears to be no dispute in this case that South Dakota can tax the transactions at issue and can require in-state customers to pay the tax.[2]

---

[2] No party disputes that South Dakota's sales tax satisfies the other prongs of the *Complete Auto* framework. Because "the taxable event of the consummated sale of goods" occurs in only one State, sales taxes like those imposed by South Dakota pose no apportionment concern under the second *Complete Auto* prong. *Jefferson Lines*, 514 U.S. at 188. And so long as the State subjects all sales consummated within the State to a uniform tax, regardless of where the goods originate, the tax is not discriminatory under the third prong. See *id.* at 198 (rejecting contention that sales tax was

The *Quill* Court's attempt to harmonize *Bellas Hess* and *Complete Auto* thus was doubly flawed. The four-part test articulated in *Complete Auto* is used to determine whether particular interstate commercial activities can be subjected to state taxation, not whether particular entities can be required to *collect* state taxes. And for purposes of resolving the question that the *Complete Auto* framework is actually designed to address—*i.e.*, whether a State can tax the sale of goods from an out-of-state retailer to an in-state customer—that commercial activity clearly *does* have a "substantial nexus" to the taxing State, even when the retailer's only contacts with that State involve deliveries by mail or common carrier.

2. Senate Bill 106 and similar state tax-collection requirements should be analyzed and sustained under the* Pike *balancing framework

a. Senate Bill 106 and similar laws do not impose a tax liability on the retailer itself. Rather, the tax is imposed on the sale of the goods to the consumer and is owed by the consumer, whether or not the retailer collects the tax at the time of sale. The sales tax itself is clearly valid, and the customers may be legally required

---

discriminatory where "all buyers pay tax at the same rate on the value of their purchases"); *D. H. Holmes*, 486 U.S. at 32 (same). The tax also fairly relates to state services under the fourth prong, which requires only a logical relationship between the State's imposition of the tax and its ability to provide benefits and services that the taxpayer enjoys. *Jefferson Lines*, 514 U.S. at 200 (noting that "police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax" under *Complete Auto*'s fourth prong); *D. H. Holmes*, 486 U.S. at 32 (finding the fourth prong satisfied where the State provided "services that facilitate [the] sale of merchandise within the State").

to pay it, regardless of the nature and extent of a retailer's other contacts with the State. See pp. 15-16, *supra*. The requirement that the retailer collect and remit the tax does not suggest any doubt as to the customer's independent legal obligation to pay, but simply reflects the "impracticability of [the tax's] collection from the multitude of individual purchasers" after taxable transactions are complete. *National Geographic Soc'y* v. *California Bd. of Equalization*, 430 U.S. 551, 555 (1977) (*National Geographic*); see *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 343 (1954) ("The collection of the use tax from inhabitants is a difficult administrative problem, and if out-of-state vendors can be compelled to collect it and remit it to the taxing state, it simplifies administration.").

The validity of that requirement is properly analyzed not under *Complete Auto*, but under dormant Commerce Clause precedents that have addressed the States' imposition of regulatory burdens *other than* taxes. When a State regulates a business engaged in interstate commercial activity, "incidental burdens on interstate commerce may be unavoidable." *City of Phila.* v. *New Jersey*, 437 U.S. 617, 623-624 (1978). Although measures that facially discriminate against interstate commerce are subject to "a virtually *per se* rule of invalidity," *id.* at 624, Senate Bill 106 and similar laws do not discriminate against interstate commerce. Rather, they impose the same obligations on out-of-state sellers that they impose on in-state sellers, without privileging intrastate commerce in any way.

When evaluating facially neutral laws like Senate Bill 106, this Court "has adopted a much more flexible approach." *City of Phila.*, 437 U.S. at 624. Under that

approach, a state regulation that imposes "only incidental" burdens on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. This Court's review under the *Pike* balancing framework is "permissive," *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (opinion of Roberts, C.J.), and "State laws frequently survive" such review, *Davis*, 553 U.S. at 339.

b. Imposing a sales-tax collection obligation on out-of-state sellers provides significant benefits to States. As explained, States require retailers to collect and remit taxes at the time a taxable transaction occurs because requiring consumers to report those transactions and remit those taxes after the fact is likely to be ineffective. In the absence of laws such as Senate Bill 106, a vast amount of commerce could go unreported and untaxed. The U.S. Census Bureau estimates that retail e-commerce sales in the United States in 2017 totaled more than $452 billion, approximately 9% of all retail sales and a 16% increase from 2016.[3] The volume of annual e-commerce sales jumps to more than $6.6 trillion

---

[3] U.S. Census Bureau, U.S. Dep't of Commerce, *U.S. Census Bureau News: Quarterly Retail E-Commerce Sales* 2 (Feb. 16, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (Quarterly Retail E-Commerce Sales). The Census Bureau defines "e-commerce" as "sales of goods and services where the buyer places an order, or the price and terms of the sale are negotiated over an Internet, mobile device (M-commerce), extranet, Electronic Data Interchange (EDI) network, electronic mail, or other comparable online system." *Ibid.*

when sales by manufacturers, wholesalers, and selected service industries are included.[4]

South Dakota reports that it loses between $21 million and $50 million per year in sales tax revenue due to its inability to require out-of-state retailers who lack a physical presence in the State to collect valid state taxes on those transactions. See Pet. Br. 35. States with larger populations and economies lose even more. See *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (noting that Colorado lost an estimated $170 million in 2012). "States' education systems, healthcare services, and infrastructure are weakened as a result." *Ibid.* Those harms are magnified in a State like South Dakota, which has no state income tax and therefore relies on sales and use taxes as a principal source of funding for essential services. S.D. Codified Laws § 10-64-1(2) (Supp. 2017).

Requiring all retailers to collect and remit applicable sales taxes benefits States in other ways as well. A constitutional rule exempting certain out-of-state retailers from applicable state-tax-collection requirements imposes a competitive disadvantage on in-state retailers and encourages the State's citizens to take their business elsewhere. See *Direct Mktg.*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (noting the "startling revenue shortfall [and] concomitant unfairness to local retailers and their customers who do pay taxes at the register"); see also *Quill*, 504 U.S. at 328-329 (White, J., concurring in part and dissenting in part); *Bellas Hess*, 386 U.S. at 763 (Fortas, J., dissenting). It also discourages out-of-

---

[4] U.S. Census Bureau, U.S. Dep't of Commerce, *E-Stats 2015: Measuring the Electronic Economy* 1 (May 24, 2017), https://www.census.gov/content/dam/Census/library/publications/2017/econ/e15-estats.pdf (reporting estimates from 2015).

state businesses from acquiring property or employing people in the State, since *any* physical presence—no matter how insignificant and unrelated to the businesses' commercial activities—would subject them to the same tax-collection responsibilities as in-state businesses. See, *e.g.*, *National Geographic*, 430 U.S. at 556 (holding that organization was required to collect state tax on mail-order sales because it maintained two offices in the State, even though they were unrelated to the mail-order business); *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 562 (1975) (same where seller employed a single person who lived in the State and worked from his home); *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 208-209, 212 (1960) (same where retailer contracted with ten part-time salesmen in the State).

Under *Quill*, consumers who wish to avoid paying sales and use taxes have an incentive to do business with out-of-state retailers whose business model allows customers to evade the payment of taxes that are lawfully due. Conversely, consumers who are committed to fulfilling their tax obligations have an incentive to eschew such retailers (or at least those who qualify for a *Quill* exemption) in order to avoid the burdens of reporting and remitting their own taxes. Senate Bill 106 and similar laws eliminate those distortions by treating all retailers alike and encouraging competition based on legitimate factors (such as price, quality, selection, convenience, and service) rather than illegitimate ones (such as the opportunity for tax evasion).

c. The burdens imposed on out-of-state retailers by Senate Bill 106 and similar laws do not "clearly" outweigh the legitimate interests of the States in ensuring the uniform collection of valid taxes. *Pike*, 397 U.S. at 142. The *Quill* Court found it "not unlikely that the

mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." 504 U.S. at 316. As explained above, however, sales by out-of-state retailers are not "exempt" from state taxes—the taxes are still lawfully owed by the consumer. *Quill* simply allows certain mail-order retailers to avoid *collecting* the tax, and thus to pursue a business model that makes it easy for customers to evade their tax obligations. But a business "is in no position to found a constitutional right" under the dormant Commerce Clause "on the practical opportunities for tax avoidance which its method of doing business affords [a State's] residents." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 366 (1941). A state law that prevents a business from capitalizing on its customers' desire to avoid paying taxes they lawfully owe does not "burden" the business, or interstate commerce, at least in any constitutionally relevant sense.

The other burden on interstate commerce cited in *Quill*—the difficulty and expense of complying with a "virtual welter of complicated obligations" imposed by various state and local taxing jurisdictions, 504 U.S. at 313 n.6 (citation omitted)—is manageable. Many States are now parties to a multistate agreement that requires them to implement reforms to "simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." *Streamlined Sales and Use Tax Agreement* Art. I, § 102 (2017);[5] see Pet. Br. 13-14. As South Dakota explains (Br. 14-15, 45-46), moreover, existing software solutions can significantly mitigate the burdens

---

[5] Streamlined Sales Tax Governing Bd., Inc., http://www.streamlinedsalestax.org/index.php?page=modules.

associated with collecting and remitting state taxes. Cf. *Bellas Hess*, 386 U.S. at 760 (Fortas, J., dissenting) (noting that claims of excessive burdens associated with tax-collection requirements "vastly underestimate[] the skill of contemporary man and his machines"). And many out-of-state retailers already collect and remit taxes in multiple jurisdictions because they have a physical presence in multiple States or have otherwise agreed to comply with state tax laws. See, *e.g.*, Chris Isidore, *Amazon to Start Collecting State Sales Taxes Everywhere*, CNNTech (Mar. 29, 2017).[6] Any assertion that the market would permit significant harm to Internet or mail-order commerce for want of an cost-effective method of complying with state-tax-collection requirements should be viewed with skepticism.[7]

In light of the significant benefits to States of tax-collection laws like Senate Bill 106, and the absence of "clearly excessive" burdens on out-of-state businesses, those laws do not impermissibly burden interstate commerce under the *Pike* balancing framework. 397 U.S. at 142.

---

[6] http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

[7] For the reasons stated in the text, the burdens associated with collection of sales and use taxes are not constitutionally excessive, even if out-of-state retailers are required to collect local as well as state taxes. It nevertheless bears noting that respondents' arguments on this score are premised almost entirely on the perceived difficulty of monitoring the tax obligations imposed by a large number of local jurisdictions. If the Court views the burdens associated with collection of local taxes to be constitutionally excessive, that rationale would not extend to laws compelling out-of-state retailers to collect taxes owed to the States themselves.

B. This Court Should Not Extend *Quill*'s Rule To E-Commerce

1. The Court in *Quill* described *Bellas Hess* as "stand[ing] for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause," 504 U.S. at 311, and it declined to disturb that rule, see *id.* at 317-318. See *Bellas Hess*, 386 U.S. at 758 ("[T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."). The *Quill* Court also described *Bellas Hess* as establishing a "physical-presence requirement." 504 U.S. at 314, 317. Based on that language, the courts below held that Senate Bill 106 violates the dormant Commerce Clause because retailers subject to the law necessarily lack a "physical presence" in South Dakota. Pet. App. 12a-13a, 16a. Although the State urges this Court to overrule *Quill*, it agrees with the courts below (Br. 7-8, 21) that "physical presence" is required under that decision.

In our view, *Quill*'s precedential effect is less sweeping than the courts below and the parties in this case have supposed. The precise *holding* of *Quill* was that a retailer's shipment of catalogs and goods into the taxing State by mail or common carrier, standing alone, is an insufficient justification for requiring the retailer to collect sales or use taxes from its customers. As we explain below, the Court can retain that holding yet conclude that Internet retailers like respondents, whose websites give them a continuous presence in South Dakota of a

sort that the *Quill* Court could not possibly have anticipated, *do* have a sufficient nexus to the taxing State to justify imposition of tax-collection responsibilities.

It bears emphasis in this regard that, although the *Quill* Court attributed the "physical-presence requirement" to *Bellas Hess*, see *Quill*, 504 U.S. at 314, 317, the Court in *Bellas Hess* itself did not use the term "physical presence" or any variant of it. The Court in *Bellas Hess* did refer to, and rely on, a "sharp distinction * * * between [1] mail order sellers with retail outlets, solicitors, or property within a State, and [2] those who do no more than communicate with customers in the State by mail or common carrier." 386 U.S. at 758. The *Quill* Court's description of *Bellas Hess* as requiring physical presence reflects an apparent assumption, wholly reasonable at the times those cases were decided, that every retailer shipping goods into other States would utilize one of those two business models. On that assumption, *Bellas Hess*'s clear rule that shipments of catalogs and goods into the taxing State could not subject a retailer to tax-collection duties was tantamount to a rule that physical presence was required. The Court simply did not imagine retailers like respondents, who do not have "retail outlets, solicitors, or property within" South Dakota, but whose contacts with South Dakota nevertheless go far beyond "communicat[ing] with customers in the State by mail or common carrier." *Ibid.*

2. E-commerce allows a retailer to "be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Direct Mktg.*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Online retailers frequently engage with consumers in ways that are more like shopping in a physical store than ordering goods from a catalog.

Many retail websites—including those of the respondents in this case—provide virtual showrooms, checkout counters, and even fitting rooms. For example, one of the respondents in this case regularly uses its website to live-stream product demonstrations.[8] The others offer "augmented reality" applications that allow customers "to visualize 3D furniture and [other products] in their home before they buy."[9] Many clothing retailers allow customers to virtually try on clothes by uploading photographs of themselves or by creating digital mannequins that conform to their dimensions. See Fleur Britten, *Brands Embrace An 'Augmented Reality'*, New York Times (Sept. 20, 2011).[10] And websites that do not offer such immersive experiences often contain other features—including 360-degree product views, video demonstrations, personalized shopping lists, real-time customer support, and user reviews—that make

---

[8] See, *e.g.*, YouTube, *Newegg Studios Live: The New 18-Core CPU in Action with Intel and ASUS*, https://www.youtube.com/watch?v=eUitlrykACY (recording of live demonstration that originally aired in September 2017).

[9] Wayfair, *Wayfair's AR-Powered Shopping App Now Available to Tens of Millions of Consumers on iOS 11* 1 (Sept. 19, 2017), http://s2.q4cdn.com/848638248/files/doc_news/Wayfairs-AR-Powered-Shopping-App-Now-Available-to-Tens-of-Millions-of-Consumers-on-iOS-11.pdf; see YouTube, *Overstock.com—ios Augmented Reality*, https://www.youtube.com/watch?v=BMtQ-8maWFk.

[10] http://www.nytimes.com/2011/09/21/fashion/fashion-embraces-augmented-reality-technology.html; see also Nathan Olivarez-Giles, *With AR Shopping Apps Like These, You'll Never Leave Home Again; Gap, Amazon, Lowe's And WayfairView Demonstrate The Benefits Of Augmented Reality*, Wall Street Journal (Jan. 13, 2017), https://www.wsj.com/articles/with-ar-shopping-apps-like-these-youll-never-leave-home-again-1484318206.

the experience of online shopping significantly more interactive than a traditional mail-order catalog.

In other important respects as well, e-commerce more closely resembles brick-and-mortar retail than it resembles commerce undertaken through mail-order catalogs. Traditional mail-order commerce is initiated by the merchant, which mails its catalogs to subscribers to advise them of the goods it is offering for sale. Subscribers then mail back order forms indicating which products they would like to buy, and the merchant ships them the goods. See *Bellas Hess*, 386 U.S. at 754-755. Physical stores and retail websites, by contrast, hold themselves out to the public as places (or virtual places) of general accommodation, where customers initiate transactions by visiting the business's storefront or website, and purchases can be made in real time. E-commerce retailers, like brick-and-mortar retailers, also derive significant benefits from the States that go well beyond those necessary to allow delivery of catalogs or goods, including the cooperative efforts of federal and state governments to build a reliable nationwide broadband infrastructure that has expanded access to the Internet.[11]

Because *Quill*'s narrow holding is limited to traditional mail-order retailers "whose *only* contacts with the taxing State are by mail or common carrier," 504 U.S. at 311 (emphasis added), it does not control the question presented here. An online retailer that maintains a continuous virtual presence in South Dakota has a much more substantial nexus to that State than does

---

[11] See, *e.g.*, Nat'l Telecomms. & Info. Admin., U.S. Dep't of Commerce, *Continuing The Broadband Dialogue With States* (Apr. 29, 2016), https://www.ntia.doc.gov/blog/2016/continuing-broadband-dialogue-states.

a traditional mail-order business. If the presence of a single salesperson or office in a State is a sufficient nexus even under the rule of *Bellas Hess* and *Quill*, see *National Geographic*, 430 U.S. at 556, the operation of an immersive online marketplace that seeks to replicate the experience of shopping in a store, open for business to every state resident 24 hours a day, should be deemed sufficient as well. The Court therefore can reverse the judgment of the South Dakota Supreme Court in this case, while retaining the rule that shipment of catalogs and goods into a State by mail and common carrier, standing alone, is an insufficient ground for requiring an out-of-state retailer to collect sales taxes owed by its customers.

C. If This Court Construes *Quill* To Hold That Only Retailers With A Physical Presence In The Taxing State Can Be Required To Collect State Sales Taxes From Their Customers, *Quill* Should Be Overruled

The parties have litigated this case, and the courts below decided it, on the premise that *Quill*'s holding affirmatively requires a physical presence in a State as a prerequisite to the imposition of state-tax-collection responsibilities. If this Court agrees with that characterization of *Quill*'s holding, it should overrule that decision, and should hold that the virtual presence within a State of retailers engaged in e-commerce is a sufficient basis for requiring them to collect state sales taxes from their customers.

1. *Quill*'s analysis was conceptually flawed from the outset because the Court purported to apply the *Complete Auto* framework—a four-part test designed to determine whether a State may *tax* particular interstate transactions—to the distinct question of whether the State may compel an out-of-state retailer to *collect* the

tax. See pp. 13-15, *supra*. In the present case, moreover, it appears to be undisputed that, consistent with the dormant Commerce Clause, South Dakota may tax respondents' sales to customers in the State and may require the customers to pay that tax. See pp. 15-16, *supra*. Thus, for purposes of answering the question that the *Complete Auto* framework is actually intended to address, respondents' sales to South Dakota customers *do* have the "substantial nexus with the taxing State," 430 U.S. at 279, that *Complete Auto* requires.

As we explain above (see pp. 17-23, *supra*), imposing state-tax-collection duties on out-of-state mail-order and Internet retailers is likewise consistent with the *Pike* balancing framework that governs dormant Commerce Clause analysis of state regulations other than the imposition of taxes. *Quill*'s practical effect is to treat requirements that out-of-state retailers collect state taxes as essentially sui generis, by subjecting them to more demanding dormant Commerce Clause scrutiny than is applied *either* to non-tax regulatory obligations *or* to the actual imposition of state taxes. Cf. *Direct Mktg.*, 814 F.3d at 1149 (Gorsuch, J., concurring) (noting that, even in situations where *Quill* bars States from requiring out-of-state retailers to collect sales and use taxes owed by their customers, States may impose "various notice and reporting obligations" that are "comparable in their severity to [the burdens] associated with collecting the underlying taxes themselves"). The Court in *Quill* identified no plausible rationale for such an approach.

If *Quill* is read to hold that only businesses with a "physical presence" in the taxing State can be required to collect state sales taxes from their customers, its application to Internet retailers will produce particularly

perverse and arbitrary results. Under that approach, a mail-order company that sells $10,000 worth of goods to 300 state residents in a year, and that employs a single employee within the State who works out of his home on matters that are unrelated to those sales, could be required to collect and remit state sales taxes under the logic of decisions like *National Geographic* and *Standard Pressed Steel*, *supra*. The State could not impose the same tax-collection duty, however, on an e-commerce retailer that makes $1 billion in annual sales to ten million state residents, using a website that replicates the immersive experience of being in a physical store, if that retailer has no employees or tangible property within the State. Although the second company's customers could still be required to pay sales taxes on their purchases, the State would lack any effective means of enforcing that obligation. No sound reason exists to retain such an illogical distinction.

2. Stare decisis "is not an inexorable command," and "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991) (citing *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940)). *Quill* is badly reasoned. If *Quill* is read to hold only that shipments of catalogs and goods into the taxing State are insufficient by themselves to support the imposition of state-tax-collection duties, its continuing practical effects are likely to be modest. But if the decision is understood to hold that "physical presence" is required, a reaffirmation of *Quill* would substantially impede state tax collection and would distort retailers' choices of appropriate business models. Those problems are likely to become more severe as e-commerce

expands.[12] Those practical concerns, combined with *Quill*'s serious analytic flaws, would amply justify overruling that decision.

This Court's dormant Commerce Clause jurisprudence has been "fluid," *United States* v. *International Bus. Machs. Corp.*, 517 U.S. 843, 851 (1996), and changes in "the national economy" have often led to "a natural development" in that jurisprudence, *Camps Newfound/Owatonna*, 520 U.S. at 577 n.10. Sensitivity to such developments is consistent with the Court's practical approach that takes account of "economic realities." *Complete Auto*, 430 U.S. at 279; cf. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007) (noting that, in construing the Sherman Act, stare decisis is "not as significant" because common-law rules adopted to implement the statute's general language may "evolve to meet the dynamics of present economic conditions"). Even if *Quill*'s reference to a "physical-presence requirement" is understood to be a holding of the case, the *Quill* Court clearly did not and could not anticipate the manner in which Internet commerce has developed, and the consequent potential for Internet retailers to maintain a pervasive presence within a State despite their lack of employees or tangible property there.

If *Quill* is read to preclude a State from imposing tax-collection duties on an out-of-state retailer who

---

[12] See, *e.g.*, *Quarterly Retail E-Commerce Sales* 2 (noting that e-commerce grew by about 16% in the United States from 2016 to 2017); U.S. Census Bureau, U.S. Dep't of Commerce, *Estimated Annual U.S. Retail Trade Sales—Total and E-Commerce: 1998-2015*, http://www2.census.gov/retail/releases/current/arts/ecommerce.xls (tracing growth of e-commerce sales, from about $5 billion in 1998 to over $340 billion in 2015).

lacks a "physical presence" in the State, that decision should be overruled. The Court could still choose, however, to leave intact *Bellas Hess*'s more limited holding that such duties cannot be premised solely on a traditional mail-order retailer's dispatch of catalogs and goods into the taxing State. That approach would largely avoid the practical problems that a "physical presence" rule would cause, while respecting the reliance interests of the (presumably rare) retailers who have remained within the "safe harbor" that *Bellas Hess* established "for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.'" *Quill*, 504 U.S. at 315 (quoting *Bellas Hess*, 386 U.S. at 758).

D. Congress's Authority To Legislate In This Area Should Not Dissuade The Court From Limiting Or Overruling *Quill*

The dormant Commerce Clause constrains State efforts to regulate interstate commerce only "when Congress has not acted." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). As in *Quill*, the "underlying issue" in this case therefore is "one that Congress has the ultimate power to resolve," 504 U.S. at 318, and Congress may do so regardless of the Court's decision in this case.

Congress's ability to exercise that authority will be enhanced, however, if this Court clarifies the limited nature of *Quill*'s holding. As the course of this litigation illustrates, *Quill* has been widely understood to establish a "physical presence" rule under which an e-commerce retailer's pervasive Internet presence in a State is an insufficient ground for imposition of state-tax-collection duties. If (as we argue above) *Quill*'s actual holding is more limited, this Court's clarification of that fact will

serve a valuable function, both by assisting the States in the administration of their tax laws and by informing Congress of the applicable default rule as it considers these issues further.

If the Court views *Quill*'s reference to a "physical-presence requirement" as a holding of the case, that holding should be overruled. To be sure, this Court is particularly reluctant to overrule precedents that Congress has power to overturn. But the nature of an Internet retailer's presence in the States where its website is accessible is different in kind from any type of "presence" that the Court could have anticipated when *Quill* was decided. Whether *Quill*'s reference to physical presence is viewed as dictum or a holding, it obviously was not written with modern e-commerce in mind. Rather than treating itself as inexorably bound by a decision that resolved that issue only serendipitously, if it resolved the issue at all, the Court should hold that a retailer's Internet presence in South Dakota provides a sufficient basis for requiring it to collect state sales taxes from its customers.

CONCLUSION

The judgment of the Supreme Court of South Dakota should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
ROBERT A. PARKER
Assistant to the Solicitor General
MARK B. STERN
NICOLAS Y. RILEY
Attorneys

MARCH 2018

No. 17-494

In The

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC. AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF THE AMERICAN ACADEMY OF ATTORNEY – CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

AMERICAN ACADEMY OF ATTORNEY – CERTIFIED PUBLIC ACCOUNTANTS, INC.
P.O. Box 706
Warrendale, PA 15095
703-352-8073

March 29, 2018

JAMES H. SUTTON, JR., CPA, ESQ., LLM (TAX)
Counsel of Record
MOFFA, SUTTON, & DONNINI, PA
8875 Hidden River Pkwy.
Suite 230
Tampa, FL 33637
813-775-1231
JamesSutton@FloridaSalesTax.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. SOUTH DAKOTA SIGNIFICANTLY UNDERSTATES THE UNCONSTITUTIONAL BURDENS PLACED ON REMOTE SELLERS TO COMPLY WITH SALES TAX LAWS AND REGULATIONS 3

A. With Almost 10,000 State and Local Jurisdictions in the United States, Sales Tax Compliance is Much More Burdensome Than a Click of the Mouse and Electronically Filed Returns 3

B. With States Having Almost Unlimited Power to Estimate Sales Tax Liabilities, Remote Sellers Face "Guilty Until Proven Innocent" Sales Tax Audits 5

C. By Focusing on "Gotcha Tax Audits," States Target Remote Sellers for Sales Tax Audits, Taking Hundreds of Millions of Dollars a Year from our Nation's Most Valuable Industries 7

TABLE OF CONTENTS – Continued

Page

II. UNLIKE INCOME TAX, SALES TAX IS A TRUST FUND EXPOSING REMOTE SELLERS TO EXTREME CIVIL AND CRIMINAL LIABILITIES (100+ YEARS OF JAIL TIME) FOR SIMPLE BUSINESS FAILURES WITH NO BANKRUPTCY PROTECTION 10

A. States Have Broad Powers to Impose Significant Civil Penalties and Pierce the Corporate Veil for Even Minor Sales Tax Mistakes 11

B. Criminal Punishment for Not Remitting Sales Tax in the Final Months of Business Are Startlingly Harsh 13

C. Remote Sellers Subject to Class Action Lawsuits for Unintentional Over Collection of Sales Tax 14

III. CONGRESS MUST ESTABLISH A UNIFORM SYSTEM OF SALES AND USE TAX REGULATIONS BEFORE STATES CAN BURDEN INTERSTATE COMMERCE 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Complete Auto Transit v. Brady, 430 U.S. 271 (1977) 5

Cunard S.S. Co. v. Lucci, 228 A.2d 719 (N.J. Super. Ct. App. Div. 1967) 16

Leisy v. Hardin, 135 U.S. 100 (1890) 16, 17

National Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967) 7

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

Welton v. Missouri, 91 U.S. 275 (1876) 16

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 3 2

STATUTES

FLA. STAT. § 120.80(14) 16

FLA. STAT. § 212.12(2)(d) 13

FLA. STAT. § 212.12(5)(b) 6

FLA. STAT. § 212.12(6)(b) 6

FLA. STAT. § 212.13(2) 13

FLA. STAT. § 212.15(1) 10

FLA. STAT. § 213.29 12

TABLE OF AUTHORITIES – Continued

Page

NEW YORK TAX LAW § 1145(a)(2) 12

NEW YORK TAX LAW § 1145(j) 12

NEW YORK TAX LAW § 1817(d) 12

NEW YORK TAX LAW § 1817(g) 12

S.D. CODIFIED LAWS § 10-59-34 12

S.D. CODIFIED LAWS § 10-59-55 12

S.D. CODIFIED LAWS § 10-64-2 4

OTHER MATERIALS

Bugliaro v. BJ's Wholesale Club, Inc., Case No. 15-006256 (17th Cir. Ct. Fla. 2015) 15

Minniti v. Pizza Hut of Am., Inc., Case No. 14-23335 (17th Cir. Ct. Fla. 2016) 14

Mohan v. Dell, Case Nos. CGC 03-419192, CJC 05-004442 (Sup. Ct. of Cal., Cty. of San Fran. 2013) 15

Schojan v. Papa Johns Int'l, Inc., Case No. 8:14-cv-1218-T-33MAP (M.D. Fla. 2015) 14

Avalara and Peisner Johnson & Company, *Sales and Use Tax Audits Uncovered: Who gets audited, why they get audited, and the impact on companies* (2017), peisnerjohnson.com/wp-content/uploads/2017/09/Sales-and-Use-Tax-Audits-Sales-and-Use-Tax-Audits-Uncovered_02-14-17.pdf 6

TABLE OF AUTHORITIES – Continued

Page

California State Auditor, State Board of Equalization, *Budget Increases for Additional Auditors Have Not Increased Audit Revenues as Much as Expected* (Mar. 1999) 9

Eric T. Wagner, *Five Reasons 8 out of 10 Businesses Fail* (Sept. 2013) 11

Jared Walczak, Scott Drenkard, & Raymond Roesler, *Sales Tax Rates in Major Cities Midyear 2017*, TAX FOUNDATION (July 2017), https://taxfoundation.org/sales-tax-rates-major-cities-midyear-2017/ 4

Sales Tax DataLINK, *Statute of Limitations and Sales Tax* (June 2012), http://www.salestaxdatalink.com/blog/statute-of-limitations-and-sales-tax 11

South Dakota Department of Revenue, 2016 Annual Report 8

Statistics of Florida's audit process provided to AAA-CPA counsel of record, Moffa, Sutton, & Donnini, upon Freedom of Information Request 8

Streamlined Sales Tax Governing Board, Inc., *How many states have passed legislation conforming to the Agreement?* http://www.streamlinedsalestax.org/index.php?page=gen6 17

Thomson Reuters, *Damned if You Collect, Damned if You Don't: Retailers Caught Between Consumer Class Action and Qui Tam Claims*, JOURNAL OF MULTISTATE TAXATION AND INCENTIVES (Vol. 24, No. 7, Oct. 2014) 15

INTEREST OF *AMICUS CURIAE*[1]

Amicus is the American Academy of Attorney – Certified Public Accountants, Inc. ("AAA-CPA"), a not-for-profit corporation formed in 1964. The AAA-CPA has members located throughout the United States. Every member has, at some time in his or her career, been licensed as both an attorney and a certified public accountant.

AAA-CPA members, with both accounting and law backgrounds, have unique perspectives on business and the courts. At the same time, a significant number of the AAA-CPA members have devoted their careers to the fields of federal and state tax law, representing a very wide variety of industries. As such, AAA-CPA members have first-hand knowledge of the challenges facing a business when having to engage in multijurisdiction sales tax and use tax compliance and just how difficult it is for a business to defend against sales tax audits and assessments. Because of these qualifications, AAA-CPA has a compelling interest in this Court's ruling.

---

[1] Pursuant to Supreme Court Rule 37.2, Petitioner and Respondents have granted blanket consent to *amicus* briefs. Letters are on file with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Petitioner, South Dakota ("South Dakota" or "State") attempts to persuade this Court that a sales tax economic nexus law merely requires remote sellers to collect sales tax and such compliance is both simple and free. What's amazing is that everything in this last sentence is wrong. When a remote seller is found to have nexus, the seller must not only begin to collect sales tax for that state, but the business will also become liable for those taxes. That means the remote seller is liable for every mistake and missing or incorrect documentation.

The purpose for adding the Commerce Clause to the United States Constitution[2] was to prevent a state from taxing and regulating interstate commerce purely for the benefit of increasing its own state tax revenue without regard for the economic well-being of the country. South Dakota, claiming a dire need for revenue, has asked this Court to allow a broad jurisdictional reach over remote sellers to collect taxes that the State's own citizenry has been unwilling to pay. South Dakota's blatant disregard for the real and complex burdens inherent in multistate sales tax compliance, simply for the sake of increasing state tax revenue, is the epitome of what the Commerce Clause is designed to prevent.

The AAA-CPA respectfully requests this Court consider the sales tax compliance burdens discussed

---

[2] U.S. CONST. art. I, § 8, cl. 3.

below that will be imposed on remote sellers if *Quill*[3] is overturned. The vast expansion of sales tax jurisdictions and the growing complexity of sales tax laws over the last fifty years, have made the burdens of multistate sales tax compliance greater now than when this Court originally ruled that state laws imposing taxation on retailers with no physical presence in the state violated the Commerce Clause.

ARGUMENT

I. SOUTH DAKOTA SIGNIFICANTLY UNDERSTATES THE UNCONSTITUTIONAL BURDENS PLACED ON REMOTE SELLERS TO COMPLY WITH SALES TAX LAWS AND REGULATIONS.

A. With Almost 10,000 State and Local Jurisdictions in the United States, Sales Tax Compliance is Much More Burdensome Than a Click of the Mouse and Electronically Filed Returns.

South Dakota raises the same argument made in *Quill*, that advances in technology will ease the burden of complying with the multitude of tax-hungry jurisdictions. However, this argument fails to consider that the sales and use tax laws are constantly growing in the number of taxing jurisdictions and the complexity of laws to determine what is, and what is not, taxable. To make matters more complicated, these laws and

[3] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

regulations are regularly amended, altered by agency rulings, and re-interpreted by the courts. If South Dakota's statute[4] is held constitutional, then remote sellers will have to keep up with the sales and use tax laws and regulations in not only forty-five states,[5] but also in nearly 10,000 individual jurisdictions[6] that have their own laws and regulations. Many of the local jurisdictions even require their own sales tax returns. Without a physical presence in the states, staying current with these sales tax laws and regulations would be, by itself, a significant and costly burden on multistate businesses.

Advances in software have helped businesses determine sales tax rates by inputting their customer's zip code. But math has never been the hard part of taxation. The difficulty of any tax is determining what is taxable, what is not taxable, what steps and documentation are required to make a sale exempt, and the laborious process of making these decisions before each transaction. Software does not make these decisions for remote sellers. Furthermore, remote sellers become liable for every mistake and missing piece of documentation. The states, including South Dakota, know just how difficult the sales tax compliance process is for

---

[4] S.D. CODIFIED LAWS § 10-64-2 (Supp. 2017).

[5] Alaska, Delaware, New Hampshire, Montana, and Oregon do not have a state sales tax, although some local jurisdictions do have a sales and use tax in some of these states.

[6] *See* Jared Walczak, Scott Drenkard, & Raymond Roesler, *Sales Tax Rates in Major Cities Midyear 2017*, TAX FOUNDATION (July 2017), https://taxfoundation.org/sales-tax-rates-major-cities-midyear-2017/.

remote sellers, which is why they target out of state businesses for sales tax audits.

In *Complete Auto Transit v. Brady*, this Court laid out a four-prong test for the constitutionality: there must be substantial nexus with the taxing State, fairly apportioned, not discriminatory towards interstate commerce, and is fairly related to the services provided by the State.[7] South Dakota's new law, however, violates these principles. For example, products transferred electronically into the state are subject to the sales tax under the new law. This could be narrowly tailored to mean electronic products delivered to the end consumer are subject to the sales tax, or could be more broadly interpreted by the state to mean electronic products merely passing through a server located in the state are now subject to the sales tax. In the case of the latter, this could potentially mean that the same sale could be taxed by South Dakota and any number of the thousands of jurisdictions that impose a sales tax, without any apportionment of the sale or limit on who can subject the sale to sales tax.

B. With States Having Almost Unlimited Power to Estimate Sales Tax Liabilities, Remote Sellers Face "Guilty Until Proven Innocent" Sales Tax Audits.

The States have legislated to themselves the power to estimate the sales tax liabilities of a business if the State determines or suspects that all the records

---

[7] *Complete Auto Transit v. Brady*, 430 U.S. 271 (1977).

have not been provided.[8] These estimating techniques often involve very high estimated assessments that have the statutory presumption of correctness. The taxpayer has the burden to establish why the assessment is incorrect to avoid paying tax,[9] resulting in a "guilty until proven innocent" tax on businesses. To overcome an audit and likely assessment, a business must maintain meticulous documents, hire professional counsel licensed and qualified to respond to the audit, spend business hours on voluminous auditor requests, and potentially have a hearing on disputed issues. On average, a negative audit costs small to medium size businesses over one hundred thousand dollars.[10] Given that an audit often takes years to get resolved, remote sellers will spend substantial time and resources responding to taxing authorities, rather than building a successful business.

Under an economic nexus regime, remote sellers would, therefore, absorb the time and significant expense of complying with each jurisdiction's regulations, and responding to multiple sales and use tax audits every year. These burdens would lead such retailers to simply stop engaging in out-of-state sales. This hinderance on interstate commerce in favor of

---

[8] *See, e.g.*, FLA. STAT. § 212.12(5)(b), (6)(b) (allows the state to use "best available information" to estimate liabilities).

[9] *See, e.g.*, FLA. STAT. § 120.80(14).

[10] Avalara and Peisner Johnson & Company, *Sales and Use Tax Audits Uncovered: Who gets audited, why they get audited, and the impact on companies* (2017), peisnerjohnson.com/wp-content/uploads/2017/09/Sales-and-Use-Tax-Audits-Sales-and-Use-Tax-Audits-Uncovered_02-14-17.pdf.

in-state economic interests is exactly the harm the Commerce Clause is designed to prevent.[11]

C. By Focusing on "Gotcha Tax Audits," States Target Remote Sellers for Sales Tax Audits, Taking Hundreds of Millions of Dollars a Year from our Nation's Most Valuable Industries.

South Dakota fails to mention in its brief that years after a sale has taken place and the sales tax collected has been remitted, the remote seller will be subject to a sales tax audit by every state where the company is deemed to have economic nexus. Sales tax audits are conducted every three to five years and cover as many years as the state's statute of limitations will allow. South Dakota does not raise in its brief the vast resources that multistate businesses devote to sales tax audits in multiple states. Nor does South Dakota mention that states target companies that are expected to be making mistakes in sales tax compliance. With different rules in each of the thousands of jurisdictions, it is easy for remote sellers to miss small differences in the sales tax exemption requirements. These mistakes often involve documenting and proving that a sale of a good or service is tax-exempt, which

---

[11] *National Bella Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 759-60 (1967) (a burden on interstate commerce results from the "many variations in rates of tax, in allowable exemptions, and in administrative and record keeping requirements [that] could entangle [a mail order house] in a virtual welter of complicated obligations.") (footnotes omitted).

is something the "free" software does not do for companies. As discussed above, when a remote seller cannot prove a sale is exempt, then the remote seller is liable for the tax even though the tax was never collected from the customer.

South Dakota also does not admit that all states with a sales tax target out of state companies with high exempt sales. Tax professionals generally refer to these as "gotcha tax audits." The phrase is used when a company makes tax-exempt sales but technically fails to qualify for the exemption because it either uses the wrong form, is missing a notary, or has some other jurisdictionally specific defect. These gotcha tax audits result in hundreds of millions of dollars of sales tax assessments against a wide variety of industries in the United States. Taxes that were never collected from customers.

South Dakota alone generates an average of more than $10,000,000 per year from subjecting remote sellers to sales tax audits.[12] Florida averages over $200,000,000 per year auditing businesses with approximately two-thirds coming from audits of companies outside Florida.[13] Even as far back as 1998, the California legislature was allocating funds to sales tax auditors based on an expected rate of return equal to $5 of sales tax assessed from businesses to $1 spent on

---

[12] *See* South Dakota Department of Revenue, 2016 Annual Report, pg. 35.

[13] Statistics of Florida's audit process provided to the AAA-CPA counsel of record, Moffa, Sutton, & Donnini, PA, upon Freedom of Information Request.

auditors, collectively taking more than $409 million of tax assessments from businesses that year alone.[14] In other words, states consider auditing out of state companies to be revenue generators for the state. If economic nexus laws like the one enacted by South Dakota are upheld by this Court, then remote sellers across the U.S. will become the targets of sales tax audits even though no employee or owner of the company resides or votes in the remote states. What should be alarming is that, manufacturers, our nation's most prized industry, is a prime target of these "gotcha tax audits" because almost all sales by manufacturers are supposed to be tax-exempt.

If South Dakota's economic nexus law is upheld, wholesalers and manufacturing companies must either spend enormous resources to hire tax professionals and properly document tax-exempt sales in almost 10,000 jurisdictions or risk incurring substantial taxes, penalties, and interest for transactions that were never supposed to be taxed in the first place. This is the essence of burdening interstate commerce and such costs are likely to be a deciding factor in whether a manufacturing company opts to locate in the United States in the first place. If burdens placed on manufacturers on transactions that were never intended to be taxed affect whether manufacturing jobs are created in the U.S., would this not be a decision required to be

---

[14] California State Auditor, State Board of Equalization, *Budget Increases for Additional Auditors Have Not Increased Audit Revenues as Much as Expected* (Mar. 1999).

left to Congress under the Dormant Commerce Clause?

Of upmost importance to this case, under the bright-line physical presence test of *Quill*, wholesalers and manufacturing companies only have to comply with audits in states where they are located and will not be subject to "gotcha tax audits" by remote states. This is one of the many reasons why this Court's physical presence test is well aligned with the economic burdens of sales tax.

II. UNLIKE INCOME TAX, SALES TAX IS A TRUST FUND EXPOSING REMOTE SELLERS TO EXTREME CIVIL AND CRIMINAL LIABILITIES (100+ YEARS OF JAIL TIME) FOR SIMPLE BUSINESS FAILURES WITH NO BANKRUPTCY PROTECTION.

Unlike income tax, sales tax is considered property of the state held in trust by the remote seller at the moment the sales tax is collected from customers.[15] This slight difference has profoundly different consequences in how remote sellers and their owners are responsible for sales tax liabilities of the business. Many states impose severe civil and criminal penalties for minor violations of sales and use tax laws. While income taxes many be dischargeable or compromised in bankruptcy, the trust fund liabilities of sales tax are not. Therefore, even if a retailer manages to integrate software, hire enough qualified personnel to respond to

---

[15] *See, e.g.*, FLA. STAT. § 212.15(1).

audits, handle the research of what is subject to tax in every sales tax jurisdiction, and prepare the sales tax returns across the country, the company and its owners must still contend with potential liability for minor mistakes or business failures. When an average of 8 out of 10 businesses fail within five years,[16] state laws imposing harsh civil and criminal penalties for sales tax on the owners of a failed business can have a profound impact on interstate commerce.

The statute of limitations for sales tax audits in most states is limited to three years and six years for substantial underreporting.[17] However, the statute of limitations varies from state to state. Similar to income tax returns, if no return is filed, states have an unlimited statute of limitations. This means that if economic nexus is approved by this court, then every remote seller could have a potential undisclosed sales tax liability in thousands of jurisdictions just because they accept orders from around the country.

A. States Have Broad Powers to Impose Significant Civil Penalties and Pierce the Corporate Veil for Even Minor Sales Tax Mistakes.

If South Dakota's economic nexus statute is held to be constitutional, then remote sellers and their

---

[16] *See* Eric T. Wagner, *Five Reasons 8 out of 10 Businesses Fail* (Sept. 2013).

[17] Sales Tax DataLINK, *Statute of Limitations and Sales Tax* (June 2012), http://www.salestaxdatalink.com/blog/statute-of-limitations-and-sales-tax.

owners will be at the mercy of 45 states' harsh civil penalties often for simple mistakes in sales tax compliance.

For example, in Florida each owner and responsible party is subject to a personal penalty equal to 200% of the sales tax owed by a business, which effectively pierces the corporate veil.[18] Florida is not unique with harsh sales tax laws. New York also pierces the corporate veil to impose a 200% of tax penalties on the responsible parties when the business is not able to remit sales tax.[19] It is a misdemeanor in New York for simply failing to show sales tax as a separate line item on an invoice.[20] New York also imposes fines up to $1,000.00 for simply failing to make records available in "auditable" form; and criminal penalties for failure to keep required records.[21] South Dakota imposes a $10,000 penalty for each return in which the sales tax data is deemed to have been altered.[22] If you challenge a South Dakota tax assessment in court and the position is "not justified," then the taxpayer owes the legal fees of the State.[23]

When a business is running at a loss and sales tax proceeds are kept in the same bank account with other

---

[18] FLA. STAT. § 213.29.

[19] N.Y. TAX LAW § 1145(a)(2).

[20] N.Y. TAX LAW § 1817(d).

[21] N.Y. TAX LAW § 1145(j); N.Y. TAX LAW § 1817(g).

[22] S.D. CODIFIED LAWS § 10-59-55 (Supp. 2017).

[23] S.D. CODIFIED LAWS § 10-59-34 (Supp. 2017).

funds,[24] then simply paying the rent or paying employees results in sales tax proceeds unintentionally being spent each month. When the business fails after several months of not being able to pay sales tax, the act of unintentionally using sales tax trust funds to pay business bills is enough to have the harsh penalties imposed. The same situation is enough in most states to evoke criminal laws as well.

B. Criminal Punishments for Not Remitting Sales Tax in the Final Months of Business Are Startlingly Harsh.

The criminal punishments inherent in sales tax compliance are hazardous to business owners because sales tax is a trust fund liability not dischargeable in bankruptcy. The simple act of spending sales tax on business expenses and not having these funds available to timely remit is considered a criminal act. For example, in Florida, it is a felony, punishable by up to 5 years imprisonment and a $5,000.00 fine for collecting and not remitting merely $301 of sales tax and up to 30 years for not remitting $100,000 of sales tax.[25] Even in South Dakota, the failure to pay sales tax just twice in South Dakota is a felony punishable with up to two years in prison and $4,000 in fines. For a remote seller collecting sales tax in 45 states, a business

---

[24] There is no requirement in any state to place sales tax into a separate bank account.

[25] FLA. STAT. § 212.12(2)(d)2.; FLA. STAT. § 212.13(2).

failure owing sales tax could result in over 100 plus years of potential jail sentence spread over multiple states.

These severe penalties for relatively minor mistakes highlight the importance of why businesses should not be subject to tax in a jurisdiction unless they maintain a physical presence there. If South Dakota's statute is held to be constitutional, the threat of civil and criminal penalties will either deter businesses from engaging in multijurisdiction commerce or will subject the owners and responsible parties to harsh, unforeseen civil and criminal repercussions.

C. Remote Sellers Subject to Class Action Lawsuits for Unintentional Over Collection of Sales Tax.

Remote sellers not only have to worry about civil and criminal penalties for not collecting and remitting enough sales tax, but they also now must worry about class action lawsuits from customers for unintentionally collecting too much sales tax. Companies such as Papa John's Pizza,[26] Pizza Hut,[27] B.J.'s Wholesale

---

[26] *Schojan v. Papa Johns Int'l, Inc.*, Case No. 8:14-cv-1218-T-33MAP (M.D. Fla. 2015) (sued for collecting sales tax on delivery fees; settled out of court).

[27] *Minniti v. Pizza Hut of Am., Inc.*, Case No. 14-23335 (17th Cir. Ct. Fla. 2016) (sued for collecting sales tax on delivery fees; settled out of court).

Club,[28] Dell,[29] and a slew of other companies have all been hit with class action lawsuits for misunderstanding sales tax laws and over collecting sales tax.[30] These lawsuits are over pennies of tax per customer and the taxes have all been remitted to the states. Nonetheless, courts are allowing the suits to continue with enormous legal costs to the defending companies. If companies the size of these cannot get sales tax collection correct with software, then South Dakota's assertion that advances in technology make sales tax simple must not be believed. If this Court allows the substantial nexus requirement to be met by economic nexus for sales tax purposes, then every remote seller in the U.S. could be subject to potential class action suits in multiple jurisdictions for minor mistakes in sales tax compliance.

---

[28] *Bugliaro v. BJ's Wholesale Club, Inc.*, Case No. 15-006256-CA-01 (17th Cir. Ct. Fla. 2015) (sued for not properly calculating sales tax on transactions with coupons).

[29] *Mohan v. Dell*, Case No. CGC 03-419192, CJC 05-004442 (Sup. Ct. of Cal., Cty. of San Fran. 2013) (sued for not properly charging use tax on purchases of optional service contracts; settled out of court).

[30] *See* Thomson Reuters, *Damned if You Collect, Damned if You Don't: Retailers Caught Between Consumer Class Action and Qui Tam Claims*, JOURNAL OF MULTISTATE TAXATION AND INCENTIVES (Vol. 24, No. 7, Oct. 2014).

III. CONGRESS MUST ESTABLISH A UNIFORM SYSTEM OF SALES AND USE TAX REGULATIONS BEFORE STATES CAN BURDEN INTERSTATE COMMERCE.

The subject matter of this lawsuit requires a uniform system between states. In such circumstances, the powers under the Commerce Clause vest exclusive authority in Congress to control the matter.[31] A significant, manifest burden to interstate commerce would result from granting states the ability to, essentially overnight, audit and assess sales and use tax based on the economic presence of a business. Because a uniform system is necessary, allowing states to control sales tax based on economic presence would lead to an unlawful encroachment upon the regulation power conferred solely with Congress.[32] The refusal of Congress to pass legislation since *Quill* should not be the basis for allowing states to encroach upon the regulation power vested fully in Congress.[33]

---

[31] *Leisy v. Hardin*, 135 U.S. 100, 108-09 (1890) ("Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached by the States.").

[32] *Cunard S. S. Co. v. Lucci*, 228 A.2d 719 (N.J. Super. Ct. App. Div. 1967) (allowing states to regulate subject matter that is national in scope would lead to conflicting and different regulations. Because of this undue burden, the Commerce Clause excludes attempted state regulation).

[33] *Welton v. Missouri*, 91 U.S. 275 (1876) (Congressional inaction "is equivalent to a declaration that interstate commerce shall be free and untrammeled.").

Some states have recognized the need for uniform sales and use tax regulations, as evidenced by the development of the Streamlined Sales and Use Tax Agreement ("SSUTA"). The SSUTA is a multistate effort to standardize and streamline the administration of sales tax. However, although SSUTA has made progress in reducing compliance burdens, only twenty-four states, representing 33% of the U.S. population have passed legislation conforming to SSUTA.[34] The lack of conformity among States again shows the need for a uniform system of regulation prior to overruling *Quill*. Because uniform regulation is necessary, the burden is on Congress to pass legislation.[35]

CONCLUSION

The AAA-CPA believes as this Court did in *Quill* that this matter is much better left for Congress to create a law that takes the interests of all parties into consideration within the intent of the Commerce Clause. Therefore, the AAA-CPA respectfully requests that this Court affirm the judgment of the Supreme Court

---

[34] Streamlined Sales Tax Governing Board, Inc., *How many states have passed legislation conforming to the Agreement?* http://www.streamlinedsalestax.org/index.php?page=gen6.

[35] *Leisy*, 135 U.S. at 108-09.

of South Dakota by upholding *Quill* and the bright-line physical presence test.

Respectfully submitted,

AMERICAN ACADEMY OF ATTORNEY – CERTIFIED PUBLIC ACCOUNTANTS, INC.
P.O. Box 706
Warrendale, PA 15095
703-352-8073

March 29, 2018

JAMES H. SUTTON, JR., CPA, ESQ., LLM (TAX)
Counsel of Record
MOFFA, SUTTON, & DONNINI, PA
8875 Hidden River Pkwy.
Suite 230
Tampa, FL 33637
813-775-1231
JamesSutton@FloridaSalesTax.com

SYDNEY S. TRAUM, ESQ., CPA, LLM (TAX)
55 S. Prospect Dr.
Coral Gables, FL 33133
305-496-3845
sydtraum@attorney-cpa.com

MICHAEL E. BRESLIN, CPA, ESQ.
130 W. 57th St.
Suite 1A
New York, NY 10019
212-867-0707
Mbreslin@FulServGroup.com

MICHAEL Y. GOLDBERG, CPA, ESQ.
25 W. Middle Lane
Rockville, MD 20850
301-838-3317
mgoldberg@steinsperling.com

MARK KRASNER, CPA, ESQ.
800 Silverado St.
Second Floor
La Jolla, CA 92037
858-551-2440
MKranser@BKFLaw.com

JERRY DONNINI, ESQ., LLM (TAX)
100 W. Cypress Creek Rd.
Suite 930
Fort Lauderdale, FL 33309
954-642-9390
JerryDonnini@FloridaSalesTax.com

LEOR M. HAFUTA, CPA, ESQ., LLM (TAX)
15760 Ventura Blvd.
Suite 801
Encino, CA 91436
818-907-6677
LHafuta@CanLLP.com

EDWIN SADIK, CPA, ESQ.
6806 Brookeshire Dr.
West Bloomfield, MI 48322
248-288-1787
ESadik@GMail.com

JONATHAN D. MARSEGLIA, CPA, ESQ., LLM (TAX)
1342 Ketzal Dr.
Trinity, FL 33884
727-576-1245
ESLLawProf@gmail.com

JONATHAN TAYLOR, ESQ.
100 W. Cypress Creek Rd.
Suite 930
Fort Lauderdale, FL 33309
954-234-2884
JonathanTaylor@FloridaSalesTax.com

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On A Writ Of Certiorari To The Supreme Court Of South Dakota

AMICUS CURIAE BRIEF OF AMERICAN CATALOG MAILERS ASSOCIATION SUPPORTING RESPONDENTS

EDWARD J. BERNERT
Counsel of Record
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, Ohio 43215-4138
ebernert@bakerlaw.com
614.462.2687

THOMAS D. WARREN
BAKER & HOSTETLER LLP
127 Public Square
Suite 2000
Cleveland, Ohio 44114-1214

April 4, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 8

A. Catalog sellers continue to meet the needs of the traditional mail order customer while adapting to the internet 8

1. Payments by check present difficulties when complying with sales tax laws 8

2. Catalog retailers sell diverse types of products, serve differing customer needs, and operate in varying ways 8

B. Complying with sales tax collection requirements is hard 10

1. The proper evaluation of the taxable status of sales remains difficult because of the inherent complexity of the sales tax 10

2. Sales tax returns require frequent filings 14

3. Reporting errors are costly to sellers and consumers 14

4. Administrative costs are high especially for smaller sellers 16

C. The Commerce Clause prohibits the imposition of excessive burdens on interstate commerce 17

TABLE OF CONTENTS – Continued

Page

D. Applying principles of economic nexus destroys the concept of a safe harbor and pushes off all of the compliance burdens on interstate commerce 18

E. Protecting interstate commerce is not the role of the states 18

F. Catalog mailers have a legitimate concern that a reversal of *Quill* could be applied to prior transactions causing real hardships to these sellers 21

G. The *Quill* decision should not be limited to the use of mail and common carriers 23

H. The multiplicity of jurisdictions and their varying compliance requirements impose demonstrable burdens on catalog companies that are not addressed by the states 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) 17

National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) ..... *passim*

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

STATE CONSTITUTIONAL PROVISIONS

Ohio Constitution, Article II, Section 28 21

STATE STATUTES

Ohio Rev. Code § 5741.01(I)(1) 21

Ohio Rev. Code § 5741.16 22

Ohio Rev. Code § 5703.58 22

SDCL § 10-64-2 19

Wash. Rev. Code § 82.08.0532 19

OTHER AUTHORITIES

2017 MA H.B. 2 (NS) 14

Alabama Dep't of Revenue, *Alabama 2018 Back to School Sales Tax Holiday Participating Localities*, https://revenue.alabama.gov/sales-use/sales-tax-holidays/alabama-2018-back-to-school-sales-tax-holiday-participating-localities/ (last visited Mar. 31, 2018) 11

TABLE OF AUTHORITIES – Continued

Page

Am. Sub. H.B. No. 231, 142 Ohio Laws, Part II, 2635, 2918-2921 22

Interpretation Opinions, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=alias-9 (last visited Mar. 30, 2018) 11

Mary Kay Martire et al., *Damned if You Collect, Damned if You Don't: Retailer Caught Between Consumer Class Action and Qui Tam Claims*, 24-OCT J. of Multistate Tax'n and Incentives 36 (2014) 15

Problem: A patchwork of complicated nonresident income tax laws, Mobile Workforce Coalition, http://www.mobileworkforcecoalition.org/problem (last visited Mar. 30, 2018) 19

United States Postal Service, *Still Relevant: A look at How Millennials Respond to Direct Mail* (2017), https://www.uspsdelivers.com/still-relevant-a-look-at-how-millennials-respond-to-direct-mail/ 2

United States Gov't Accountability Office, *SALES TAXES: States Could Gain from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* at 15-24 (Nov. 2017) 5, 16, 25, 26

INTEREST OF *AMICUS CURIAE*[1]

The American Catalog Mailers Association ("ACMA") is a nonprofit organization founded in 2007 to advocate for catalog marketers and their suppliers. ACMA is the leading trade association in the United States representing the interests of businesses, individuals, and organizations engaged in and supporting catalog marketing.

More than one-half of Americans shop using catalogs. More than 9,000 companies use catalogs to make sales, and many of these sellers are small and medium-sized entities. A requirement that sellers must file sales tax returns in every state in which they have customers would create barriers to entry and would place excessive burdens on those sellers engaged in interstate commerce.

Catalog sales remain a vital part of the economy. They represent the most universal source of goods, especially in rural areas, which are often far removed from stores and typically not wired for high-speed internet. Catalogs also attract customers concerned with online transactional safety because the catalog sellers generally provide both mail and phone ordering capabilities in addition to online ordering. Catalogs meet the needs of shut-ins, handicapped persons or older consumers. But, the use of catalogs is not limited to

---

[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than *amicus* and its counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

older Americans. Baby boomers buy more from catalogs per capita than any other generation, and catalogs continue to be very relevant even among those comfortable with the digital age as studies show that millennials use catalogs when making purchases.[2]

Catalogs are particularly useful for presenting new products not yet known to consumers, and for providing better and more-detailed knowledge of certain types of products. But specialty retailers, which could not operate in storefronts because their products appeal to a small segment of the market, will struggle to comply with multiple taxing jurisdictions. Catalogs continue to serve the traditional markets, but are also used in combination with other means of selling products. Catalogs are also associated with the internet in a blend of old and new. In the real world of the small- and medium-sized catalog company, sales tax compliance remains a particular challenge that cannot be fixed by software.

The overwhelming burdens that compliance with the laws of multiple states and localities impose for smaller and medium-sized sellers are not adequately addressed by the Petitioner and its *amici* ("the states"). Just one example of how the states fail to depict the catalog market with accuracy is that the states assume that checks are no longer used in making sales, but that is untrue. Some catalog sellers continue to receive

---

[2] See United States Postal Service, *Still Relevant: A look at How Millennials Respond to Direct Mail* (2017), https://www.uspsdelivers.com/still-relevant-a-look-at-how-millennials-respond-to-direct-mail/.

orders by mail accounting for as much as 35% of all of their sales, with many of these orders paid by check. The receipt of checks presents special challenges in complying with the tax rules of multiple jurisdictions as described below. But the states fail to acknowledge, much less confront, the many existing challenges like these facing catalog companies if the physical presence standard is abrogated.

SUMMARY OF ARGUMENT

The authority of the states and their many localities to tax interstate commerce is unquestioned. But the Commerce Clause prohibits actions that create excessive burdens impeding interstate commerce. As this Court said in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992): "the 'substantial-nexus' requirement is not, like due process' 'minimum-contacts' requirement, a proxy for notice, but rather a means for *limiting state burdens* on interstate commerce." 504 U.S. at 313 (emphasis added).

The states do not deny that burdens exist even today for retailers selling in interstate commerce. See Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 9 ("For very small sellers these fixed costs [of collection and remittance] alone may be prohibitive."). The essence of the states' argument, however, is that the time has now come for interstate commerce to shoulder the burdens arising from the inherent complexity and uncertainty of the

sales tax collection process across multiple jurisdictions and that the states should be released from further efforts at tax simplification.

In particular, the states argue that the physical presence safe harbor – *i.e.*, the need for the seller to have some physical presence in the state constituting more than a slightest presence before the obligation to collect sales tax applies – should be rejected. The states propose three alternatives, none of which protects remote sellers:

1. Abandon any safe harbor altogether and permit collection responsibility whenever sellers have customers in the state and the remote sellers will simply have to deal with the burdens imposed on that collection responsibility;

2. Employ voluntary state-level sales volume standards, unique to each state, to protect sellers chosen for relief by each state; or

3. Abandon any national safe harbor and address any claims of burdens by remote sellers on a case-by-case basis in state-level judicial, administrative, or legislative proceedings, *i.e.*, let the states identify and deal with any burdens asserted by remote sellers.[3]

---

[3] See Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 17.

Tax systems by their nature are complex. The varied sales tax collection schemes applied by the states and localities would subject catalog companies to not only new and overwhelming collection burdens, but also additional liabilities for under-collection or to class action plaintiffs for over-collection. Good faith attempts at compliance are not enough in the face of tax audits or class action lawsuits. And, the administrative costs to comply with the ever-changing laws are real and substantial.[4]

The Streamlined Sales and Use Tax Agreement ("SSUTA") is relevant to the analysis because it reveals the inherent complexity in the sales tax collection process. Formed in 1999, SSUTA remains very much a work in progress. The Agreement (a) is applicable only to a third of the population of the United States[5] and (b) has not been adopted in any of the states that permit localities to administer a tax regime separately from the state. Of most concern, if *Quill* were overruled, member states of the SSUTA cannot be expected or required to continue to use the SSUTA

---

[4] *Compare* Br. for Colorado and 40 Other States, Two United States Territories, and the District of Columbia as Amici Curiae Supporting Pet'r at 22 (contending retailers' "burdens of collecting have been all but eliminated") *with* United States Gov't Accountability Office, *SALES TAXES: States Could Gain from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* at 15-24 (Nov. 2017) (analyzing the costs and exposure for business in collecting taxes on all remote sales) ("GAO Report").

[5] See GAO Report at 18 (noting that twenty-four states have passed legislation to conform to the SSUTA and that many of the largest states in terms of population are not fully participating).

simplification efforts and non-participating states and localities cannot be expected to join the project, thereby exacerbating an already complex situation and ending any realistic hope of a uniform taxing standard.

Overruling *Quill* would not only discourage efforts at uniformity, but it would also expose catalog retailers to significant past lability for transactions that already have occurred. Contrary to the states' arguments, the states most likely would apply the expanded grant of authority to require sellers to pay sales tax for prior transactions. The states cannot commit to prospective application only. Current laws on the books of some of the states permit collection of taxes for prior transactions using standards beyond what *Quill* allows. Assessments based on these laws would not be applying the law retroactively because the state laws already exist. Moreover, state constitutional and statutory law will be cited by the states as preventing them from disregarding and not enforcing the state laws that predate the Court's decision in this appeal.

The argument advanced by the United States that the holdings in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) and *Quill* should be confined to sales made solely by mail or common carrier[6] does not address sellers' concerns and should be rejected for two reasons. First, that rule would reflect the establishment of an artificial, non-economic

---

[6] See Br. for the United States as Amicus Curiae Supporting Pet'r at Sec. B.

standard without any practical significance. Second, such a limited application of *Quill* evades, rather than confronts, the burdens placed on those selling in interstate commerce. Sellers using catalogs are a hybrid of the mail order companies of the past and sellers using the internet. The United States' argument would exacerbate, rather than alleviate, the burdens for catalog sellers.

In 2018, the complexity of the process of complying with sales (and use) taxes in the United States remains burdensome. In many ways, the nationwide sales tax system has actually become dramatically *more* complex. In comparison to the 2,300 local taxing jurisdictions at the time of *National Bellas Hess*, and the 6,000 taxing jurisdictions at the time of *Quill*, now more than 12,000 state and local jurisdictions exist in the United States that impose a sales or use tax. The classification issues between taxable and exempt sales and complying with extensive and changing procedural requirements remain serious problems for catalog retailers. Changing the law with respect to sales tax collection responsibility will add significant additional costs to be borne by sellers. Catalog sellers continue to need real simplification in the collection process and appropriate safe harbors.

ARGUMENT

A. Catalog sellers continue to meet the needs of the traditional mail order customer while adapting to the internet.

1. Payments by check present difficulties when complying with sales tax laws.

An important market remains for customers – principally older Americans – who use mail-in or telephone orders and make payment by check. On average, 9% of catalog purchases are made by mailed-in orders, and for some catalog sellers, mailed-in orders account for more than 35% of their sales. Many of these mailed-in orders include a check for payment. Payment by check thus continues to be a significant part of the catalog companies' business. The receipt of checks means that if the customer incorrectly determines the taxable or exempt status of the purchase or the applicable tax rate on the order form, the seller is confronted with a difficult task. When the customer underpays the tax, the seller must do one of the following: (a) return the check to the customer, (b) absorb the loss and pay the additional tax due directly, or (c) issue an additional bill for the balance due. Normally, the amount at issue ensures that it would not be economical to seek the underpayment from the customer so the seller picks up the tax. Cumulatively, the small underpayments become an economic burden on the sellers, especially for those with small profit margins. This problem is greatly magnified if *Quill* were to be overruled.

Whenever overpayments occur, the seller must either pay back the tax to the customer or overpay the state or localities. Under no circumstances can the seller keep that overpayment, including to offset underpayments from other customers: state laws prohibit retention of sales tax collected under any circumstances. For their part, consumers realistically cannot seek refunds for overpayments because of the time and difficulty of seeking refunds under state laws.

2. Catalog retailers sell diverse types of products, serve differing customer needs, and operate in varying ways.

Many different kinds of catalog companies sell to many different kinds of customers. A seller may target a small segment of the overall market, but across numerous jurisdictions. These specialty retailers need to reach the entire country and could not operate with storefronts. They provide specialized attention to customers, and the orders may change based on the back and forth discussion. As the goods and services become more specialized, the classification issues as to whether some or all of the products are taxable become even more difficult.

The suggestion that sellers are confined solely to mail or telephone orders on one hand or the use of the internet on the other does not reflect reality. Catalog companies' customers use both catalogs and websites. The common issue among the various marketing channels is that complexity and uncertainty affect all

sellers in interstate commerce making compliance difficult, risky, and expensive.

B. Complying with sales tax collection requirements is hard.

1. The proper evaluation of the taxable status of sales remains difficult because of the inherent complexity of the sales tax.

Sellers want to get the tax classifications correct. A state or local specific exemption may depend on the status of the customer – *e.g.*, whether engaged in manufacturing, or operating as one of certain statutorily defined types of charitable organizations. Other exemptions are dependent on the consumer's specific use of the item or service, such as using the item in certain types of manufacturing activities. These determinations remain challenging today, notwithstanding available software. The coding of dynamic retail inventories (*i.e.*, determining into what category the various products of the seller should be assigned for taxation) must reflect the many different and distinct Stock Keeping Units (SKUs) for products being sold. The coding process is a very judgment-intensive exercise that cannot be delegated to entry-level staff or third parties in that the process is replete with opportunities for honest errors creating unknown liabilities for future penalties and interest (in addition to uncollected tax). Sellers typically change their merchandise frequently; changing out one-third or one-half of the inventory every year is not uncommon. Different rules on shipping

costs, accounting for refunds and other administrative issues are consistent day-to-day problems.

Recently, more states have begun offering sales tax holidays providing temporary exemptions for items – *e.g.*, certain school supplies, some types of clothing or selected computers for one weekend a year. The classes of items that qualify for these exemptions differ from state to state, as do the calendar dates when the holidays occur. The compliance problems arising from the sales tax holidays are even greater for remote sellers with Alabama customers; each county or municipality decides individually whether to participate in the state tax holiday.[7]

The classification of taxable versus exempt sales is much more challenging than suggested by the states. Because of the number of definitions, exemptions, and procedural requirements for each state and many localities, compliance is necessarily difficult and uncertain. The SSUTA website shows the large number of complex tax classifications and procedures that have been considered over the more than 17 years of the existence of SSUTA.[8] While SSUTA continues to struggle with interpretive issues, at least for "streamlined"

---

[7] Alabama Dep't of Revenue, *Alabama 2018 Back to School Sales Tax Holiday Participating Localities*, https://revenue.alabama.gov/sales-use/sales-tax-holidays/alabama-2018-back-to-school-sales-tax-holiday-participating-localities/ (last visited Mar. 31, 2018).

[8] See *Interpretation Opinions*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=alias-9 (last visited Mar. 30, 2018).

states, some guidance exists. For "non-streamlined" states and their localities, however, the lack of guidance and pronounced lack of consistency among state and even local interpretations makes compliance even more difficult.

The statutes and regulations of the states and localities frequently do not address the particular interpretative questions that retailers encounter day-to-day. Searching the sources of the law, even on the web, is time-consuming and information is presented in a variety of inconsistent formats. Getting the guidance that is needed is very difficult. The states are reducing the resources available to those seeking to obtain guidance on the state tax laws. If the seller's question is not addressed on the state or locality's website in a "frequently-asked questions" format and the seller cannot afford to pay for tax or legal advice, the seller must assume the risk of incorrectly classifying the item being sold as taxable or exempt. The localities typically provide even less guidance to sellers than that provided by the states.

Even if software is provided by the states, the cost of implementing the software in the first instance is a significant expense. Many catalog marketers rely on home-grown and specially-developed software to run their operations, warehouses, inventory management, order processing, customer service and other enterprise activities. Each time the state-provided software is updated, each of the sellers' legacy systems must be modified to map to (*i.e.*, identify the particular items being sold by reference to the categories defined by the

various states and localities) and interact with that software. Technology does not prevent the ongoing expense of implementing the software, coding inventories, updating the software, maintaining compliance, revising customer-facing communications, training personnel, answering customer questions, administering tax law changes, recordkeeping, and responding to audits by multiple jurisdictions. Software does not solve the problem, or avoid the printing expense, of communicating the complexities of a nationwide sales tax collection process to mail order purchasers as a part of the text of the catalog. The assignment of a tax rate to a zip code by the software, which itself has inherent problems, does not address the many other issues confronting sellers.

The internet does not solve these burdens. Catalog sellers using a web connection still must grapple with multiple state and local systems that remain both difficult and confusing for the taxability determinations and other elements of compliance. And, any claimed simplicities provided by the internet are irrelevant for customers who do not have online access.

Catalog sellers focusing on business-to-business ("B-to-B") sales make few, if any, taxable retail sales when the seller's product is inventory purchased for resale or other items that may not be taxable. Those sellers nevertheless must accumulate exemption certificates from all of their customers on a nationwide basis under the states' laws or face an assessment for the failure to collect. For these audits, the seller who has not collected and preserved all of the correct

exemption certificates is required to pay the tax to the state or locality even if the sale to the customer would be exempt. The number of certificates that must be obtained and preserved would increase greatly under the states' proposal. For example, South Dakota's sales thresholds are not confined to taxable sales, but include any sales, including exempt sales. The costs of compliance easily could exceed the total tax revenue the states would receive from these sales.

2. Sales tax returns require frequent filings.

Unlike a personal or corporate income tax, most sellers must file sales and use tax returns more frequently than annually. Some sellers file quarterly, but many sellers must file monthly returns for every state as well as for some localities. Some states even require estimated sales tax filings in between monthly filings. Massachusetts has proposed a daily sales tax collection system by third-party payment (credit card) processors. See 2017 MA H.B. 2 (NS), Secs. 49 and 60. Retailers, both large and small, using credit cards would have to track and reconcile all of these payments. The frequency of filings combined with the number of separate jurisdictions requiring separate reporting create a demonstrable undue burden.

3. Reporting errors are costly to sellers and consumers.

Because of the complexity and uncertainty inherent in the sales tax collection system, sellers are at risk

for good faith mistakes. If the seller fails to collect the tax initially, it normally is very difficult to ask the customer to pay the tax later. Nevertheless, the seller itself remains responsible for the tax, and penalty and interest likely will be added upon audit.

If the seller collects tax that should not be collected, it is difficult for sellers to claim the refund because the refund process requires extensive documentary support and adherence to rigorous procedural requirements. Moreover, the seller may be required to pre-pay the tax back to each customer before seeking the refund or obtain a written statement from each customer agreeing to await the resolution of the refund claim.

There is also an increasing danger of consumer class action cases when sellers are accused of over-collecting tax. See Mary Kay Martire et al., *Damned if You Collect, Damned if You Don't: Retailer Caught Between Consumer Class Action and Qui Tam Claims*, 24-OCT J. of Multistate Tax'n and Incentives 36 (2014). Depending on the theories advanced, the threatened recoveries could be multiples of the tax at issue.

Likewise, it is difficult for consumers to obtain refunds from the taxing authority when overpayments are made to sellers. Few consumers willingly undertake the process of seeking a refund. If the consumer simply deletes the tax from the payment of the invoiced amount, the seller could remain liable for the tax and likely will have already reported and paid over that tax to the taxing authority.

4. Administrative costs are high especially for smaller sellers.

Sellers are in the middle between the taxing authorities and the customer and the sellers want to get it right. Sellers cannot simply rely on the software vendors. The seller is the one that has to assign the taxability determination to the products and handle the administrative costs of registering, reporting, remitting and following up with customers and the taxing authorities.

The use of software requires considerable upfront costs conforming the software to the legacy computer systems in place for many catalog mailers. Sellers incur continuing costs to maintain and license the system and to update the classification of products to the changing tax laws. The November 2017 GAO Report addresses the costs of implementation and concludes that remote sellers will shoulder additional costs to become and remain compliant. See GAO Report 15-24.

Many of these burdens could be eliminated or reduced if the underlying complexity and uncertainty in the process were addressed before remote sellers with no in-state presence are compelled to undertake these additional expenses. If *Quill* is reversed, it is reasonable to expect that the states will proceed on their separate paths. The complexity and uncertainty will only increase.

C. The Commerce Clause prohibits the imposition of excessive burdens on interstate commerce.

The Commerce Clause protects interstate commerce by prohibiting excessive burdens being placed on commerce without congressional approval. Avoiding these burdens "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015). This Court has intervened in the absence of legislative action in recognition of the importance attached to preventing excessive burdens on interstate commerce.

Twice this Court – in *National Bellas Hess* and in *Quill* – has recognized that the systems by which states require remote sellers to collect state and local taxes burden interstate commerce. This Court applied a safe harbor of physical presence to limit the burdens. The states renew the same arguments made in the first two cases, arguing now that while the burdens may exist, those burdens can be overcome by software vendors and their products. The states do not deny that safe harbors should exist for remote sellers. Instead, the states argue that the establishment of the safe harbors should devolve to the states despite the constitutional mandate for Congress to establish the rules.

D. Applying principles of economic nexus destroys the concept of a safe harbor and pushes off all of the compliance burdens on interstate commerce.

The states argue that the physical presence safe harbor of *National Bellas Hess* and *Quill* should be replaced with the economic nexus standard, and that dollar or transaction volume thresholds could be established simply in the discretion of the states. But no dollar or transaction volume thresholds are guaranteed to any remote seller now or in the future. See Br. of Nat'l Governors Ass'n et al. Supporting Pet'r at 7-8 ("Determining the level of economic activity sufficient to create an economic nexus should be left to the state legislatures, as this determination is a *highly individualized and context-specific inquiry*.") (Emphasis added). By itself, the economic nexus standard imposes no restraint because the seller would be required to collect whenever the seller had a single customer in the state.

E. Protecting interstate commerce is not the role of the states.

The states propose to assume the role of addressing the burdens on interstate commerce either (a) by providing a dollar and transaction volume trigger for the obligation to collect tax, or (b) by providing safe harbors as a matter of state law on a case-by-case basis.

South Dakota, as a matter of state law, provides a trigger for the responsibility to collect based on either $100,000 in sales or 200 transactions annually in the current or previous year. SDCL § 10-64-2. Many sellers cannot know early in the year whether the cumulative sales in the year will exceed the threshold. Moreover, the trigger is solely a matter of state law. Other states have lower thresholds, including the State of Washington's trigger point of only $10,000. Wash. Rev. Code § 82.08.0532. The states specifically argue against a national standard, and instead seek differing state thresholds at levels determined by each state. Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 26-27. The states thus would be free to set up the thresholds at any level, including upon the first sale into the state.

The states argue that individual states can be relied upon to establish reasonable standards *sua sponte*. Past practices do not support this assertion. One analogous situation is the application of income tax withholding to employees traveling in the states. While some states recognize the hardship on employers of withholding in multiple states and provide a safe harbor for employee travel in the state for 14, 20 or 60 days before requiring withholding of income tax by the employer, many states demand withholding the first time the employee enters the state.[9] Because nothing ensures that the states must apply a certain sales or

---

[9] See *Problem: A patchwork of complicated nonresident income tax laws*, Mobile Workforce Coalition, http://www.mobileworkforcecoalition.org/problem (last visited Mar. 30, 2018).

transaction threshold for sales tax, it is unreasonable to expect the South Dakota levels to become the norm.

As an alternative to statutory dollar or volume thresholds, the Multistate Tax Commission and Federation of Tax Administrators argue for an assignment to the states of the authority to set nexus thresholds in the following terms:

> But we believe the physical presence standard not only represents what the *law* is, but acts as a substitute for a determination of what the *facts* are ("actual burdens"). If so, then the Court may simply remove the physical presence standard and allow the weighing of actual burdens, as a factual matter, to proceed in all cases. That weighing, of course, can occur not only in the courts, but through administrative and legislative processes. And to the extent those administrative and legislative processes arrive at a reasonable assessment of the relative burdens, and provide reasonable standards to avoid undue burdens, those standards can be applied as well.

Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 17 (emphasis original). This proposal from the taxing authorities would be the ultimate devolution for standard-setting by allowing the state and local taxing authorities to evaluate and adjudicate specific burdens on interstate commerce for remote sellers in all cases.

F. Catalog mailers have a legitimate concern that a reversal of *Quill* could be applied to prior transactions causing real hardships to these sellers.

If the Court were to reverse *Quill*, the application of the new law to prior transactions would create real hardships for remote sellers. The sellers could not expect to recover the taxes from customers and would have to respond to audits for prior periods for which no state-specific tax information had been accumulated. This "lookback" would be occurring despite sellers' reasonable reliance on *Quill*.

Respondents have set forth compelling reasons why retroactivity remains a reasonable concern for all remote sellers. See Br. of Resp'ts at 62-65. In addition, the states could utilize a reversal of *Quill* to assess prior transaction while claiming no retroactive application of the state laws.

Ohio law shows how this could occur. The Ohio Constitution expressly forbids retroactive laws. Ohio Constitution, Article II, Section 28. Nevertheless, Ohio laws provide, and have provided for more than twenty years, that the collection responsibility under Ohio law for remote sellers is whatever the U.S. Constitution allows. Ohio Rev. Code § 5741.01(I)(1), in defining substantial nexus for determining which remote sellers must collect and report tax, states:

> "Substantial nexus with this state" means that the seller has sufficient contact with this state, in accordance with Section 8 of Article I

> of the Constitution of the United States, to allow the state to require the seller to collect and remit use tax on sales of tangible personal property or services made to consumers in this state.

Comparable language has been in the Ohio statute since 1987. See Am. Sub. H.B. No. 231, 142 Ohio Laws, Part II, 2635, 2918-2921. No statute of limitations would apply if the remote seller did not file in Ohio in prior years. Ohio Rev. Code § 5741.16. A separate seven-year limitation of the lookback would apply under Ohio Rev. Code § 5703.58. A seven-year lookback period for exposure to tax assessments would impose a significant burden on catalog companies of all sizes with Ohio customers.

Other states have different statutes that anticipated a possible change in the interpretation of *Quill* with different effective lookback periods. The states have been anticipating "Killing *Quill*" even before this Court addresses the issues. The states and localities likely will assert that their taxing authorities are bound legally to follow the laws as enacted by the legislatures effective with the respective dates of the enactments. As the Ohio analysis shows, a determination of how far back any new interpretation of the Commerce Clause would apply would require a careful analysis of prior enactments of the respective legislatures. The fact that South Dakota took retroactivity "off the table" provides no comfort to catalog companies with customers in other states.

G. The *Quill* decision should not be limited to the use of mail and common carriers.

The United States Government argues that "this Court should limit [*Quill*] to its precise holding, involving traditional mail-order retailers whose only connection to a state is by mail or common carrier." See Br. for the United States as Amicus Curiae Supporting Pet'r at 8. As the Government recognizes, this reading of *Quill* would render the decision meaningless, as it would recognize a safe harbor only for the *presumably rare* retailer. *Id.* at 32.

Creating a special rule under the Commerce Clause for sellers whose only connection to a state is by mail or common carrier would create a formalistic and unrealistic distinction between types of operations that does not reflect economic realities. Such a distinction does not serve the purpose of evaluating the burdens on interstate commerce.

Today, catalog companies use mail and common carriers, but also use websites. The burdens on retailers selling in multiple taxing jurisdictions without a local presence was the point of *National Bellas Hess* and *Quill*, and the different methods of reaching remote customers has not been shown to alter the analysis focusing on the burdens. This Court's physical presence safe harbor was not tailored to the method of operation but a reflection of the burdens facing the remote seller. Those burdens have survived the advent of websites and e-commerce. These real burdens continue

to support a physical presence safe harbor for remote sellers.

H. The multiplicity of jurisdictions and their varying compliance requirements impose demonstrable burdens on catalog companies that are not addressed by the states.

The burdens placed on remote sellers in complying with multiple state and local sales tax laws compel the conclusion that the states should be restricted when imposing sales tax responsibilities on remote sellers and that voluntary state restraints are insufficient. The states' relentless assault on the physical presence safe harbor over the last fifty years does not show that the *National Bellas Hess* rule was wrong. This Court correctly recognized that interstate commerce would be impermissibly burdened if the states were granted the unlimited ability to impose sales tax requirements on remote sellers. While the contours of the burdens may have changed, the burdens remain.

The states' unsubstantiated dismissal of the burdens facing remote sellers as insignificant also ignores the fact that small- and medium-sized catalog companies have particular legitimate concerns that are not being addressed by the states' proposals. The states point out that the tax is owed by the consumers. That is not in dispute, but the burden to collect and remit is not placed on the consumer, but instead is placed on the remote seller. Catalog companies do not object to reasonable burdens imposed for collecting sales tax.

The objection is limited to the imposition of the extra burdens created by the multiplicity, frequency and difficulty of remaining compliant, including registration, filing returns, and responding to audit notices – most of which are simply computer-generated and not the result of tax agent analysis – in a great many jurisdictions.

As Respondents point out, studies show that the larger retailers already collect the tax. Br. of Resp'ts at 4. The states' focus on the ability of the large retailers to comply is thus misplaced because the larger retailers already comply consistent with their business models. The more relevant burdens for this Court to consider are those facing small and medium retailers, and even "micro sellers." As the November 2017 GAO report shows, these companies, including many of the 9,000 catalog companies represented here, are least equipped to comply with the varying state and local requirements. See GAO Report 15-24. These retailers simply do not have the financial ability to pay for the compliance systems touted by the states as the solution to the sellers' burdens, especially considering the small margins on many of the products sold by the smaller retailers.

The states' attempt to address the burdens on smaller retailers by offering varying, voluntary, state-specific dollar and transaction thresholds also fails. For states with no or low dollar volume or transaction thresholds, the safe harbor will be useless. For those states with a dollar/volume threshold, staying compliant with these thresholds would add a separate level

of complexity for those retailers who might, based on customer response, sell above the threshold in any given year.

It is also no answer that retailers can avoid all uncertainty by collecting for every transaction because the cost of such compliance will prevent entry into the market for new retailers and doom some retailers already doing business: "[f]or very small sellers, these fixed costs [of collection and remittance] alone may be prohibitive." Brief of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 9. This observation is accurate, but does not go far enough in that more than the smallest retailers will be burdened.

The states recommend SSUTA to this Court as a model, but the actual SSUTA process does not support rejecting *Quill*. Rather, SSUTA and its 17-year history show that the process of collecting tax across many jurisdictions is hard, and that the process could be substantially improved by coordinated efforts by the states and their localities. As it stands now, SSUTA has been rejected by states representing almost 70% of the population and by every state that permits its localities to administer separate sales tax regimes. See GAO Report at 18. For SSUTA to present a solution or a model, more states would need to commit to the necessary reforms. On the other hand, reversing *Quill* now would eliminate any incentive for the states to continue to develop a streamlined sales tax system or to maintain the measures of the SSUTA.

South Dakota's appeal is a call to end the reform process, ignore the burdens, and proceed to require unrestricted collection responsibility subject only to voluntary limitations by the states under their own laws. The states and the localities should not obtain authority to require retailers to comply with the difficulties of collecting and remitting tax in multiple jurisdictions until the states address the burdens thereby created. SSUTA shows both the extent of the problem and a path forward. Until the burdens currently placed on remote sellers are addressed, the current safe harbor based on physical presence should be retained.

CONCLUSION

The decision of the South Dakota Supreme Court should be affirmed.

Respectfully submitted,

EDWARD J. BERNERT
Counsel of Record
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, Ohio 43215-4138
ebernert@bakerlaw.com
614.462.2687

THOMAS D. WARREN
BAKER & HOSTETLER LLP
127 Public Square
Suite 2000
Cleveland, Ohio 44114-1214

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC. ET AL.

Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF AMICUS CURIAE FOR THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF RESPONDENT

JONATHON P. HAUENSCHILD
Counsel of Record
JOEL GRIFFITH
BARTLETT CLELAND
AMERICAN LEGISLATIVE EXCHANGE COUNCIL
2900 Crystal Dr., Ste. 600,
Arlington, VA 22202
Main - (703) 373-0933
jhauenschild@alec.org
Counsel for Amicus Curiae

QUESTION PRESENTED

Should the Court abrogate the physical presence standard of "substantial nexus" for state sales and use taxes, reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
IDENTITY AND INTERESTS OF AMICUS CURIAE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. The History of the Commerce Clause Supports Retention of *Quill*'s and *National Bellas Hess*'s Physical presence Standard 5
A. *Overview* 5
B. The Articles of Confederation Did Not Provide for a Uniform Standard of Commerce and the Lack of a Standard Was a Driving Force Toward the Constitutional Convention 8
C. The Constitutional Convention and Early Supreme Court Cases Support Limiting a State's Taxing Authority to Those Individuals and Corporations Having a Physical Presence in the State 11
D. The Judicial Development and History of the Physical Presence Standard—The Physical Presence Standard Helps Prevent States from Abusing Their Authority to Tax 15
II. In Order to Protect Unfettered Interstate Commerce, National Economic Dynamics Require and Justify a Continued Physical Presence Standard 25

B. Tax Compliance Burden on Remote Retailers not Fairly Related to the Services Provided by the State 31

C. The Condition of the U.S. Retail Market After Decades of Online Sales Expansion 32

C. States are not Facing Sales Tax Revenue Shortfall Related to Remote Retailers 35

D. Remote Sales Taxes Unfettered from any Substantial Presence Undermines Tax and Economic Policy Competition 40

CONCLUSION 42

TABLE OF AUTHORITIES

CASES

Allied-Signal. Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992) 3

Brown v. State of Maryland, 25 U.S. (12 Wheat.) 419 (1827)..... 6, 7, 13, 14

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 16

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)..... 18, 19

Direct Marketing Association v. Brohl, __ U.S. __, 135 S. Ct. 1124 (2015) 38

Gibbons v. Ogden 12, 13

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 7

M'Culloch v. State of Maryland, 17 U.S. (4 Wheat.) 316 (1819)..... *passim*

McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944)2, 7, 13, 16

Miller Brothers Co. v. State of Maryland, 347 U.S. 340 (1954)..... 7, 16, 19

National Bellas Hess, Inc. v. *Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967).. *passim*

National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977)..... 18, 31, 32

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 8, 16, 17, 19

North Dakota v. Quill Corp., 470 N. W. 2d 203 (N.D. 1991)..... 30

Norton Co. v. Department of Revenue of the State of Illinois, 340 U.S. 534 (1951) 16, 18

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const., Article 1 Sec. 8 11

OTHER AUTHORITIES

21st Century Commercial Nexus Act, (Adopted May 1, 2002, amended January 29, 2013), American Legislative Exchange Council, *available at* https://www.alec.org/model-policy/21st-century-commercial-nexus-act/ 5

ADDRESS OF THE ANNAPOLIS CONVENTION (September 14, 1786), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-03-02-0556 11

ARTHUR B. LAFFER, JONATHAN WILLIAMS, AND STEPHEN MOORE, RICH STATES, POOR STATES (10th ed,) (2017) https://www.alec.org/publication/rich-states-poor-states/ 39

Articles of Confederation, Art. 4 § 1 9

Ashwini Murphy, HOW MANY E-COMMERCE COMPANIES ARE THERE? WHAT'S THE GLOBAL E-COMMERCE MARKET SIZE? PIPE CANDY (2017), http://blog.pipecandy.com/e-commerce-companies-market-size/ 32

B. Putney. FEDERAL POWERS UNDER THE COMMERCE CLAUSE (1935), CQ PRESS, http://library.cqpress.com/cqresearcher/cqresrre1935100400 13

Chris Atkins, *Important Tax Cases:* Quill Corp. v. North Dakota *and the Physical presence Rule for Sales Tax Collection*, Tax Foundation, July 19, 2005, https://taxfoundation.org/important-tax-cases-quill-corp-v-north-dakota-and-physical-presence-rule-sales-tax-collection/ 25

Chris Isadore, AMAZON TO START COLLECTING SALES TAXES EVERYWHERE, CNN, (2017). http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html 34

Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce, House Comm on the Judiciary, 112th Cong. 1 (2011) (Testimony of Patrick Byrne) 27

David B. Rivkin, *Healthcare reform vs. the Founders*, THE WALL STREET JOURNAL (September 29, 1993)6

Dr. Michael Mandel. THE CREATION OF A NEW MIDDLE CLASS?: A HISTORICAL AND ANALYTIC PERSPECTIVE ON JOB AND WAGE GROWTH IN THE DIGITAL SECTOR, PART I,, PROGRESSIVE POLICY INSTITUTE (2017), http://www.progressivepolicy.org/wp-content/uploads/2017/03/Tech-middle-class-3-9-17b.pdf 27

E. Prentice and J. Egan, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION (1898) 7

FROM JAMES MADISON TO THOMAS JEFFERSON (January 22, 1786), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0249 9

FROM JAMES MADISON TO THOMAS JEFFERSON (Oct. 3, 1785), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0195 10

Jake Swearingen, WHY IS AMAZON BUILDING BRICK-AND-MORTAR BOOKSTORES?, NEW YORK MAGAZINE (2017), http://nymag.com/selectall/2017/06/why-is-amazon-building-bookstores.html 33

Jeffrey A. Eisenach, and Robert E. Litan, UNCOLLECTED SALES TAX ON ELECTRONIC COMMERCE: A REALITY CHECK, Empiris, LLC (2010), https://netchoice.org/wp-content/uploads/eisenach-litan-e-commerce-taxes.pdf 36

Jonathan Williams and Joel Griffith, ONLINE SALES TAX COLLECTION, CONSTITUTIONAL PRECEDENT, AND INTERSTATE COMMERCE: WHAT YOU NEED TO KNOW, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (2018), ... 6

Jordan Valinsky, WAYS AMAZON HAS ALREADY CHANGED WHOLE FOODS, CNN MONEY, (2018), http://money.cnn.com/2018/02/09/news/companies/amazon-whole-foods-changes/index.html 33

Krista Garcia, US ECOMMERCE SALES 2017: THE TOP 10 COMPANIES, EMARKETER (2017), https://www.emarketer.com/Report/US-Ecommerce-Sales-2017-Top-10-Companies/2002164 33

Larry Kavanagh, EXPERT REPORT CONCERNING THE COSTS AND BURDENS FOR REMOTE RETAILERS TO COMPLY WITH SALES AND USE TAX COLLECTION OBLIGATIONS IMPOSED BY JURISDICTIONS THROUGHOUT THE UNITED STATES, INCLUDING ALABAMA, TRUE SIMPLIFICATION (2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf, ... 29

LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (January 22, 1786) 11

Norton Francis and Frank Sammartino, *Governing with Tight Budgets* (September 2015), p 3, https://www.urban.org/sites/default/files/publication/66046/2000376-Long-Term-Trends-in-State-Finances.pdf 36

Poll: Strong Opposition to Internet Tax Schemes Across Partisan, Ideological Lines, NATIONAL TAXPAYERS UNION (2018), https://www.ntu.org/library/doclib/Poll-Strong-Opposition-to-Internet-Sales-Tax-Schemes-Across-Partisan-Ideological-Lines.pdf 25

Prentice, THE COMMERCE CLAUSE 12, 13, 14

RESOLUTION CALLING FOR THE REGULATION OF COMMERCE BY CONGRESS (November 14, 1785), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0213 11

Sidney S. Silhan, *If it Ain't Broke Don't Fix It: An Argument for the Codification of the Quill Standard for Taxing Internet Commerce*, 76 Chi.-Kent L. Rev. 671, 679 (2000) 16

Stephen Wilmot. *Death of the Mall? Greatly Exaggerated, Says Big Money*, THE WALL STREET JOURNAL, March 19, 2018 35

Steve DelBianco. *Act now on No Regulation Without Representation*, THE HILL, June 19, 2017, http://thehill.com/blogs/congress-blog/economy-budget/338456-act-now-on-no-regulation-without-representation 25

The Federalist No. 11 (Alexander Hamilton) (John C. Hamilton, ed., 1998) 12

The Federalist No. 22 at 185 (Alexander Hamilton) (John C. Hamilton, ed., 1998) 10, 12

The Federalist No. 42 (James Madison) (John C. Hamilton, ed., 1998) 9

U.S. BUREAU OF LABOR STATISTICS, ALL EMPLOYEES: RETAIL TRADE [USTRADE], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/USTRADE 34

U.S. BUREAU OF THE CENSUS, E-COMMERCE RETAIL SALES [ECOMSA], Federal Reserve Bank of St. Louis (2018), https://fred.stlouisfed.org/series/ECOMSA 36

U.S. CENSUS BUREAU, QUARTERLY RETAIL E-COMMERCE SALES, 4TH QUARTER 2017, (2018), https://www2.census.gov/retail/releases/historical/ecomm/17q4.pdf 34

U.S. GOV. ACCOUNTABILITY OFFICE, GAO-18-114, SALES TAXES: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, November 2017 ..... 28, 29, 36, 37

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the American Legislative Exchange Council (ALEC) respectfully submits this brief amicus curiae in support of Respondents Wayfair, Inc., et al.[1]

The American Legislative Exchange Council (ALEC) is a nonprofit, tax-exempt corporation and is the nation's largest non-partisan individual membership association of state legislators. ALEC has approximately 2,000 members in state legislatures across the United States. The American Legislative Exchange Council works to advance limited government, free markets and federalism at the state level through a nonpartisan public-private partnership of America's state legislators, members of the private sector and the general public.

Not all states, much less all state legislators, believe the physical presence standard discussed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) ("*Quill*") and *National Bellas Hess, Inc.* v. *Department of*

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Revenue of the State of Illinois, 386 U.S. 753 (1967) ("*Bellas Hess*") should be abrogated. The physical presence standard has allowed the multi-trillion dollar online marketplace system to develop and thrive, providing regulatory certainty for all businesses. The standard is firmly rooted in the purpose and history of the Commerce Clause.

ALEC submits this brief both to help educate the Court on certain, salient topics and to emphasize that many state legislators wish this Court to sustain the current physical presence standard for the imposition of sales tax collection requirements set forth in the *Quill* and *National Bellas Hess* cases. This brief will look at the reasons why the founders included the Commerce Clause in the Constitution and the Clause's early jurisprudence, the development of the Physical presence standard leading up to *Quill* and *National Bellas Hess*, and examine the current online marketplace ecosystem and the consequences if the physical presence standard were abrogated.

SUMMARY OF ARGUMENT

The Framers of the Constitution included the Commerce Clause to prevent states from reaching across their borders to tax interstate transactions. *See, e.g., McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 329 (1944) ("[A] tax on an interstate sale like the one before us... involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a

transaction forming an unbroken process of interstate commerce in Congress, not in the States"). The Court developed the physical presence standard to provide a powerful check on the authority of state governments, ensuring that they violate neither the Commerce Clause nor an individual's or company's Due Process. *E.g. Allied-Signal Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992), *Bellas Hess*, 386 U.S. at 756-760. The ability to impose a sales or use tax is the ability to impose a tax upon a legislature's constituents, be they people or companies, or to tax goods within the state. This limitation prevents states from imposing "erroneous and oppressive" taxes upon people or companies not capable of holding the legislature accountable. *See M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) ("The only security against the abuse of [the power to tax], is found in the structure of the government itself. *In imposing a tax, the legislature acts upon its constituents.* This is, in general, a sufficient security against erroneous and oppressive taxation.") (Emphasis added.)

The *Quill* and *National Bellas Hess* physical presence standard led to an explosion of the online marketplace. Companies like Amazon, Overstock, eBay, and others developed because of the certainty regarding state sales tax the physical presence standard created. The standard has its roots both in the advent of mail order catalogs in 1940s-1990s and the original purposes for which the Founding Fathers included the Commerce Clause in the Constitution.

Though operating online, the trend to massive physical presence is clear. Over the past decade, many companies have gained a physical presence in a number of states through acquisitions, data centers, and warehouse construction. Amazon, for example, recently purchased the grocery chain Whole Foods. Through this purchase, Amazon virtually guaranteed a physical presence in each state. Similarly, existing box stores, such as Walmart, already have a physical presence in every state and have placed their inventories online.

If the Court were to abrogate the physical presence standard found in *Quill* and *Bellas Hess*, it would abrogate over 230 years of American trade philosophy, including both the purpose for which the Framers crafted the Commerce Clause and 20th Century jurisprudence. States with high sales taxes—such as California, New York, and Illinois—would be allowed to reach across their borders and impose heavy burdens on individuals and companies having no connection to the state, much like the states under the Articles of Confederation taxed goods imported from other states. Many of these entities reside in other states with low sales taxes or those without sales taxes altogether. Furthermore, these companies, small business, and individuals would not possess the ability to hold state legislators accountable through the electoral process. With little influence, their pleas would inevitably fall on deaf ears, as the state legislatures would correctly identify them as non-constituents.

ARGUMENT

I. The History of the Commerce Clause Supports Retention of *Quill*'s and *National Bellas Hess*'s Physical presence Standard

A. *Overview*

States may debate the propriety of the physical presence standard discussed in *Quill* and *Bellas Hess*. Even during the original debate on *Quill* in 1992, North Dakota faced off against states such as New Hampshire, Delaware, and Maine. *Quill*, 504 U.S. at 300. The American Legislative Exchange Council has been involved in these debates since the early 2000s. *See* 21st Century Commercial Nexus Act, (Adopted May 1, 2002, amended January 29, 2013), American Legislative Exchange Council, *available at* https://www.alec.org/model-policy/21st-century-commercial-nexus-act/. In 2002, ALEC adopted the 21st Century Commercial Nexus Act as model policy. The Act encouraged states to "create a bright line rule similar to that espoused by the Supreme Court of the United States in *Quill*, to determine when a business must collect and remit sales and use [taxes]." *Id. See also* Sales and Use Tax Collection Protection Act, (Re-approved January 29, 2013), American Legislative Exchange Council, *available at* https://www.alec.org/model-policy/sales-and-use-tax-collection-protection-act-2/ and Resolution Urging Congress to Reject Authorization of the Streamlined Sales Tax Project (SSTP), (Re-

approved January 29, 2013), American Legislative Exchange Council, *available at* https://www.alec.org/model-policy/resolution-urging-congress-to-reject-authorization-of-the-streamlined-sales-tax-project-sstp/. Recently, ALEC published *Online Sales Tax Collection, Constitutional Precedent, and Interstate Commerce: What You Need to Know*. Jonathan Williams and Joel Griffith, ONLINE SALES TAX COLLECTION, CONSTITUTIONAL PRECEDENT, AND INTERSTATE COMMERCE: WHAT YOU NEED TO KNOW, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (2018), https://www.alec.org/app/uploads/2018/03/2018-03-20-ALEC-Online-Sales-Tax-Collection-WEB.pdf (last visited, April 2, 2018).

The current physical presence standard for the imposition of sales tax is consistent with the history of the Commerce Clause and its early jurisprudence. The need for the Commerce Clause arose from deficiencies within the Articles of Confederation and how states either raised revenue or engaged in protectionist practices during this phase of American History. "One of the most serious deficiencies of the first union under the Articles of Confederation was that states were able to erect barriers to trade with other states and foreign countries. The Commerce Clause was added to the Constitution so that Congress could create the original North American free trade zone." David B. Rivkin, *Healthcare reform vs. the Founders*, THE WALL STREET JOURNAL (September 29, 1993), *available at* https://bakerlaw.com/files/Uploads/Documents/News/Articles/INTELLECTUAL%20PROPERTY/2012/rivkin_93_wsj.pdf, (last visited March 29, 2018). *Quill*,

504 U.S. at 312 ("Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for those structural ills"), and *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 445-446 (1827).

The earliest cases addressing the Commerce Clause occurred in state courts and frequently involved questions of transportation and transportation monopolies. E. Prentice and J. Egan, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, 13 (1898) ("Prentice, THE COMMERCE CLAUSE"). The Supreme Court decided roughly five cases involving the Commerce Clause as of 1840. *Id.* at p. 14. Of these five early cases, one addressed interstate transportation and state issued transportation monopolies while another addressed whether a state could impose a license fee upon importers for the "privilege of selling imported goods." *Id.* at 18. *See also, Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

In these early cases, the Court discussed first conceptions of the physical presence standard. In *Brown v. Maryland*, and one of the cases it relied on, *M'Culloch*, the Court emphasized both a state's authority to tax persons and property within its borders and the property protections such limitations provided. "The only security against the abuse of [the power to tax], is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive

taxation." *M'Culloch*, 17 U.S. (4 Wheat.) at 428 (brackets added).

The physical presence standard grew from cases addressing mail order catalogues and the application of state sales taxes to orders placed as a result of the catalogues and may trace its direct lineage to *Miller Brothers Co. v. State of Maryland*, 347 U.S. 340 (1954), *McLeod v. J.E. Dilworth Co*, 322 U.S. 327 (1944), and *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941). The standard serves as a bulwark, ensuring "a national economy free from [ ] unjustifiable local entanglements." *Bellas Hess*, 386 U.S. at 760; *see also, M'Culloch*, 17 U.S. (4 Wheat.) at 428.

B. The Articles of Confederation Did Not Provide for a Uniform Standard of Commerce and the Lack of a Standard Was a Driving Force Toward the Constitutional Convention

The federal government's inability to regulate foreign and domestic commerce under the Articles of Confederation led to both the 1787 Constitutional Convention in Philadelphia and the inclusion of the Commerce Clause in the final draft of the Constitution. The Framers intended to provide the new federal government—specifically Congress—broad authority over interstate commerce.

The commerce clause appearing in the Articles of Confederation did not have a binding effect on the states. With respect to domestic commerce, the Articles provided that

> the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant...

Articles of Confederation, Art. 4 § 1.

This clause was not a grant of authority to the federal government. Because it was not a grant of authority, problems with the Article's approach to foreign and domestic commerce developed. Connecticut, for example, placed heavier tariffs on goods imported from Great Britain than did Massachusetts. FROM JAMES MADISON TO THOMAS JEFFERSON (January 22, 1786), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0249, (last visited March 29, 2018). States raised revenues by imposing tariffs on goods imported from other states. *See e.g.*, The Federalist No. 42 at 333 (James Madison) (John C. Hamilton, ed., 1998) ("The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience... A very material object of this power was the relief of the state which import and export through other states, from the improper contributions levied on them by

the later. Were these at liberty to regulate the trade between state and state, it must be foreseen... to load articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former.") and The Federalist No. 22 at 185 (Alexander Hamilton) (John C. Hamilton, ed., 1998), *id.* at 185 ("The interfering and unneighbourly [sic] regulations of some states, contrary to the free spirit of the union, have, in different instances, given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by national control, would be multiplied and extended till they become not less serious sources of animosity and discord, than injurious impediments to the intercourse between the [states].")

In 1785, members of Congress recognized the Article's deficiencies. A resolution was proposed, which would provide Congress "an adequate power over trade." FROM JAMES MADISON TO THOMAS JEFFERSON (Oct. 3, 1785), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0195 (last visited March 29, 2018). The resolution recognized

> [T]he relative situation of the United States... to require uniformity in their commercial regulations... a stipulation of privileges, reciprocal to those enjoyed by the subjects of such nations in the ports of the United States; for preventing animosities, which cannot fail to arise among the several States from the

> interference of partial and separate regulations... and whereas, such uniformity can be best concerted and carried into effect by the federal councils...

RESOLUTION CALLING FOR THE REGULATION OF COMMERCE BY CONGRESS (November 14, 1785), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0213, (last visited March 29, 2018).

The resolution was tabled after some debate as Congress tried to negotiate a compromise for "regulating trade with regard to other States." LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (January 22, 1786). The resolution's failure led to the Annapolis Convention. The delegates to the Annapolis Convention agreed to a resolution, which called for a constitutional convention to strengthening the Articles' commerce provisions. ADDRESS OF THE ANNAPOLIS CONVENTION (September 14, 1786), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-03-02-0556, (last visited March 29, 2018).

C. The Constitutional Convention and Early Supreme Court Cases Support Limiting a State's Taxing Authority to Those Individuals and Corporations Having a Physical Presence in the State

The first draft of the Constitution introduced May 29, 1787 included specific grants of authority, empowering Congress "to raise revenue, to coin

money, to establish post-offices, post and military roads, and other grants upon related subjects" along with a general grant "to regulate commerce with all nations and among the several States." Prentice, THE COMMERCE CLAUSE at 7.

Many of the specific grants of commercial authority found their way into the final version. *Id.* at p. 9. The power to raise revenue or coin money, as cited in the previous paragraph, may be found in U.S. Const., Article 1 Sec. 8, along with the broader authority "[t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." *See also*, Prentice, THE COMMERCE CLAUSE at 10, The Federalist No. 22 at 332 (Alexander Hamilton) (John C. Hamilton, ed., 1998).

During the ratification debate, Alexander Hamilton and James Madison both sought to allay anti-Federalist fears. They did so with respect to interstate commerce by reminding people of the failures of the Articles of Confederation and explaining how the new Constitution would remedy those failures. In Federalist 11, for example, Alexander Hamilton wrote that

> An unrestrained intercourse between the states themselves will advance the trade of each, by an interchange of their respective productions... The veins of commerce in every part will be replenished, and will acquire additional motion and vigour [sic] from a free circulation of the commodities of every part.

The Federalist No. 11 at 118 (Alexander Hamilton) (John C. Hamilton, ed., 1998).

The first Commerce Clause case decided by the Court was *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). By 1840, the Court heard only five cases where it was asked to render decisions on the Clause. B. Putney. FEDERAL POWERS UNDER THE COMMERCE CLAUSE (1935), CQ PRESS, http://library.cqpress.com/cqresearcher/cqresrre1935100400 (last visited, March 29, 2018). By 1860, the number of Commerce Clause cases the Court decided increased to 20; by 1870, the number of cases grew to 30; by 1900, the number of cases grew to at least 185. *Id.*, *see also*, Prentice, THE COMMERCE CLAUSE at 14.

Two of the Court's early decisions addressing the Commerce Clause and taxation recognized the inherent conflict between federal and state interests. On the one hand, states have a theoretically unlimited taxing authority. *E.g. M'Culloch*, 17 U.S. (4 Wheat.) at 428 ("The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse."). On the other hand, the Framers included the Commerce Clause "to create an area of free trade among the several states." *McLeod*, 322 U.S. at 330. The Marshall Court sought to balance the competing interests by limiting a state's authority to tax interstate commerce. *Brown v. Maryland*, 25 U.S. (12 Wheat.) at 448-449.

The first cases, including those decided by state courts, interpreting the Commerce Clause involved questions of transportation and transportation monopolies. Prentice, THE COMMERCE CLAUSE at 13. The Court's first Commerce Clause opinion addressed interstate transportation and a state-issued monopoly. In *Gibbons v. Ogden*, the Court struck down a New York State law providing Livingston and Fulton the exclusive right to navigate the rivers of New York by steamboat as "repugnant" to the Constitution and its Commerce Clause. 22 U.S. (9 Wheat.) at 240.

The second case decided by this Court under the Commerce Clause involved a form of interstate taxation. In *Brown v. Maryland*. the State of Maryland imposed a "license tax" upon those importing goods into the state for sale. Prior to Maryland's actions, Congress imposed a duty on the particular good sold in Maryland. The Court struck down the duty as a violation of the Commerce Clause. After noting that states have the authority to tax their "own citizens, or [the citizens'] property within [the state's] territory," Chief Justice Marshall stated that

> the taxing power of the States must have some limits. [A State's authority to tax] cannot reach and restrain the action of the national government within its proper sphere... It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from

> taxing goods in their transit through the State from one port to another, for the purpose of re-exportation?... Or what should restrain a State from taxing any article passing through it from one State to another for the purpose of traffic? or [sic] from taxing the transportation of articles passing from the State itself to another State, for commercial purpose?

25 U.S. (12 Wheat.) at 449.[2]

D. The Judicial Development and History of the Physical Presence Standard—The Physical Presence Standard Helps Prevent States from Abusing Their Authority to Tax

As discussed above, the Court has long recognized the inherent conflict between state authority and federal authority with regard to taxation. States are constrained only by the voting populous—if a voting populous feels it is overtaxed, it may elect state legislators who will reduce tax burdens. If a state taxes an out-of-state resident, that resident has little recourse against the legislators. She cannot vote for a reform-minded legislator nor would the legislature heed her cries for relief. *Bellas Hess*, 386 U.S. at 759-760.

---

[2] After asking a series of rhetorical questions, the Court stated that all the questions posed were "within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce..." The Court continued, citing approvingly to *M'Culloch*.

While the idea of limiting states' ability to tax out-of-state individuals and entities can be found in the earliest of Court Commerce Clause decisions, the modern solution to preventing abuse of taxing authority is the physical presence standard. The standard is grounded on theories that a business should have an adequate "nexus" with the taxing jurisdiction and that a lack of a minimum contact would deprive the business of Due Process. *E.g. Quill*, 504 U.S. at 311.

As applied to taxation, the Due Process Clause "ensures fundamental fairness in the operation of the state government towards its citizens." Sidney S. Silhan, *If it Ain't Broke Don't Fix It: An Argument for the Codification of the Quill Standard for Taxing Internet Commerce*, 76 Chi.-Kent L. Rev. 671, 679 (2000). The two claims, according to the Court in *Bellas Hess* "are closely related." 386 U.S. at 756. In the context of commerce and taxation, the Court has stated that "in determining whether a state tax falls within the confines of the Due Process Clause... the 'simple but controlling question is whether the state has given anything for which it can ask a return." *Id.*

One of the holdings in *Quill*, though, was to overrule the Due Process holdings discussed, in part, in *Bellas Hess* and other related cases. *Quill*, 504 U.S. at 308 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical presence can defeat personal jurisdiction there." *Quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

Foundational to *Quill* and *Bellas Hess* are cases such as *Miller Bros.*, 347 U.S. 340 (1954), *Norton Co. v. Department of Revenue of the State of Illinois*, 340 U.S. 534 (1951), *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), and *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941).

Cases such as *Norton Co.* and *Nelson* stand for the proposition that any presence in a taxing state, even small, is sufficient to trigger sales and use tax-collecting requirements. *Miller Brothers* and *McLeod*, on the other hand, stand for the proposition that a state may not impose sales and use tax-collecting requirements where the only contacts with the taxing jurisdiction are through common carriers.

In *Nelson*, the Court sustained Iowa's use tax assessments against the Sears, Roebuck & Company. The company maintained a mail-order business, which included customers from Iowa. It also maintained stores in the state. Iowa wanted to tax sales from both the physical stores and the mail orders from Iowa residents. Iowa successfully argued that the mail order portion of Sears' business should be subject to the state's sales tax. According to the Court, Sears' stores provided sufficient grounds to sustain the tax. *Nelson*, 312 U.S. at 365-366.

This Court reached a similar conclusion in *Norton Co.* The Court allowed Illinois to collect sales tax from the Norton Company for all sales to Illinois residents. Similar to the *Nelson* case, the Norton Company maintained an office and warehouse in Chicago where customers could place orders. The

company also maintained a mail-order business, which included customers from Illinois. The Court believed the company submitted to the jurisdiction of Illinois and thus, Illinois could collect sales tax from the orders assignable to the state's residents. In the decision, though, the Court defined when a state may impose such a tax and when it may not.

> Where a corporation elects to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filing, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.

Norton Co., 340 U.S. at 537.

A decade after the Court decided *Bellas Hess*, it affirmed the holding in *Nelson* and *Norton Co.* in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). [3] California

---

[3] The Court decided *National Geographic* less than one month after *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Court cited both *Complete Auto* and *Bellas Hess* in the decision. It cited *Complete Auto* for the proposition that "[o]ther fairly apportioned, nondiscriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State." 430 U.S. at 558. The Court analyzed *Bellas Hess*, using the case to support the distinction between an out-of-state seller "whose only connection with customers in the taxing

required retailers to collect a statewide use tax. The National Geographic Society, which conducted sales through its magazines and mail-order catalogues, objected claiming an insufficient nexus between the state and the Society. The Society, though, maintained two offices in the state for various reasons, including soliciting contributions. Because of the two offices located in the state, the Court sustained the tax collection obligation. 430 U.S. at 556-557.

The *McLeod* and *Miller Brothers* cases are cut from the same cloth. In both cases, businesses conducted interstate transactions and maintained no physical presence in the taxing states. In *McLeod*, the J.E. Dilworth Company sold products to Arkansas companies through traveling salesmen domiciled in Tennessee or over the phone. In *Miller Brothers*, the company sold to Maryland residents who crossed into Delaware to purchase from the store. The company would send catalogs to former customers and occasionally deliver products to Maryland residents who placed orders at the store's Delaware location. The companies' contacts with the taxing jurisdiction were advertisements sent through the mail and customers located within the jurisdiction. According to the Court, neither a customer nor advertisements targeted to residents of a particular state may form the basis for physical presence. As the Court noted in *Bellas Hess*, it "has never held that a State may

---

State was by common carrier or mail" and sellers with retail outlets, solicitors, or property within the state. 430 U.S. at 559. A state would not be able to collect tax from the former while the latter had a sufficient nexus to require tax collection. *Id.*

impose the duty of use tax collection and payment upon a seller whose only connection is by common carrier or the United States mail." 386 U.S. at 758 (citing both *Nelson v. Sears, Roebuck & Co.* and *Miller Bros.*).

A case often cited within the Court's Commerce Clause and taxation jurisprudence is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). While *Complete Auto* falls within the Commerce Clause and taxation jurisprudence, it mostly falls outside of the Court's physical presence analysis. *Quill*, 504 U.S. at 303-304 ("With respect to the Commerce Clause, the court emphasized that [*Complete Auto*] rejected the line of cases holding that the direct taxation of interstate commerce was impermissible..."). [4] The case briefly mentioned the four-pronged test for analyzing a state's challenged tax regime. Under the four-prong test, courts will sustain "a tax against Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

The appellant, the company challenging the tax, in *Complete Auto* "did not allege that its activity which Mississippi taxes *does not* have a sufficient nexus with the state..." *Id.* at 277-278 (emphasis added). Since the company challenging the tax did not allege

---

[4] The Court's opinion as to this part discussing *Complete Auto* was unanimous. 504 U.S. at 299.

it did not have a sufficient nexus, the Court noted "that no claim is made that the activity is not sufficiently connected to the State to justify a tax." *Id.* at 287. In other words, the Court assumed the company challenging Mississippi's taxes satisfied the physical presence standard.

E. Overturning Precedent is Contrary to the Principles of Federalism as it Erodes Protection of State Borders

1. Abandoning the physical presence standard unleashes possibly thousands of aggressive state and local auditors against businesses far outside their jurisdiction

Supporters of overturning the *Quill* decision have wrapped themselves in the language of federalism. However, a proper understanding of federalism involves a balance between federal and state governments. In the case of protecting interstate commerce, Article 1 of the United States Constitution clearly allocates to the federal government the role of protecting the American people.

As discussed above, the U.S. Constitution was written to replace the Articles of Confederation in no small part due to the latter's failure to prevent a spiraling interior "war" of states who could assert tax and regulatory authority outside their borders and thereby create "fiefdoms" for themselves. The U.S. Constitution's Commerce Clause and subsequent

jurisprudence make clear that taxing power must be limited by state borders.

If the Supreme Court overturns *Quill*, state tax collectors would be empowered to reach across their boundaries to collect taxes from non-resident online retailers located outside of their jurisdictions. These retailers could face fines or legal challenges from taxing jurisdictions based on rules in which the online retailers have no voice.

Prior to the ratification of the 14th Amendment, the Court recognized the basic need to limit states' taxing authority. *E.g. M'Culloch*, 17 U.S. (4 Wheat.) at 429-430. As the Court nearly two centuries ago explained,

> All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared

> to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

Cases decided after the 14th Amendment's ratification simply built upon this limitation, recognizing the Pandora's box should a state be permitted to impose tax burdens on entities engaged in commerce outside its jurisdiction. *Bellas Hess*, 386 U.S. at 759 ("[I]f the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision through the Nation with the power to impost sales and use taxes.").

Hardworking individual and business taxpayers deserve protection from out-of-state tax collectors and regulators. The United States Constitution, as well as subsequent rulings from the United States Supreme Court, such as the landmark *Quill* decision, outlines the proper balance between the federal government, the states and the American taxpayer.

Overturning the *Quill* precedent will erode the protection of state borders as effective limits on state tax power. This will encourage tax-heavy states like California, New York, and Illinois to unleash their aggressive tax collectors on businesses located in better-managed locations. This would be especially damaging to the five states that choose to avoid statewide sales taxes (New Hampshire, Delaware,

Montana, Oregon and Alaska), as well as the businesses within their states. These businesses could be subject to audit and enforcement actions in states across the country in which they have no physical presence and, thus, no political influence.

2. A Bright Line Test is Needed to Firmly Establish Limits of State Taxing Power

A bright line test limits the risk of lawsuits that bog down interstate commerce.

> Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.... a bright line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail order industry's dramatic growth over the last quarter century is due in part to the bright line exemption from state taxation created in *Bellas Hess*.

Quill, 504 U.S. at 315-316.

3. The Public Overwhelmingly Opposes Enabling Out-of-State Efforts to Force Remittance by Retailers

Unsurprisingly, most Americans oppose the idea of burdensome online tax collection requirements. A March 2018 poll of likely voters by National Taxpayers Union found Republicans oppose such

laws by a 42-point margin, Democrats by a 38-point margin, and independents by a 46-point margin. Poll: Strong Opposition to Internet Tax Schemes Across Partisan, Ideological Lines, NATIONAL TAXPAYERS UNION (2018), https://www.ntu.org/library/doclib/Poll-Strong-Opposition-to-Internet-Sales-Tax-Schemes-Across-Partisan-Ideological-Lines.pdf (last visited March 29, 2018).

II. In Order to Protect Unfettered Interstate Commerce, National Economic Dynamics Require and Justify a Continued Physical Presence Standard

A. Onerous Compliance Costs Related to Sales Tax Remittance Unduly Burden Interstate Commerce, Stunting Economic Dynamism

1. Compliance Requirements are Unfair Discrimination Against Small Remote Retailers Engaged in Interstate Commerce

The Court in *Quill* expressed concern that collection duties could possibly "be imposed by the Nation's 6,000 plus taxing jurisdictions." *Quill*, 504 U.S. at 313, n.6. Now there are more than 12,000 tax jurisdictions across the states – roughly twice as many as when the U.S. Supreme Court decided the landmark *Quill* case in 1992. *See*, Steve DelBianco. *Act now on No Regulation Without Representation*, THE HILL, June 19, 2017, http://thehill.com/blogs/congress-blog/economy-budget/338456-act-now-on-no-regulation-without-representation, (last visited March 29, 2018); and

Chris Atkins, *Important Tax Cases:* Quill Corp. v. North Dakota *and the Physical presence Rule for Sales Tax Collection*, Tax Foundation, July 19, 2005, https://taxfoundation.org/important-tax-cases-quill-corp-v-north-dakota-and-physical-presence-rule-sales-tax-collection/ (last visited March 29, 2018) Each of these jurisdictions might have different rates, exemptions, rules, tax holidays, or other differences that online retailers would either be forced to track or face the risk of costly audits and fines. A remote retailer must determine the place of residence or place of use for each item sold in order to collect and remit sales taxes to each of those jurisdictions.

By contrast, brick-and-mortar businesses are only required to collect and remit taxes for the jurisdictions in which they are physically located. A remote retailer engaged in business with twenty jurisdictions could face exponentially higher compliance costs relative to gross sales compared to a retailer with physical presence in one jurisdiction.

When Patrick Byrne, the founder of online retailer Overstock.com, testified before Congress to oppose the threat of new online tax collection burdens, he stated:

> In 1999, we had 18 employees, carried 100 products and had $1.8 million in revenue. If we had been required to administer and collect sales tax on behalf of remote state governments without meaningful simplification, indemnity, and compensation, our chances of becoming an

> employer of 1,500 American workers that we are today would have been small.

Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce, House Comm on the Judiciary, 112th Cong. 1 (2011) (Testimony of Patrick Byrne).

The innovative e-commerce sector created more than 355,000 new jobs between 2007 and 2016. Dr. Michael Mandel. THE CREATION OF A NEW MIDDLE CLASS?: A HISTORICAL AND ANALYTIC PERSPECTIVE ON JOB AND WAGE GROWTH IN THE DIGITAL SECTOR, PART I,, PROGRESSIVE POLICY INSTITUTE (2017), http://www.progressivepolicy.org/wp-content/uploads/2017/03/Tech-middle-class-3-9-17b.pdf (last visited March 29, 2018). Dealing with federal, state, and local taxes and regulations is already an incredibly burdensome task for start-ups and small businesses. Online retailers should not be forced to decide between complying with onerous requirements or forgoing new opportunities in other states.

Compliance burdens would fall particularly hard on specialty businesses and small sellers, serving as barriers to entering the national marketplace.

2. Compliance Risks Shift from Consumers and the State to Small Remote Retailers

Imposing these compliance requirements will shift risks from consumers and the State onto small remote retailers. Audit risks for sales tax collection and remittance will be a constant threat along with possibility of lawsuits from consumers related to retailers inadvertently collecting more tax than lawfully due.

As responsibility shifts from consumer to retailer for remittance of taxes due, auditing costs for compliance will be borne by the retailer. A simple audit by one taxing jurisdiction can require tens of thousands of dollars in legal fees. In some instances, legal counsel will be required to be on site in the state investigating or litigating compliance. Demonstration of compliance will not absolve a retailer of the expenses incurred. And in the event of an inadvertent underpayment, fines may cripple the financial health of a retailer. Furthermore, retailers may incur liabilities to consumers for inadvertently collecting and remitting more than the requisite tax.

3. Compliance Costs Threaten Viability of Businesses

Compliance costs for multistate tax collection and remittance include capital expenditure on software used to determine tax categories, determine the tax owed on particular products, filing tax remittance forms, and remitting taxes collected. Additionally, the company must respond to assessment inquiries from taxing jurisdictions. This may require securing legal representation in multiple jurisdictions. *See*

U.S. GOV. ACCOUNTABILITY OFFICE, GAO-18-114, SALES TAXES: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, November 2017. ("GAO, *Sales Taxes*".)

Setup itself is not a simple process. Products must be coded by type as differing sales tax rates often apply even within a state for varying types of products. Additionally, a product classification in one state or jurisdiction may not hold true in another. The tax software system must be integrated into the business's order entry system and website. Costs related to this setup can exceed $150,000 even for a medium sized online retailer. Larry Kavanagh, EXPERT REPORT CONCERNING THE COSTS AND BURDENS FOR REMOTE RETAILERS TO COMPLY WITH SALES AND USE TAX COLLECTION OBLIGATIONS IMPOSED BY JURISDICTIONS THROUGHOUT THE UNITED STATES, INCLUDING ALABAMA, TRUE SIMPLIFICATION (2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf, (last visited March 29, 2018)

Determination of sales tax amounts for each potential sale requires interaction with the database for the software system. The costs for inquiries typically increase with the number of inquiries. The GAO found licensing fees ranging from "$12 per month for up to 30 information requests each month and as high as $200,000 per year for unlimited information requests." GAO, *Sales Taxes* at 19. According to a top consultant and industry expert Larry Kavanagh, costs for one major software provider run "$35,000 a year plus $0.13 per

transaction over 500,000 transactions." Larry Kavanagh, EXPERT REPORT CONCERNING THE COSTS AND BURDENS FOR REMOTE RETAILERS TO COMPLY WITH SALES AND USE TAX COLLECTION OBLIGATIONS IMPOSED BY JURISDICTIONS THROUGHOUT THE UNITED STATES, INCLUDING ALABAMA, TRUE SIMPLIFICATION (2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf, (last visited March 29, 2018).

Costs extend beyond setup and transaction fees. Sales tax holidays vary across states and localities. The time periods of such holidays also vary from year to year, often with minimal notice. Even engagement with a fraction of the nation's taxing jurisdictions may require filing of hundreds of tax returns and ongoing administration, consuming hundreds of hours of valuable time and thousands of dollars in labor costs.

4. This "Welter of Complicated Obligations" Unduly Burdens Interstate Commerce

As explained by the Court in *Quill*, the "substantial nexus" requirement within *Complete Auto* test upheld by *Quill* exists to "limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce.... Thus, the 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Quill*, 504 U.S. at 313. The Court also stated, "North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce" and expressed concern

that "similar obligations might be imposed by the Nation's 6,000 plus taxing jurisdictions." *Id.*, 504 U.S. at 313, n.6. The Court in *Quill* favorably quoted an analogous concern in *Bellas Hess* of the "many variations in rates of tax, in allowable exemptions, and in administrative and record keeping requirements could entangle [a mail order house] in a virtual welter of complicated obligations." *Id.* (*quoting Bellas Hess*, 386 U. S., at 759-760).

Close examination of compliance costs and a growing number of tax jurisdictions clearly illustrates that despite technological advancement, these compliance costs continue to be an undue burden on interstate commerce.

Forcing remote sellers to comply with a complex network of taxes and reporting regulations stretching beyond the purview of residents stunts economic dynamism, unduly burdening interstate commerce. The myriad compliance costs may drive some retailers out of entire markets and deter entry by others.

B. Tax Compliance Burden on Remote Retailers not Fairly Related to the Services Provided by the State

Absent constitutionally required nexus, the Court has said "inquiry into whether the out-of-state seller enjoys services related to the taxing State" is of "significance." *National Geographic*, 430 U.S. at 558. Continuing, the Court noted that "fairly apportioned, nondiscriminatory direct taxes have also been

sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State." *Id.* The Court in *Bellas Hess* focused on the concern of retailers being subject to the "welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" *Bellas Hess*, 386 U.S. at 759-760. Likewise, one of the four prongs to sustaining a tax against a Commerce Clause challenge under the *Complete Auto is that the tax must be "fairly related to the services provided by the State." National Geographic*, 430 U.S. at 279 (emphasis added).

Remote sellers forced to collect and remit sales taxes do not benefit from police protection, fire protection, highways, roads, trash collection, water services, educated workforce, or assorted public utilities funded by sales tax revenue. Retailers with physical presences in these jurisdictions, on the other hand, do utilize these services. Remote sellers should not be forced to comply with collection and remittance requirements because such tax revenue collected by the remote sellers on behalf of the state are not "fairly related to the services provided" the remote sellers.

C. The Condition of the U.S. Retail Market After Decades of Online Sales Expansion

As technology has advanced over the past twenty years, the retail marketplace has not segmented into brick-and-mortar v. online retailers. Instead, for many retailers with a traditional physical retail

locations, online sales transactions are merely just another—albeit very profitable—distribution channel. This "omnichannel" strategy is evidenced by the many brick-and-mortar retailers with a strong online presence, such as Walmart and Target.

Ashwini Murphy, an e-commerce expert estimates that "pure-play e-commerce companies around the world are less than 100,000. Which means, e-commerce by default means omni-channel." Ashwini Murphy, HOW MANY E-COMMERCE COMPANIES ARE THERE? WHAT'S THE GLOBAL E-COMMERCE MARKET SIZE? PIPE CANDY (2017), http://blog.pipecandy.com/e-commerce-companies-market-size/ (last visited March 29, 2018). Consider the recent acquisition of Whole Foods by Amazon or the new brick-and-mortar Amazon bookstores operating. Jordan Valinsky, WAYS AMAZON HAS ALREADY CHANGED WHOLE FOODS, CNN MONEY, (2018), http://money.cnn.com/2018/02/09/news/companies/amazon-whole-foods-changes/index.html (last visited March 30, 2018), and Jake Swearingen, WHY IS AMAZON BUILDING BRICK-AND-MORTAR BOOKSTORES?, NEW YORK MAGAZINE (2017), http://nymag.com/selectall/2017/06/why-is-amazon-building-bookstores.html (last visited March 30, 2018).

Another common example is the wide array of tech products available online through Apple in conjunction with the Apple stores. According to Krista Garcia, "60 percent of the biggest ecommerce players are multichannel, with a majority of sales occurring in-store." Krista Garcia, US ECOMMERCE SALES 2017: THE TOP 10 COMPANIES, EMARKETER

(2017), https://www.emarketer.com/Report/US-Ecommerce-Sales-2017-Top-10-Companies/2002164 (last visited March 29, 2018). In fact, 9 of the top 10 U.S. online retailers also have physical store locations (eBay being the exception). These retailers—including Walmart, Best Buy, Macy's, and Costco—account for 64 percent of total U.S. retail ecommerce.

As retail businesses expand, nexuses sufficient to meet the physical presence standard often expand regions far larger than a single state. These businesses are enabled to artificially suppress competition from smaller, more geographically constricted entities by forcing on them sales tax compliance burdens. For example, Amazon once opposed efforts to force remote sellers without the requisite physical presence into collecting and remitting sales tax revenue. However, as Amazon developed a physical presence across the nation sufficient to meet the nexus requirements in nearly every state, the company changed its stance. Chris Isadore, AMAZON TO START COLLECTING SALES TAXES EVERYWHERE, CNN, (2017). http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html (last visited March 30, 2018).

Far from dominating the retail sector, remote sales equaled just 8.9 percent of the $5 trillion annual U.S. retail market in 2017. U.S. CENSUS BUREAU, QUARTERLY RETAIL E-COMMERCE SALES, 4TH QUARTER 2017, (2018), https://www2.census.gov/retail/releases/historical/ecomm/17q4.pdf (last visited March 29, 2018). As discussed above, 64 percent of these sales are

attributed to companies with physical retail locations. Annual retail trade employment levels reached a third consecutive record high in 2017, at 15.86 million. U.S. BUREAU OF LABOR STATISTICS, ALL EMPLOYEES: RETAIL TRADE [USTRADE], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/USTRADE, (last visited March 29, 2018). This represents more than a 9 percent increase since Great Recession lows.

Many consumers prefer a shopping experience of physically viewing, touching, and experiencing the products along with interacting with sales associates. Recent moves by leading real-estate investment firms suggest experts expect a strong future for physical commerce venues as well. For instance, this March, Klépierre bid $6.8 billion in cash and stock for Hammerson, a real-estate investment trust (REIT). This was a 41 percent premium to Hammerson's share price. Stephen Wilmot. *Death of the Mall? Greatly Exaggerated, Says Big Money*, THE WALL STREET JOURNAL, March 19, 2018.

The economy has benefited from this retail evolution with broadened consumer choice, increased jobs opportunities, more competitive consumer prices.

C. States are not Facing Sales Tax Revenue Shortfall Related to Remote Retailers

1. Sales Tax Revenue Continues to Soar, Despite the "Lost Revenue" from Remote Sales

State and local sales tax collection hit a record $574 billion in 2017, a seventh consecutive record. From

2011 through 2017, state and local sales tax revenue increased by 23 percent,[5] eclipsing the 13.9 percent combined growth in national population and inflation. Population increased just 4.9 percent increase by the end of 2017;[6] inflation rose 9 percent through this period.[7] States continue to derive approximately 30 percent of all revenue from sales taxes. Norton Francis and Frank Sammartino, *Governing with Tight Budgets* (September 2015), p 3, https://www.urban.org/sites/default/files/publication/66046/2000376-Long-Term-Trends-in-State-Finances.pdf.

Total lost revenue from remote sales, nationwide, based on estimated seller collection rates is estimated at $8.5 billion to $13.4 billion annually. GAO, *Sales Taxes*, at 45 Another study estimates an even smaller loss of $5 billion in sales tax revenue. Jeffrey A. Eisenach, and Robert E. Litan,

---

[5] U.S. BUREAU OF ECONOMIC ANALYSIS, STATE AND LOCAL GOVERNMENT CURRENT TAX RECEIPTS: TAXES ON PRODUCTION AND IMPORTS: SALES TAXES [B248RC1Q027SBEA], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/B248RC1Q027SBEA (last visited March 29, 2018).

[6] WORLD BANK, POPULATION, TOTAL FOR UNITED STATES [POPTOTUSA647NWDB], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/POPTOTUSA647NWDB, (last visited March 28, 2018).

[7] U.S. BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS: ALL ITEMS [CPIAUCSL], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/CPIAUCSL (last visited March 26, 2018).

UNCOLLECTED SALES TAX ON ELECTRONIC COMMERCE: A REALITY CHECK, Empiris, LLC (2010), https://netchoice.org/wp-content/uploads/eisenach-litan-e-commerce-taxes.pdf (last visited, March 29, 2018). Estimates are merely 1-2 percent of the $5 trillion U.S. retail market. GAO, *Sales Taxes*, p. 45.

This boom in sales tax revenue occurred even as e-commerce retail sales more than doubled from approximately $200 billion in 2011 to more than $450 billion in 2017.[8] State and local governments as a whole are enjoying booming sales tax revenues even as e-commerce expands exponentially.

2. Remote Sellers Already Collecting the Vast Amount of Taxes Payable on Sales

Under current law, the United State Government Accountability Office (GAO) estimates that "state and local governments can...require remote sellers to collect about 75 to 80 percent of the taxes that would be owed if all remote sellers were required to collect tax on all remote sales at current rates." GAO, *Sales Taxes* p. 8. Remote sellers include both internet retailers (comprising more than 70 percent of the business-to-consumer remote sales) and e-marketplace sellers (comprising 18 percent of business-to-consumer remote sales) such as Etsy and eBay.

---

[8] U.S. BUREAU OF THE CENSUS, E-COMMERCE RETAIL SALES [ECOMSA], Federal Reserve Bank of St. Louis (2018), https://fred.stlouisfed.org/series/ECOMSA (last visited March 26, 2018).

In particular, the GAO "found that the percentage of taxes already being collected by sellers...was generally higher for Internet retailers than for other types of remote sellers like catalog retailers or e-marketplaces." GAO, *Sales Taxes*, at p. 8. A GAO analysis of just the 1,000 top internet retailers (not including e-marketplace sellers) found that "about 80 percent of the potential revenue from requiring all Internet retailers to collect is already collectible." Of the top 100 internet retailers, 85 either had a physical presence in or claimed to collect sales taxes for New York and California while 55 percent had a physical presence in or collected sales tax for smaller states. *Id.* at p. 13.

E-marketplaces are critical for the success of success of smaller entrepreneurs and new businesses. E-marketplace commerce accounts for just 18 percent of the business-to-consumer remote sales and an even smaller percentage of remote sales if business-to business sales are included. *Id.* at p. 35. Entities such as eBay provide a platform for individual sellers to reach online buyers. Because relatively few of these sellers have widespread nexuses, the amount of sales tax collectible from remote e-marketplace sellers under current law is just 14 percent to 33 percent of the total due from these sales. *Id.* at p. 40. Even though lost revenue from e-marketplace sellers is small, these e-marketplace platforms will likely be targeted if the physical presence standard is overturned. *Id.* at p. 45. Sales tax collection compliance costs would crush many of these entrepreneurs.

3. States Already Possess the Power to Enforce State Tax Laws on Purchases from Remote Sellers with no Physical presence

In *Direct Marketing Association v. Brohl*, __ U.S. __, 135 S. Ct. 1124 (2015), the state of Colorado required online retailers choosing not to collect state sales taxes to notify customers regarding Colorado's sales and use tax requirements and to report tax information related to particular sales to both the customer and the Department of Revenue. *Id.* at 1125. The Court indicated that Commerce Clause limitations on jurisdictional boundaries for sales tax collection requirements do not preclude states from requiring online retailers with no physical presence to inform customers of their state's sales and use tax requirements or to report tax information to the state.

These statistics illustrate that as commerce develops, it evolves. Many online retailers now have presence—showrooms, warehouses, etc. And some that began as brick and mortar become online retailers. Despite the claims of the "efairness" advocates that "online-only retailers are not collecting sales tax during a purchase," Internet commerce is not, nor should it be, free of taxation.

D. Remote Sales Taxes Unfettered from any Substantial Presence Undermines Tax and Economic Policy Competition

1. Capability to Force Remote Sellers to Collect Sales Tax Undermines the Drive for Fiscal Policy Reform

Overall, economic evidence strongly suggests states with lower tax burdens and more economic freedom regularly outperform their higher taxed and more restrictive counterparts. The annual *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index* presents the case of tax competition in full detail and shows how Americans "vote with their feet" across state lines to pursue economic opportunity. ARTHUR B. LAFFER, JONATHAN WILLIAMS, AND STEPHEN MOORE, RICH STATES, POOR STATES (10th ed,) (2017) https://www.alec.org/publication/rich-states-poor-states/ (last visited March 29, 2018). This healthy economic competition in a free market, between the 50 "laboratories of democracy," is at the heart of the American experiment with federalism.

State lawmakers possess the power to create a tax and fiscal policy environment conducive to economic growth. Individuals, businesses, and even government revenues benefit from the increased savings and investment spurred by a growth in total economic output. Poorly designed tax policy creates a fundamental disconnect between work and reward, driving out the key ingredients to earned success.

Unfortunately, the repeated failures of state tax increases have caused some state policymakers to

look aggressively beyond their own state lines for tax revenue. This ill-advised strategy chases the promise of short-term revenue and fails to consider the harm to the national economy that is caused as businesses elsewhere are inadvertently stifled by compliance costs.

Remote sellers, like any other business, often choose their home state based on costs of compliance with state and local regulations. The desire to enhance the state economy by attracting these businesses fosters a healthy competition between the states to enact prudent tax and regulatory policies. Forcing remote sellers to comply with the sales tax collection and remittance requirements of locales in which they have no physical presence erodes this tendency.

2. Forcing remote sellers to act as tax collection agents for the state mutes political pressure for reform by constituents

Absent forcing remote sellers to collect and remit taxes, taxpayers would instead pay the use tax on their individual purchases quarterly or annually. Forcing remote sellers to collect the sales tax on each purchase as it occurs allows politicians to mask the full burden of the tax by spreading payment by the consumer over a period of time. As such, political pressure by consumers for fiscal reform is muted by forcing remote sellers to act as tax collection agents for the state. *See, e.g. M'Culloch*, 17 U.S. (4 Wheat.) at 428.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted,

Jonathon P. Hauenschild
Counsel of Record
Joel Griffith
Bartlett Cleland
American Legislative Exchange Council
2900 Crystal Dr., Ste. 600
Arlington, VA 22202

Main – (703) 373-0933
jhauenschild@alec.org

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR INC., OVERSTOCK.COM, INC. AND NEWEGG, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF OF AMERICANS FOR TAX REFORM AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

JONATHAN MYLES
LAURIER CANNON
AMERICANS FOR TAX REFORM
722 12th Street, NW, Suite 4
Washington, DC 20005
(202) 785-0266

CLARK R. CALHOUN
Counsel of Record
ALSTON & BIRD LLP
333 South Hope Street,
16th Floor
Los Angeles, CA 90071
(213) 576-1000
clark.calhoun@alston.com

Attorneys for Amicus Curiae Americans for Tax Reform

279951

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT IN SUPPORT OF RESPONDENTS . 5

I. South Dakota's economic nexus thresholds are not sufficient to prevent the imposition of undue burdens on multistate and international sellers of property and services 5

II. A ruling for South Dakota would subject taxpayers to substantial retroactive state tax liability 14

III. Congress, rather than the South Dakota legislature, is the appropriate and best party to legislate the proper nexus standards for balancing the interests of States, businesses, individuals, and taxpayers 17

IV. Rewarding South Dakota for passing an unconstitutional law to challenge a Supreme Court precedent could have dangerous consequences for our constitutional order 22

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Cases

Am. Trucking Ass'ns v. *Smith*,
496 U.S. 167 (1990) 16

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 19

Complete Auto Transit v. Brady,
430 U.S. 274 (1977) 13, 14

Dot Foods Inc. v. Dep't of Revenue,
372 P.3d 747 (Wash. 2016), *cert. denied*,
137 S. Ct. 2156 (2017) 15

Gillette Commercial Operations N. Am. and Subsidiaries v. Mich. Dep't of Treasury,
878 N.W. 2d 891 (Mich. Ct. App. 2015),
cert. denied, 137 S. Ct. 2157 (2017) 15

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1992) 16

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Other Authorities

18 Cal. Code. Regs. 1602(a)(1) 8

20 N.Y. Comp. Codes R. & Regs. 525.2(a)(3) 9

86 Ill. Admin Code 130.605(a) 8

Wisc. Stat. § 77.54(46) 7

Americans for Tax Reform, *Marketplace Fairness Act, Exposing your business to Every State's IRS*, Posted by Katie McAuliffe, (April 29, 2013) 13

Editorial, *An Ohio Bill Would Ban All Abortions. It's Part of a Bigger Plan*, THE NEW YORK TIMES, Mar. 25, 2018 24

eMainStreet, *The Costs of "Free" Software – An Important Study by TruST*, (Oct. 12, 2013) 10

H.R. 2193, 115th Cong. (2017-2018) 19

H.R. 2887, 115th Cong. (2017-2018) 19

James Gattuso, *Taxing Online Sales: Should the Taxman's Grasp Exceed His Reach?* The Heritage Foundation (June 19, 2013) 10

Joseph Bishop-Henchman and Richard Borean, *State Sales Tax Jurisdictions Approach 10,000*, Tax Foundation (Mar. 24, 2014) 7

Joseph Bishop-Henchman and Steven Pahuskin, *Happy Flag Day! 14 States Exempt Flags from Their Sales Tax*, Tax Foundation (June 24, 2011) 7

Katie McAuliffe, *Top Five Reasons Conservatives Oppose the Marketplace Fairness Act*, Townhall, (Mar. 25, 2013) 13

Larry Kavanagh and Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax for Mid-Market and Online Catalog Retailers*, True Simplification of Taxation (Sept. 2013) 10

N.J. Division of Tax'n Reg. Servs. Branch Technical Bull., TB-70, Sales and Use Tax 8

N.Y. State Dep't of Taxation and Fin., Tax Bulletin ST-103 (June 1, 2014) 8

Press Release, European Commission, "Digital Taxation: Commission proposes news measures to ensure that al companies pay fair tax in the EU," at http://europa.eu/rapid/press-release_IP-18-2041_en.htm (Mar. 21, 2018) 12

Tom Cornett and Samantha Hesley, *Taxpayer Challenges to Retroactive State Tax Legislation*, STATE TAX NOTES 647, 652-58 (Feb. 29, 2016)..... 16

INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief in support of Respondents' position is filed by the Americans for Tax Reform ("ATR"). ATR is a non-profit 501(c)(4) organization that represents the interests of the American taxpayers at the federal, state, and local levels. ATR has no parent companies, subsidiaries, or affiliates, other than the Americans for Tax Reform Foundation, with which it shares board and staff. No publicly held corporation has an ownership stake of 10% or more in ATR.

ATR is based in Washington, D.C. and represents the interests of taxpayers across the country. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates citizens and government officials about sound tax policies to further these goals. This case involves an important tax policy issue on which ATR has testified and otherwise written extensively about the taxpayer burdens of expanded tax nexus. As such, ATR has an institutional interest in ensuring that the physical-

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certify that no counsel for any party to this matter authored this brief in whole or in part. Counsel also certifies that no person other than amicus curiae, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by *amici curiae*.

presence standard is upheld and that the U.S. Supreme Court continues to defer to Congress in the regulation of interstate commerce. Such deference is essential in order to protect taxpayers from taxation without representation.

SUMMARY OF THE ARGUMENT

In the telling of the State of South Dakota and its *amici curiae*, collecting use tax in 2018 is as easy as obtaining free software and "turning on" collection in every jurisdiction into which a business makes sales. But this picture is removed from reality and overlooks the substantial costs that a lower nexus threshold will impose on businesses. If this Court overturns *Quill*, retailers with no presence in a taxing State will face complex and costly collection obligations, the threat of expensive and intrusive audits from thousands of taxing jurisdictions, and potential retroactive tax assessments. For service providers, such obligations may arise when a seller has neither solicited sales nor agreed to provide services in a state, simply by virtue of the purchaser's decision to pass on the benefit of the service to employees located across the country. These are heavy burdens on interstate and international commerce, and the economic nexus thresholds imposed by South Dakota are insufficient to alleviate them.

A ruling for South Dakota in this matter would suffer from two other procedural concerns: namely, that the Court cannot prevent states from subjecting taxpayers to retroactive state tax liability, and that the Court cannot rule for South Dakota without legislating a new nexus standard—*i.e.*, without performing the task that this Court

assigned to Congress in 1992. While South Dakota suggests that other states are "likely" not to apply a ruling in its favor retroactively, it offers no guarantees. Similarly, more than 40 states and territories filed an amicus brief with the Court in this case, and they noted their "incentives" not to apply a ruling in South Dakota's favor retroactively but stopped well short of promising not to do so. The states' history of retroactive tax assessments provides substantial reason to doubt that the "incentives" toward fairness will hold the states back from a money grab if the Court eliminates the physical-presence rule on which businesses have relied for more than 50 years.

The Court also must recognize that a ruling for South Dakota would have the effect of new national nexus legislation. South Dakota's economic nexus thresholds involve judgments about the proper balance of the interests of States, remote sellers of property and services, in-state businesses, individual and business buyers, international businesses, and other constituencies—all of which adds up to a quintessentially *legislative* choice about how best to balance those interests. In 1992, this Court held that Congress was the right party to determine a new standard (if any) for sales and use tax collection nexus—and Congress has indeed been engaged in a robust debate about potential replacements. It would be a giant step in the opposite direction to decide, 26 years later, that the

South Dakota legislature is the right party to establish that new standard. The briefs of numerous *amici* in this case serve to underline that the case before this Court involves a *legislative*, rather than judicial, choice.

Finally, the Court should pause to consider what message it would send to the country if it were to reward South Dakota for passing an intentionally-unconstitutional law with a fast-track appeal mechanism in an effort to get this case before the Court. To rule for South Dakota would be a dangerous precedent that would encourage other states to pass unconstitutional laws to force the reconsideration of numerous other constitutional issues.

ARGUMENT IN SUPPORT OF RESPONDENTS

I. South Dakota's economic nexus thresholds are not sufficient to prevent the imposition of undue burdens on multistate and international sellers of property and services.

In its brief, South Dakota dismisses the burdens on interstate commerce of remote use tax collection as "marginal" and offers tax collection software as a singular and complete solution to these burdens. Pet. Br. at 44–47. South Dakota goes so far as to suggest that retailers can *profit* from collecting

sales tax with the right tax collection software. *Id.* at 47. South Dakota's portrayal of comprehensive, multistate use tax collection for remote retailers is far too simplistic and vastly understates the actual burdens that compliance will place on retailers. If this Court overturns *Quill*, retailers with no presence in a taxing State will face complex and costly collection obligations, the threat of expensive and intrusive audits from thousands of taxing jurisdictions, and potential retroactive tax assessments. For service providers, such obligations may arise when a seller has neither solicited sales nor agreed to provide services in a state, simply by virtue of the purchaser's decision to pass on the benefit of the service to employees located across the country. These are heavy burdens on interstate and international commerce, and the economic nexus thresholds imposed by South Dakota are insufficient to alleviate them (and in the case of international sellers and service providers, do not even address them).

The sales and use tax system in the United States is convoluted. Forty-five States, the District of Columbia, and thousands of municipalities, counties, and special taxing districts impose sales and use taxes. In *Quill*, this Court determined that the threat of complying with 6,000 taxing jurisdictions imposed a burden on interstate commerce. *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.6 (1992). Since *Quill*, the number of

jurisdictions has increased to nearly 10,000.[2] Contrary to South Dakota's suggestion, complying with the requirements of each one of these jurisdictions is not as simple as plugging an address into a piece of software. That might identify a tax *rate*, but it will not help a retailer deal with the wide variation in taxability, interpretation, and administration that exists among taxing jurisdictions.

Tax software is imperfect at identifying what is subject to sales tax, and shedding light on this question is no easy task. Take sales of flags, for example. In Wisconsin, the U.S. flag and the Wisconsin state flag are exempt from sales tax, while all other flags are taxable.[3] Wisconsin is not an isolated case: at least 14 states have distinct rules for determining which flags are taxed and which are not.[4] The story is the same for other goods and services: for example, many States exclude candy

---

[2] Joseph Bishop-Henchman and Richard Borean, *State Sales Tax Jurisdictions Approach 10,000*, Tax Foundation (Mar. 24, 2014), https://taxfoundation.org/state-sales-tax-jurisdictions-approach-10000/.

[3] Wisc. Stat. § 77.54(46).

[4] Joseph Bishop-Henchman and Steven Pahuskin, *Happy Flag Day! 14 States Exempt Flags from Their Sales Tax*, Tax Foundation (June 24, 2011), https://taxfoundation.org/happy-flag-day-14-states-exempt-flags-their-sales-taxes-0/.

from their sales tax exemption for food,[5] but others do not.[6] Moreover, determining *what* qualifies as "candy" can be challenging. New Jersey considers a granola bar "candy"—unless it contains flour.[7] By contrast, neighboring New York exempts all granola bars from sales tax.[8] Detailed classification problems are rampant in the American sales and use tax system, and retailers must solve these problems to stay in full compliance. If this Court overturns *Quill*, multistate and international sellers will be burdened with understanding the specific way that dozens—if not hundreds—of jurisdictions tax (or do not tax) their merchandise.

The varying administrative procedures among jurisdictions provides an additional burden on interstate commerce. For example, some rely on origin-based sourcing (taxing to the location of the seller), while others rely on destination-based sourcing (taxing to the location of the buyer).[9] This

---

[5] *See, e.g.*, N.J. Division of Tax'n Reg. Servs. Branch Technical Bull., TB-70, Sales and Use Tax ("The sales of candy are subject to tax.").

[6] *See, e.g.*, 18 Cal. Code. Regs. 1602(a)(1) (exempting "candy, confectionary, and chewing gum").

[7] *Id.*

[8] *See See* N.Y. State Dep't of Taxation and Fin., Tax Bulletin ST-103 (June 1, 2014) (excluding "granola or cereal bars" from the definition of "candy and confectionary").

[9] *Contrast* 86 Ill. Admin Code 130.605(a) ("Where tangible personal property is located in this State at the time of its sale (or is subsequently produced in Illinois), and then

variation presents the possibility that a retailer must decide which competing jurisdiction should receive the tax it collects. Jurisdictions also apply different rules for how a retailer's customer may claim a tax exemption. Some accept multistate exemption certificates, while others require their own unique certificate—or no certificate at all.

Other than variations in tax rates, South Dakota does not address any of this complexity in its brief. But even when it comes to rates, South Dakota vastly underestimates the cost of its proffered solution to that problem—tax software. The sticker price of tax software may be affordable, but retailers confronting multistate tax collection will face significant implementation costs. They must hire staff to install, monitor, and maintain the software. There are costs involved with coordinating tax software with their existing systems and updating the software. For example, the owner of Garage Flooring (an online business with around $1,000,000 in annual revenue) calculated that it would cost around $40,000 to collect tax accurately in multiple states—a figure that is exclusive of additional

---

delivered in Illinois to the purchaser, the seller is taxable if the sale is at retail") *with* 20 N.Y. Comp. Codes R. & Regs. 525.2(a)(3) ("Except as specifically provided otherwise, the sales tax is a 'destination tax.' The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.").

annual costs related to training and operations.[10] The CEO and co-founder of Scrapbook.com estimated that his small online business would be subjected to $60,000–$80,000 in integration costs alone to comply with additional use tax collection obligations.[11]

More generally, the "at no charge" software solutions touted by South Dakota (Pet. Br. at 46) are estimated to cost between $80,000–$290,000 in initial setup and integration, and approximately $57,500–$260,000 per year to maintain.[12] This high cost could destroy small businesses. The average mid-market retailer stocks between 2,000–30,000 separate products.[13] These items must be logged and classified to determine whether they are taxable in each particular taxing jurisdiction. This could take

---

[10] James Gattuso, *Taxing Online Sales: Should the Taxman's Grasp Exceed His Reach?* The Heritage Foundation (June 19, 2013), https://www.heritage.org/taxes/report/taxing-online-sales-should-the-taxmans-grasp-exceed-his-reach.

[11] eMainStreet , *The Costs of "Free" Software – An Important Study by TruST,* (Oct. 12, 2013), https://www.emainstreet.org/articles/the-costs-free-sales-tax-software.

[12] Larry Kavanagh and Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax for Mid-Market and Online Catalog Retailers,* True Simplification of Taxation (Sept. 2013) at 1, http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

[13] *Id.*

anywhere between 100 and 2,500 hours—a tremendous expense of labor.[14]

If this Court overturns *Quill*, burdensome compliance with sales and use tax collection will be only part of the story. In a world governed by economic nexus standards, retailers will be open to a multitude of intrusive audits from thousands of potential jurisdictions. Florida can audit a coffee retailer in Hawaii. The revenue department of Montgomery, Alabama, can compel the production of sales data from a SaaS provider in Vermont, California, or, in some cases, an international location. Simply by selling its wares over the internet, a retailer exposes its books and records to the eyes of government agencies across the nation. The cost for this increased audit attention is significant: one study estimates that businesses who are newly exposed to multistate tax collection will need to add one-half of one full-time position to deal with the increased governmental inquiries.[15] This is an easier pill for large retailers to swallow, but as audit expenses increase the costs of participating in the online marketplace, smaller companies will be pushed out. Far from creating a level playing field, removing *Quill*'s physical presence standard gives

---

[14] *Id* at 5.

[15] *Id.* at 7.

an advantage to large businesses because of the common fixed costs of compliance software.

The Court must also recognize that South Dakota's low economic-nexus thresholds would have international tax implications. Traditional tax policy has been based on territorial taxation (*i.e.*, businesses are only taxed in jurisdictions in which they have a presence). However, the European Union is aggressively pursuing American businesses with a proposed "interim digital tax" on revenues that, according to the EU, result from interactions with European customers through digital channels.[16] The Court's decision regarding the circumstances under which a state may impose a tax collection obligation on a remote seller will affect the EU's thinking regarding its own ability to impose tax obligations on American companies that earn income from foreign sources without establishing any "physical presence" there.

South Dakota attempts to give the Court comfort that its economic nexus standard—$100,000 in sales or 200 transactions in a year—provides a safe-harbor for small retailers from the burdens of interstate sales and use tax compliance. This claim is questionable in its own right. (A retailer whose

---

[16] *See, e.g.*, Press Release, European Commission, "Digital Taxation: Commission proposes news measures to ensure that al companies pay fair tax in the EU," at http://europa.eu/rapid/press-release_IP-18-2041_en.htm (Mar. 21, 2018, *last accessed* Mar. 30, 2018).

average sale is $10 has nexus with South Dakota with sales of only $2,000.) But unless this Court is willing to set a bright-line standard that definitively protects small businesses, the elimination of *Quill*'s physical-presence standard will create a race to the bottom. Given the opportunity, the States will turn "substantial nexus" under *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), into nothing more than constitutional due process, under which any directed commercial activity (maybe even one sale over the internet) provides a State the power to tax. Use tax collection in *all* 10,000-plus jurisdictions could become the de facto rule. That is a rule that small- and medium-sized online retailers cannot bear.

Finally, exposure to tax audits from far-flung jurisdictions highlights a deeper concern, one rooted in the American system of government. South Dakota is asking this Court for increased permission to impose its taxes on businesses who have no ability to influence the imposition and administration of those taxes through representative government—a classic case of exporting the tax burden to impose taxation without representation.[17] The physical

---

[17] *See* Katie McAuliffe, *Top Five Reasons Conservatives Oppose the Marketplace Fairness Act*, Townhall, (Mar. 25, 2013), https://townhall.com/columnists/katiemcauliffe/2013/03/25/top-five-reasons-conservatives-oppose-the-marketplace-fairness-act-n1548461; Americans for Tax Reform, *Marketplace Fairness Act, Exposing your business to Every State's IRS*, Posted by Katie McAuliffe, (April 29, 2013),

presence rule of *Quill* provides a connection (albeit approximate) between the taxing power of the government and the political power of the taxpayer: retailers with physical locations in a State are likely to have employees and owners who reside in the State and who can participate in the State's political process. The pure economic nexus standard offered by South Dakota obliterates this connection. For all of these reasons, South Dakota's low economic-nexus thresholds are insufficient (on their own or in comparison to the existing physical-presence threshold) to protect multistate and international sellers of property and services from the undue burdens of complying with multi-jurisdictional sales and use tax collection obligations.

II. A ruling for South Dakota would subject taxpayers to substantial retroactive state tax liability.

In addition to the prospective burdens that taxpayers would face if the Court were to reverse *Quill*, online retailers would face an additional burden: a real risk of retroactive tax assessments. Although *South Dakota* has chosen not to seek the collection of taxes for periods prior to the enactment of S.B. 109 (Pet. Br. at 48), other states will not be so generous. South Dakota does not even suggest that its sister States cannot impose retroactive sales

---

https://www.atr.org/marketplace-fairness-act-exposing-business-states-a7586.

tax assessments, only that they will "likely follow suit." *Id.* at 48.

South Dakota proffers several "safeguards" against retroactive tax liability: sister-state retribution, prohibitions against enacting retroactive state laws, political pressure, and acts of Congress. Pet. Br. at 48–49. None of these is compelling. On the contrary, states have demonstrated a voracious appetite for retroactive tax laws. For example, after an unfavorable court decision against its Department of Revenue, the Washington State Legislature enacted legislation with 23 years of retroactive application. *See Dot Foods Inc. v. Dep't of Revenue*, 372 P.3d 747 (Wash. 2016), *cert. denied*, 137 S. Ct. 2156 (2017). Likewise, the Michigan Legislature recently enacted retroactive income tax legislation to deny corporate taxpayers the financial benefit of a decision by the State's highest court. *See, e.g.*, *Gillette Commercial Operations N. Am. and Subsidiaries v. Mich. Dep't of Treasury*, 878 N.W. 2d 891 (Mich. Ct. App. 2015), *cert. denied*, 137 S. Ct. 2157 (2017). In an ironic twist, the attorneys general of both of those States—along with the AGs of other states that have issued egregious retroactive tax assessments in recent years, including Arizona and Kentucky—signed on to an amicus brief in this case. In that brief, they acknowledge the "thorny" issues of retroactivity raised by the possibility of reversing *Quill* but assert that existing guidance would "limit retroactive

enforcement" and add that "other legal and pragmatic safeguards will address any constitutional concerns."[18] Yet those "legal and pragmatic safeguards" have done nothing to stop those same States in numerous cases of retroactive tax liability in the years since *Quill*.[19]

Precedent from this Court demonstrates plainly that an abrogation of *Quill*'s physical presence rule would have retroactive application. Just a year before the *Quill* decision, this Court held that when the court has applied "a rule of law . . . in one case it must do so with respect to all others." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1992). Justice Scalia believed it beyond the Court's power to apply rules on a purely prospective basis. *Id.* at 549 (Scalia, J., concurring); *see also Am. Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 201 (1990) ("Either enforcement of the statute at issue . . . was unconstitutional, or it was not; if it was, then so is enforcement . . . whether occurring before or after our decision."). The impact of the Court's holding in *Quill* was retroactive, and any adjustment to *Quill*'s

---

[18] *See* Brief for Colorado and 40 Other States, Two United States Territories, and the District of Columbia as *Amici Curiae* Supporting Petitioner, at 19.

[19] *See* Tom Cornett and Samantha Hesley, *Taxpayer Challenges to Retroactive State Tax Legislation*, STATE TAX NOTES 647, 652-58 (Feb. 29, 2016).

physical presence rule will apply retroactively as well.

The States and Territories that filed the amicus brief carefully avoid a promise not to apply a ruling in South Dakota's favor retroactively; rather, they note their "incentives" to implement regulatory changes "carefully and fairly" and weakly state that they "generally" provide advance notice of substantial legal changes.[20] This is little comfort to taxpayers familiar with the consistent pattern of retroactive state taxation.

III. Congress, rather than the South Dakota legislature, is the appropriate and best party to legislate the proper nexus standards for balancing the interests of States, businesses, individuals, and taxpayers.

South Dakota asks this Court to remove the physical-presence limitation upheld in *Quill* and in its place approve a test for substantial nexus crafted by its own state legislature (i.e., $100,000 of annual sales or 200 annual transactions into the State). In essence, South Dakota asks this Court to play the role of a legislature—by eliminating the physical-presence standard on which businesses have relied for half a century and replacing it with a specific new economic threshold suggested and approved by the

---

[20] *See* Brief for Colorado and 40 Other States, at 19.

legislature of a single state. But South Dakota's nexus threshold—or any other specific economic nexus threshold—is inherently arbitrary and can be evaluated only by considering whether South Dakota has set forth a new rule that appropriately balances the competing interests of the States, remote sellers of property and services, in-state businesses, individual and business buyers, international businesses doing business in the United States, and others—an inherently and quintessentially *legislative* task. Viewed another way: in 1992, this Court stated that Congress was the right party to determine a new standard for sales and use tax collection nexus, if any. Now in 2018, South Dakota asks this Court to decide that the *South Dakota legislature* is the right party to establish that new standard.

Fortunately, this Court has already reached a much more sensible conclusion: Congress is the branch that should resolve this question. *See Quill*, 504 U.S. at 318 (noting that reaffirming the physical presence standard was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."). This case presents a question for which *Quill* gave a clear and cogent answer: if the States desire a rule other than physical presence, Congress must provide it. As *Quill* reminds, "the better part of both wisdom and valor is the judgment of the other branches of the

Government." *Id.* at 319 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 638 (1981) (White, J., concurring)).

Indeed, Congress has been in the midst of robust debate on this topic for years, with proposed legislation introduced in previous terms and in the current Congress. *See, e.g.*, H.R. 2887, 115th Cong. (2017-2018) (the "No Regulation Without Representation Act of 2017," which would codify the physical presence requirement for e-commerce); H.R. 2193, 115th Cong. (2017-2018) (the "Remote Transactions Parity Act of 2017," which would allow remote sellers who are members of the Streamlined Sales and Use Tax Agreement to collect and remit sales tax). That these proposed solutions differ in their approach to interstate sales and use tax collection demonstrates that Congress is engaged in a substantive discussion of potential solutions. Because the legislative process is in motion (as this Court intended), the Supreme Court should defer to Congress in this matter. If anything, this Court should remind Congress and the States that it is Congress's job to determine an appropriate standard in this arena, and that Congress's deliberation in doing so is a feature—not a failure—of that constitutional separation of powers.

The *Quill* Court's reliance on *stare decisis* to maintain the physical presence rule had much to do with the fact that Congress is the appropriate body

to decide (i) what substantial nexus means; and (ii) to set any new standard in accordance with the legislative process, which allows for a collection, consideration, and balancing of differing viewpoints and priorities. The fact that Congress is *perhaps* taking longer than the Court envisioned in 1992 has no effect on the particular force of *stare decisis* in this case. It is far from a given that the Court in *Quill* expected Congress to change *Quill's* physical-presence standard before 2018 (nor is it clear that Court had any expectations at all regarding the timing of such a change). South Dakota and its *amici curiae* act as though the 26 years between *Quill* and this case have substantially altered the question before this Court. But this is not the case. Though the physical-presence standard may be imperfect, under *stare decisis* it remains the rule until Congress acts.

Finally, the *amici curiae* briefs illustrate the broad recognition that the question before the Court is a quintessentially *legislative* task. Two briefs offered in support of neither party ask the Court to bless standards other than the one at issue. First, the Tax Foundation indicates that an economic-nexus threshold would avoid imposing undue burdens on interstate and international businesses—*if* it is scaled "in proportion to [states'] population or total economy relative to South

Dakota's . . . ."[21] Second, David Fruchtman argues that South Dakota's economic-nexus threshold is constitutional—but that the Court should create a carve-out for sellers of *services*.[22]

Separately, the Retail Litigation Center has written on behalf of a trade coalition in support of South Dakota. That brief notes the variety of economic-nexus thresholds that different states have chosen but acknowledges that if this Court rules for South Dakota, then South Dakota's thresholds will become the de facto standard.[23] Finally, the brief for the United States also acknowledges Congress's authority to resolve the issue in question but claims that Congress's ability to do so will somehow be "enhanced" if the Court

---

[21] Brief of Tax Foundation as *Amicus Curiae* In Support of Neither Party," at 16–17 (suggesting that New York should impose an economic-nexus threshold of $2.28 million, which would be "comparable" to South Dakota's law based on their population differences).

[22] Brief for David A. Fruchtman as *Amicus Curiae* Supporting Neither Party, at 24–25 ("[U]ntil the states develop an efficient methodology for taxing interstate sales of services, this Court should continue to apply the physical presence requirement to service providers.").

[23] Brief of Retail Litigation Center, Inc. and 21 Retail and Wholesale Distribution Trade Associations as *Amici Curiae* in Support of Petitioner, at 33 (noting the different thresholds chosen by Alabama, Tennessee, and Wyoming and asserting that no state would seek to enact a threshold lower than South Dakota's).

narrows the scope of *Quill*.[24] The United States then concludes its brief by arguing that the Court should hold that a seller's "Internet presence in South Dakota" (whatever that means) is sufficient to permit South Dakota to impose a collection obligation on sellers there, without acknowledging that such a ruling would set a new standard across all states that would apply to national and international sellers of property and services.

By highlighting the variety of possible nexus standards for multistate use tax collection, these briefs demonstrate that the question before the Court is much more legislative than judicial. The Court should affirm its own "wisdom and valor" from 1992 when it held that Congress is the branch of government best suited to resolve this issue.

IV. Rewarding South Dakota for passing an unconstitutional law to challenge a Supreme Court precedent could have dangerous consequences for our constitutional order.

The majority in *Quill* extolled the "special force" of stare decisis in the context of the Commerce Clause, where Congress has the power to rewrite the rules. *Quill*, 504 U.S. at 320. That special force is doubly applicable in this case, because a reversal of

---

[24] Brief for the United States as Amicus Curiae Supporting Petitioner, at 32.

Quill would require the Court not only to undermine its own statements regarding the force of *stare decisis* but also to legislate from the bench and decide whether the new South Dakota economic nexus thresholds are sufficient to prevent the imposition of undue burdens on businesses. Congress's ability to set a new rule to replace the physical-presence standard was itself an important reason cited by the majority that decided *Quill*. It would therefore be a giant step in the opposite direction for the Court to reverse *Quill* and, in the process, usurp the undeniably legislative responsibility of determining the new nexus thresholds.

States have made clear that they believe the time for Congress to have replaced the physical-presence standard is long overdue. If this Court agrees, then it should take the opportunity of this case to remind Congress of the task that the Court assigned to it 26 years ago by urging Congress either to affirm the existing standard or to establish a new one. To rule for South Dakota, by contrast, would create a dangerous precedent with the potential to yield awful complications outside of the staid world of state tax, with consequences that could affect life and liberty instead of merely dollars and cents.

If successful, South Dakota will have established a blueprint for reversing a Supreme Court ruling (*i.e.*, pass a plainly unconstitutional

law with a fast-track-appeal mechanism). South Dakota's success would surely embolden numerous other actors to try the same stunt. Unfortunately, it takes little imagination to think of efforts in other arenas that could quickly yield dangerous stand-offs in state capitals and state courts across the country (e.g., aggressive libel laws allowing prosecutors to bring charges against journalists for publishing inaccurate reports to challenge existing First Amendment rulings, or aggressive gun-restriction laws to try to force a new review of the scope of the Second Amendment).[25]

To reward South Dakota by reversing *Quill* under these circumstances would encourage and embolden other states to pass unconstitutional laws to force reconsideration of numerous other issues, potentially causing cracks in the rule of law and leading to constant efforts at the state level to upset long-settled constitutional issues.

---

[25] *See, e.g.*, Editorial, *An Ohio Bill Would Ban All Abortions. It's Part of a Bigger Plan*, THE NEW YORK TIMES, Mar. 25, 2018, at A22.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Supreme Court of South Dakota and uphold *Quill*.

Respectfully Submitted,

CLARK R. CALHOUN
Counsel of Record
ALSTON & BIRD LLP
333 South Hope Street,
16th Floor
Los Angeles, CA 90071
(213) 576-1000
clark.calhoun@alston.com

JONATHAN MYLES LAURIER
CANNON
AMERICANS FOR TAX REFORM
722 12th Street, NW, Suite 4
Washington, DC 20005
(202) 785-0266

Attorneys for Amicus Curiae
Americans for Tax Reform

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF *AMICUS CURIAE* AMERICA'S COLLECTIBLES NETWORK, INC. d/b/a JEWELRY TELEVISION IN SUPPORT OF RESPONDENTS

Of Counsel
TIMOTHY B. MATTHEWS
CHARLES A. WAGNER III
JEWELRY TELEVISION
9600 Parkside Drive
Knoxville, Tennessee 37922
(865) 692-1349
tim.matthews@jtv.com
charlie.wagner@jtv.com

CHARLES A. TROST
Counsel of Record
CHRISTOPHER A. WILSON
ANDREW A. WARTH
SARAH F. BOTHMA
WALLER LANSDEN DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
(615) 244-6380
charles.trost@wallerlaw.com
chris.wilson@wallerlaw.com
drew.warth@wallerlaw.com
sarah.bothma@wallerlaw.com

Counsel for Amicus Curiae Jewelry Television

March 28, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. Petitioner's Linchpin Argument That "The Alleged Practical Difficulties Of [Sales Tax] Collection Have Now Vanished" Is Unfounded 6

II. *Quill* Continues To Remain Important As A Bright-Line Standard To Balance Interests In Commerce Among The States And The Federal Government 26

III. If *Quill* Were Abrogated, A Stronger Test Than "Economic Nexus" Would Be Warranted To Preserve Meaning To The Dormant Commerce Clause 31

IV. In Light Of The Severe Burden On Interstate Commerce That Would Result If *Quill* Were Abrogated, State Authority To Enforce Its Tax Laws Against Remote Sellers Should Not Be Further Extended To Local Jurisdictions 31

TABLE OF CONTENTS – Continued

Page

V. Were The Court To Abrogate Or Change The *Quill* Rule To Permit States To Have Taxing Jurisdiction Over Remote Sellers, Any New Rule Should Be Limited To States That Adopt A Simple Tax Collection System 39

CONCLUSION..... 41

TABLE OF AUTHORITIES

Page

FEDERAL CASES

America's Collectibles Network, Inc. v. Sterling Commerce (Am.), Inc., No. 3:09-CV-143 (E.D. Tenn., Apr. 18, 2017) ..... *passim*

Comptroller of Treasury v. Wynne, 135 S.Ct. 1787 (2015) 10, 35

Direct Mktg. Ass'n v. Brohl, 81 4 F.3d 1129 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 591 (2016) .... *passim*

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) 9

Hughes v. Oklahoma, 441 U.S. 322 (1979) 35

Nat'l Bellas Hess, Inc. v. Ill. Dep't of Rev., 386 U.S. 753 (1967) ..... *passim*

Northeast Bancorp. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985) 27

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) .... *passim*

U.S. v. Lopez, 514 U.S. 549 (1995) 9

STATUTES

47 U.S.C. § 1102 (2011) 8

OTHER AUTHORITIES

Advisory Comm'n on Elec. Commerce, Report to Congress (Apr. 2000), http://govinfo.library.unt.edu/ecommerce/acec_report.pdf 5, 8, 33

TABLE OF AUTHORITIES – Continued

Page

Amazon accounts for 43% of U.S. online retail sales, ***Business Insider*** (Feb. 3, 2017, 12:12 p.m.), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2 29

Colorado Dep't of Rev. Pub. DR1002, Colorado Sales/Use Tax Rates (Dec. 29, 2017), https://www.colorado.gov/pacific/sites/default/files/DR1002.pdf 14

Uniform Sales and Use Tax Base Throughout the State: Recommendations to the General Assembly to Establish a Revenue-Neutral Uniform Sales and Use Tax Base Throughout the State, Required by HB 13-1288, Colorado Dep't of Rev. (Dec. 2013), https://www.colorado.gov/pacific/sites/default/files/Uniform%20sales%20and%20use%20tax%20base.pdf.....15

John Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 Nat. Tax J. 605 (2005) 11

Kendall L. Houghton & Gary C. Cornia, *The National Tax Association's Project on Electronic Commerce and Telecommunication Taxes*, 53:4 Nat'l Tax J. 1351 (2000) 10, 40

Larry Kavanagh, *Expert Report Concerning the Costs and Burdens for Remote Retailers to Comply with Sales and Use Tax Collection Obligations Imposed by Jurisdictions Throughout the United States, Including Alabama* (Aug. 28, 2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf.....4

TABLE OF AUTHORITIES – Continued

Page

Scott Drenkard, *State and Local Sales Tax Base Conformity Issues in Other States*, Tax Foundation (Oct. 28, 2015), https://taxfoundation.org/state-and-local-sales-tax-base-conformity-issues-other-states/.. 11

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae, America's Collectibles Network, Inc. d/b/a Jewelry Television (herein "JTV"), has a direct interest in supporting Respondents' position in this case. Were this Court to abrogate the "physical-presence" nexus standard of *Bellas Hess* and *Quill*, in reliance on which JTV has developed its business platform, it is likely JTV's operations would be significantly disrupted. JTV would incur enormous expenses as States and other taxing authorities would use the precedential vacuum to make JTV their tax collector. JTV would have to learn the rules of 12,000 taxing jurisdictions and incorporate those rules into its existing software solutions. These taxing districts have little incentive to ease compliance and may not provide maps and other sales tax information in a format that can be integrated with JTV's existing software.

Quill's physical presence standard is a vital bulwark against overreach by State and local jurisdictions

---

[1] This Brief is filed pursuant to a blanket consent filed by all parties. No person other than the *Amicus* and its counsel has authored this Brief in whole or in part, or made a monetary contribution toward its preparation or submission. Lawyers in the Birmingham, Alabama office of Waller Lansden Dortch & Davis represent Newegg, Inc. in a separate matter pending in Alabama Tax Court. However, Newegg, Inc. has not contributed financially to the preparation of this Brief. The factual assertions in this Brief were provided to Counsel of Record directly by Timothy B. Matthews, President & CEO of JTV, and its Vice Chairman and Legal Counsel, Charles A. Wagner III. Mr. Matthews and Mr. Wagner are members of the Tennessee Bar. On March 26, 2018, counsel provided counsel of record for all parties the notice required by Rule 37.2.a.

and allows JTV to operate its business pending proper federal legislation, which JTV has long sought. Abrogation of *Quill* would likely result in an enormous undue burden on interstate commerce for JTV and similarly situated remote retailers, even assuming a software solution were available, which is not at all certain. JTV thus has an interest in supporting the position of the Respondents and the *Quill* rule.

SUMMARY OF ARGUMENT

JTV supports Respondents in opposing Petitioner's request that the Court abrogate the "*Quill* Rule." *Quill* is not outmoded nor an outlier. In fact it is *Quill*'s bright-line rule that enables JTV to operate until Congress acts, without having to comply with impossible or prohibitively expensive state or locally imposed tax collection requirements. There are 12,000 state and local taxing jurisdictions nationwide, so abrogation of *Quill* would hit JTV with a tidal wave of overwhelming tax collection obligations.

JTV is privately-owned, principally by its employees. Since its inception in 1993, the company has grown from C-band satellite broadcasting to a current reach of 85 million television households across all 50 States through analog and digital television, direct-to-home satellite systems, cable system operators, and emerging over-the-top (OTT) technologies like AppleTV. Its products can also be purchased online at www.jtv.com. During the past 25 years, JTV has grown its gross

revenues to more than $600 million and currently employs over 1,500 employees in Knoxville, Tennessee. Its products are delivered to its customers nationwide by U.S. Mail, UPS, FedEx, and other interstate carriers. It does not have a physical presence in any other state that imposes a sales tax and only collects sales taxes in Tennessee and Connecticut.

To operate its business JTV has developed unique, proprietary software over 25 years, the modification of which is complex and expensive, and the prospect of being required to comply with 12,000 sales tax jurisdictions is overwhelming.

At its core, South Dakota's argument is that the "virtual welter of complicated [tax collection] obligations" faced by remote mail-order vendors at the time of *Bellas Hess* in 1967 and *Quill* in 1992 has been "washed away"[2] by a technological wave. Petitioner says "it was impossible then to imagine a world where the data needed to answer almost any question would be immediately available from almost any computer terminal, laptop or smart phone."[3] Petitioner then makes the extravagant and unsupported claim that "the alleged practical difficulties of [sales tax] collection have now vanished."[4]

Petitioner's argument belies reality. The real world difficulties experienced by JTV confirm the

---

[2] Petitioner's Brief, at 2.

[3] Petitioner's Brief, at 12.

[4] Petitioner's Brief, at 19.

findings of independent studies that the challenges of sales tax collection remain extreme.[5]

From its experience in an unsuccessful attempt to develop software to comply with sales tax collection obligations in Colorado, JTV knows that "the welter of complicated obligations" has not been "washed away" – if anything the degree of complication is even greater today. The "practical difficulties" of collecting sales taxes have not "vanished," but have only compounded, and the capability of computers "to answer almost any question immediately" is a fantasy in the context of sales tax collection by remote vendors. As we explain, technology has not destroyed the need for *Quill*, but reinforced it.

Were the Court to abrogate the physical-presence nexus standard enunciated in *Quill*, what would replace it? "Economic nexus" alone is insufficient to limit adequately State power to regulate and tax nonresident vendors, and would make jurisdictional boundaries irrelevant. Unlike for Due Process, for purposes of Commerce Clause jurisprudence, the "economic nexus" test would be no test at all, emasculating the Commerce Clause, and granting license to the States and their political subdivisions to place upon interstate commerce whatever burdens they choose.

---

[5] *See, e.g.*, Larry Kavanagh, *Expert Report Concerning the Costs and Burdens for Remote Retailers to Comply with Sales and Use Tax Collection Obligations Imposed by Jurisdictions Throughout the United States, Including Alabama* (Aug. 28, 2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf.

Commerce Clause standards necessarily must preserve the integrity of federal-state relationships and impose limits on the States' jurisdictional reach.

If any new taxing nexus standard that lacked a "physical-presence requirement" and relied solely on the existence of an economic transaction were adopted by the Court, considerable controversy and new legal questions would arise by giving States and their political subdivisions – cities, municipalities, regional authorities, and special taxing districts – the latitude to exert national taxing authority with disparate rates, tax bases, exemptions, exclusions, holidays, and terms and conditions of collection. The resulting further proliferation of rules and regulations would create a truly chaotic taxing regime and would place an undue burden on interstate commerce that would clearly be Constitutionally unsound.

JTV is not looking for a "tax break" or an advantage over local "brick and mortar" vendors. Rather, it opposes the Court imposing an unfair economic burden of having to comply with 12,000[6] varying sets of complex and inconsistent rules which would be crippling to remote retailers. JTV simply seeks compliance simplification – one rate and one set of exemptions and rules per state, all in a downloadable format that can be used electronically. The States have resisted that simplification for 25 years, many choosing instead to

---

[6] This is the number seen in the Briefs, but it is estimated as high as 16,000. No one really seems to know the exact number. Advisory Comm'n on Elec. Commerce, Report to Congress (Apr. 2000), http://govinfo.library.unt.edu/ecommerce/acec_report.pdf.

further complicate their systems and proliferate their taxing districts, while simultaneously complaining about remote vendors not complying.

There are grave reasons for judicial caution when the Court is asked to upend *stare decisis* in this case. The Court should deny the relief requested by Petitioner and leave resolution of this issue to Congress where it belongs.

Nevertheless, if the Court were to decide to modify the *Quill* rule, any change in the physical-presence requirement should be limited in scope to those States that adopt a simplified sales tax collection system – one rate, one base, and one set of exemptions and rules per state, all in an easily downloadable, electronic format, with one reporting location and one audit per state.

ARGUMENT

I. PETITIONER'S LINCHPIN ARGUMENT THAT "THE ALLEGED PRACTICAL DIFFICULTIES OF [SALES TAX] COLLECTION HAVE NOW VANISHED"[7] IS UNFOUNDED.

The entire thrust of Petitioner's argument – indeed its linchpin – is that "the alleged practical difficulties of [sales tax] collection have now vanished." This is unsupported and wrong.

[7] Petitioner's Brief, at 19.

Petitioner and its *Amici* argue that circumstances have changed since the 1992 *Quill* decision, that Internet sales were not envisioned at that time,[8] and that technology has now advanced to the point that collection of sales taxes is only a "mouse click away" for remote sellers. One can debate whether the proliferation of Internet retail was contemplated in 1992 (the world wide web was born in 1991), but the suggestion that sales tax collection is as simple as "clicking a mouse" is simply untrue.

Petitioner and its *Amici* next argue that remote vendors are trying to continue to enjoy a "tax shelter," and that the "tax shelter" prevents the States from collecting their sales taxes on sales to their residents by remote vendors. However, Petitioner and its *Amici* completely ignore that the grievous challenge for remote vendors collecting States' sales taxes arises almost exclusively from the labyrinthine complexity of the sales taxing regimes of States that allow multiple local jurisdictions to impose varying rates and rules.

---

[8] Petitioner's briefing suggests there are two primary forms of commerce, brick and mortar and e-commerce. But shopping by television and radio, without a physical presence, was common at the time of *Quill* and remains so today. The Court in *Quill*, in fact, made specific mention of radio advertisements as a mode of promoting one's products. 504 U.S. 298, 313 n.6 (1992). The oldest home television shopping network started with radio broadcasts in Florida in 1977 (HSN), some 15 years before *Quill* was decided, and the largest home shopping network (QVC) was started in 1986. JTV was started in 1993, contemporaneously with *Quill*. These companies still use television as a primary sales method, as do "infomercials."

Notwithstanding advances in computer technology, the *Quill* rule is a vital, necessary protection against States imposing disparate requirements, and the undue burdens on interstate commerce arising out of the technical complexities of sales tax collection that abrogating *Quill* would allow States and their political subdivisions to place on remote vendors.

A. The *Quill* Rule Protects Against Disparate State Requirements and Burdens of the States' Own Making, Which the States Seek to Shift to Remote Vendors.

State sales tax complexity is not new. It was recognized as a critical issue in the 2000 report of the Advisory Commission on Electronic Commerce (ACEC), the Commission that Congress established by the Internet Tax Freedom Act[9] and the precursor to the Streamlined Sales Tax Governing Board, Inc. This report recommended that the States:

> simplify their state and local transaction tax systems in a manner which would equalize the burdens of tax collection . . . [to] not be more burdensome on a business that collects and remits taxes to several taxing jurisdictions than it is to a business that collects and remits taxes in a single taxing jurisdiction.[10]

The recommended simplification requirements included many concepts subsequently incorporated into

---

[9] 47 U.S.C. § 1102 (2011).

[10] Advisory Comm'n on Elec. Commerce, *supra* n.6.

the Streamlined Sales and Use Tax Agreement (SSUTA), and also included "one rate per state." However, only 23 States, representing 31% of the country's population, signed the SSUTA, and the States rejected entirely the one rate per state rule. Moreover, since *Quill*, the taxing jurisdictions of state and local governments have grown from 6,000[11] to over 12,000, and the States are manifestly attempting to shift the burden of the complexity of their taxing systems to remove vendors based on the unfounded assumption that advances in technology have eased the burden of collection.

As Justice Kennedy has articulated:

> One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses.[12]

The dormant Commerce Clause prohibits State taxation or regulation "that discriminates against or unduly burdens interstate commerce." *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). The burdens imposed by state law must be carefully examined in all instances. Abrogation of *Quill* would result in States and political subdivisions imposing taxing and collection obligations on remote vendors. While "one rate per state" may arguably be an "incidental"

---

[11] *Quill*, at 313 n.6.

[12] *U.S. v. Lopez*, 514 U.S. 549, 579 (1995).

burden on interstate commerce, the burden a regime of nationally imposed local taxes, rules, and processes would impose on remote vendors like JTV is far from incidental.

The Court in *Wynne* cited the foundational danger of State-imposed burdens which the Commerce Clause protects against: "By prohibiting States from imposing excessive burdens on interstate commerce without congressional approval, it [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce."[13]

The States have consistently rejected a simple solution that would involve one rate, one base, one auditing authority, and one set of rules, all in an easily downloadable format, that over time could be adopted by even the smallest remote vendor. Indeed, the States rejected the advice of the ACEC as well as the work of the National Tax Association's Project on Electronic Commerce and Telecommunication Taxes,[14] both of which urged the States to simplify their sales tax systems, *especially* the multitude of rates.

Furthermore, in addition to the six States that allow completely local options for taxing remote

---

[13] *Comptroller of Treasury v. Wynne*, 135 S.Ct. 1787, 1795 (2015).

[14] Kendall L. Houghton & Gary C. Cornia, *The National Tax Association's Project on Electronic Commerce and Telecommunication Taxes*, 53:4 Nat'l Tax J. 1351 (2000).

vendors,[15] States that are not members of SSUTA are free to do the same, and they comprise a majority of the States and represent 69% of the country's population.

In summary, since *Quill* was decided, (i) the number of taxing jurisdictions has increased from 6,000 to 12,000; (ii) even among the 23 States (including South Dakota) that accepted SSUTA, the "one rate per state requirement" necessary for true simplification was rejected;[16] and (iii) the States continue to craft a confounding maze of local law requirements that would unduly burden interstate commerce in the absence of *Quill*.

The prospect of the Court abrogating *Quill* and potentially subjecting out-of-state sellers to the complexities of 12,000 tax jurisdictions across 50 States is daunting. The "Pandora's Box" associated with multiple disparate local tax schemes, in contradistinction to a uniform, state-wide rate, is inadequately addressed

---

[15] *See* Scott Drenkard, *State and Local Sales Tax Base Conformity Issues in Other States*, Tax Foundation (Oct. 28, 2015), https://taxfoundation.org/state-and-local-sales-tax-base-conformity-issues-other-states/. Louisiana, Alaska, Arizona, Colorado, Idaho, and New Jersey constitute 8.8% of the U.S. population and generate sales for JTV averaging $52,800,000 annually – a significant revenue loss were JTV to have to forego sales to customers in those States.

[16] *See* John Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 Nat. Tax J. 605, 606-07 (2005).

in the record, but would be sprung wide open for new litigation if *Quill* were abrogated.

B. Retailer Burdens Associated with Multi-Jurisdictional Sales Tax Collection and Reporting Remain Enormous.

Advances in technology have increased computing power and network access, but those advances do not equate to simplicity of tax collection. It would be an erroneous leap of faith were the Court to conclude that increases in computing power and easy access to ubiquitous information "makes tax compliance easy."[17] JTV has first-hand experience with the actual complexities of tax collection in an e-commerce context, and nothing is "easy" about it.

1. Retailer Dependence on Proprietary Technology is a Significant Impediment to Tax Collection and Reporting.

Like many remote retailers, JTV is dependent upon proprietary, home-grown technology systems used to operate its business. These systems allow it to purchase product from vendors, ingest inventory, operate a warehouse system, take orders from customers,

[17] Much is made in the Briefs before the Court of the success of Amazon, a case of success that does not mirror any other e-commerce company, many of which continue to face fierce competitive challenges to their continued growth and profitability. The Court should not consider Amazon's success to be the typical case study for e-commerce.

fulfill those orders from JTV's warehouse, and accept returns. These home-grown systems, developed at great expense over the last 25 years, are vast, containing tens of millions of lines of computer code developed for JTV's specific purpose. The primary reasons for its dependence on "home-grown" software are that "off-the-shelf" software is generally not available to support the core operations of a television shopping network, available software requires extensive customization to meet JTV's specific requirements, and JTV is the vendor of unique products (such as loose gemstones) in a market niche that is too small to support development of software by a third party vendor. So, like many other retailers, JTV has had to develop systems on its own, and they are complicated to modify and to integrate with "off-the-shelf" software. Even with "off-the-shelf" software, integration is costly and burdensome, and effective integration of sales tax collection software into systems designed to manage sales and credit product returns in multiple jurisdictions is far from a "mouse click" away.

2. JTV's Experience with Colorado's Reporting Legislation has Validated the Complexity of Compliance.

JTV's experience attempting unsuccessfully to comply with Colorado's multi-jurisdictional tax system illustrates the complexity and resulting difficulty of local sales tax compliance in a State with multiple taxing districts, all with different sales tax rates and rules.

Colorado legislation, designed to circumvent *Quill*, required remote retailers either to collect and remit its sales taxes, or report on sales to Colorado customers. After the legislation was upheld in *Direct Mktg. Ass'n v. Brohl*,[18] JTV attempted in good faith to comply with Colorado's collection requirements, but, its effort to do so was unsuccessful.

Colorado does not furnish zip code, zip+4, or similar postal address range data to ensure a proper tax calculation. Colorado's Department of Revenue provides only a non-electronically processable PDF file that contains tables of multiple regional, city, and county taxes. Jurisdictional boundaries are not well defined. For example, the Colorado Regional Transportation District tax applies to: "Arapahoe County (south of I-70, generally west of Picadilly Rd. to Jewell, then west of Gun Club Rd. to Quincy, then generally west of Monaghan Rd., including Arapahoe Park and Aurora Reservoir). . . ."[19] Boundaries defined "generally" in this manner cannot be processed by a computer.

In order to track the multi-tier tax rates for special districts, cities, and counties throughout Colorado, a significant amount of geographic data is needed to determine which cities are in which counties in Colorado. There are 20 cities in Colorado that reside in two or more counties (e.g., portions of the City of

---

[18] 814 F.3d 1129 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 591 (2016).

[19] Colorado Department of Revenue Publication DR1002, Colorado Sales/Use Tax Rates (Dec. 29, 2017), https://www.colorado.gov/pacific/sites/default/files/DR1002.pdf.

Littleton, Colorado, are present in Arapahoe, Jefferson, and Douglas counties). Determining the appropriate county rate based on a customer's city is not insufficient information and results in errors.

Ironically, officials in the Colorado Department of Revenue have recognized that this very complexity is a problem for taxpayers:

> Currently, Colorado has nearly 300 taxing authorities with differing sales and use tax bases, but when overlapping boundaries are taken into account, there are over 700 areas with different rates and bases. This situation produces a heavy burden on businesses operating in our state.[20]

Deciphering rates and requirements for Colorado's hundreds of taxing districts is a Herculean task which even a cursory examination of the ten page listing of Colorado Sales/Use Tax Rates[21] for each of the localities will reveal.

For JTV's systems to be able to support these complicated tax rules, JTV would need to make several large enterprise enhancements, would be required to construct a database schema with a set of tax tables to

---

[20] *Uniform Sales and Use Tax Base Throughout the State: Recommendations to the General Assembly to Establish a Revenue-Neutral Uniform Sales and Use Tax Base Throughout the State, Required by HB 13-1288*, Colorado Dep't of Rev. (Dec. 2013), https://www.colorado.gov/pacific/sites/default/files/Uniform%20Sales%20and%20Use%20Tax%20Base.pdf.

[21] https://www.colorado.gov/pacific/sites/default/files/DR1002.pdf.

track the relationships between the cities, counties, and different rates, and would need to design a manual update mechanism because these rates change quarterly. In addition to the schema to hold data manually entered into the database from the Colorado Sales/Use Tax Rates PDF document, calculation logic to parse relationships between cities, counties, and the different tax tiers would need to be coded. This logic would optimally reside in a database stored procedure such that JTV's back-end processes like customer return refund processing could interact with the tax calculation logic for each transaction. In addition, the tax calculation logic would need to be exposed through the core service-oriented middleware to the internal applications for orders placed in JTV's call center. An additional interface would be required for JTV's website so that orders placed on the web platform could preview the tax applied to customer orders before payment is requested from the customer. Each integration would require development efforts, testing efforts, correctness validation, and ongoing deployments as new tax rates are published in each complex State.

JTV tried to comply with Colorado's taxing scheme, but it was too complex. Compliance would have required incorporating unpublished and often confusing local directives into existing software, and then ensuring this data could be appropriately validated and updated. Ultimately, JTV's expert software engineers were not able to complete this task.

In short, JTV's experience[22] with customized enterprise systems, its efforts to implement "off-the-shelf" software by major companies that claim to solve problems with a "mouse click," and specifically its unsuccessful effort to comply with Colorado's law, demonstrate the burdens on remote vendors imposed by conflicting, multi-jurisdictional rules are unduly burdensome, exactly the result that the Framers of the Commerce Clause would have wanted to avoid.

JTV's experience also illustrates why Petitioner's claims that software is "off-the-shelf," "plug-and-play," or predicting that implementation is only a "mouse click" away, should be viewed with extreme skepticism. Petitioner's statements regarding the ease of using tax collection software in this context are simply not correct.

---

[22] In 2006, JTV contracted with a large company (Sterling Commerce/AT&T) to replace its order management, purchase order, and warehouse management systems and to integrate Sterling software into legacy systems. Sterling presented a timeline of 7 1/2 months for implementation and a budget of about $2 million. The implementation was a spectacular failure. Sterling's software could not be adapted to JTV's needs. Integration proved impossible. After devoting 13 months to implementation and after JTV spent over $10 million on the project, and the project failed, JTV sued Sterling Commerce over misrepresentations about the "ease" of implementation. In 2017, a jury granted JTV a verdict against Sterling Commerce for $39 million. This case is on appeal. *America's Collectibles Network, Inc. v. Sterling Commerce (Am.) Inc.*, No. 3:09-CV-143, Doc. 814 (E.D. Tenn. 2017).

3. Burdens Associated with Processing Sales Tax Credits are Significant and Overlooked.

JTV has experience in other aspects of sales tax collection that are not addressed in other Briefs, but are relevant to the question of burden. Because JTV's products cannot be seen in stores, and because its customers purchase "sight unseen" on television, JTV experiences a phenomenon prevalent in television home shopping – an extremely high return rate on products. Typically, approximately 25% of the goods sold by JTV to its customers are returned. These returns are not primarily due to product dissatisfaction. Rather, customers are selective – they like to try items for fit, touch and feel, and compare styles. They examine gemstones closely for attributes like color, cut, and clarity. JTV processes returns exceeding $150 million annually with the average transaction being under $100. Extensive systems are required to process millions of dollars of credits, partial credits and returns and to compute correct credit card refunds. Petitioner completely overlooks this "back end" complexity when touting "off-the-shelf" solutions.

For example, when processing the refund of a return or an exchange for an item priced less than the original item price, the amount of the sales tax charged at the time of the sale would need to be known. To do so JTV would be required either to track the tax percentage applied to the item at time of sale, or develop a way to request what the tax was, based upon the original order date. If multiple rates per state are applied,

the complexity increases exponentially. In addition, if the tax rates were volatile (e.g., quarterly changes), JTV would need to change its database stored procedure logic and, most likely, take it out of the database into Java code if using an external provider. In cases where an exchange for a more expensive item occurs, JTV would need to use the current tax rate that may have changed since the original sale, which would compound the tracking data and logic needed. All of this requires development time and no "off-the-shelf" solution exists for order return, partial return, and exchange tracking for JTV.

4. Multi-channel Retailing has Multiplied the Complexity of Systems and Increased the Burden of Sales Tax Collection.

As a multi-channel retailer JTV also has relevant experience in the conduct of electronic commerce. While 70% of its revenues are derived from its blend of entertainment, educational, and interactive television programming, JTV also operates a website, www.jtv.com, and mobile apps that comprise about 30% of JTV's sales. Multi-channel ordering systems have additional complexities, and often comprise disparate systems, all of which must be custom-modified at considerable expense in order to collect sales taxes.

Multi-channel retailing increases complexity at JTV in several ways. First, the order management system is more complex. JTV's home-grown software

interface (called "Jupiter") used by Call Center operators to take phone orders has approximately 1 million lines of code. The "core" system at JTV adds another approximately 870,000 lines of code. Other products such as JTV's "granite" server has 417,000 lines of code, the "Hoku" application, about 50,000, just for the service exposure component alone. More than 100 additional applications related to JTV's order system are supported. Depending upon how source code is counted, including items such as database stored packages, procedures and functions custom to its business, JTV's system easily has more than 10 million lines of custom code. This does not count code applicable to reporting functions including ETL mapping in Informatica, reports in the Microstrategy application, network device configurations for services and other applications supporting JTV's systems but not directly related to order management.

Second, multi-channel retailing means multiple point-of-sale (POS) systems. JTV uses several discrete POS systems, each requiring modification to accommodate a national sales tax tracking system. The discrete systems include Jupiter (mentioned above), EOS (or "Express Ordering System") for touch tone orders, Demandware's shopping cart (which is now being transitioned to an Oracle platform) for Internet orders, the iPhone/iPad apps for orders placed on Apple iOS mobile devices, the Android app for orders placed on Android OS devices, and systems in development for "over-the-top" devices such as Roku, Hulu, Amazon Fire, and AppleTV. Compliance would require

modifications across all seven systems, plus four additional systems under development.

Thus, what might at first appear to be a single software integration is, in fact, a multiple-platform integration involving seven different systems. A "tax lookup module" would have to be developed for, and integrated with, each and every distinctly different system used by the remote seller.

5. Additional Burdens to JTV Arise in the Absence of Off-the-Shelf Solutions.

The burden of multi-jurisdictional sales tax collection is further complicated by two additional technological complexities present at JTV and, likely, other remote sellers: database complexities and the assignment of tax codes to stock keeping units (SKUs).

JTV, like other retailers, operates with multiple database systems to store and update order records, each of which would require modification and updates. JTV's database environments include databases used for distinctly different purposes: production, testing, quality control, development, training, and backup. JTV has seven instances of its principal database (X5). Compliance would require modification of each and every one of these database structures. Because of the need to utilize multiple databases with essentially the same information, but used in different environments, the effect of one change is multiplied seven times as the same change must be coded in each separate

database instance. In addition to critical database instances to which the tax logic would need to be deployed (and redeployed with each change in any jurisdiction's tax rules), JTV would be required to change its new Oracle Web Commerce instances, of which there are presently four (development, quality assurance, user acceptance testing, and production) plus multiple local developer instances for development and, ultimately, a like process for periodic tax law updates.

As for SKU complexities, JTV presently has 146,659 active SKUs in its warehouse management system and is constantly introducing new styles to compete. Each year, approximately 107,000 SKUs are added to JTV's warehouse and many are removed as well. Some businesses can operate with a handful of products, but JTV cannot. Ever changing trends and consumer tastes dictate a constantly changing inventory makeup. Were JTV to be required to code its software to map to the requirements of 12,000 different jurisdictions, if each jurisdiction required different tax treatment based upon the product, its price, metal content, origin, or any one of any number of factors that a logical tax scheme could be based upon, at least 1.76 billion possible codes would need to be assigned to JTV's inventory in any given year and over 1.28 billion *new* codes would be required each year thereafter.

6. In Sum, the Assertion that Collection is "Simple" Belies Reality for Retailers Like JTV.

The assertions of simplicity in implementing tax collection software solutions made by various *Amici* supporting Petitioner are not grounded in any practical experience. Tax collection is not as simple as "adding a tax-collection widget to their websites" as the Retail Litigation Center, Inc. would have the Court believe.[23] Its claim that "[i]f Systemax could toggle the widget on its website to collect sales taxes, so can other absentee retailers"[24] is wholly foreign to the contrary experience of JTV.

It is simply a myth that sales tax collection software is cheap, effective and easy to obtain and implement. The "virtual welter" of complicated obligations that concerned the Court in *Bellas Hess* still exists.

C. Certified Service Providers (CSPs) Do Not Ease the Burdens.

Certified Service Providers (CSPs) and the States have reported in their Briefs that sales tax collection is "simple" to implement with the aid of CSPs. Again, this claim is contrary to the experience of JTV.

CSPs inherently lack expertise in the diverse panoply of proprietary order systems, and claims that their tax modules are "plug-and-play" are simply not

---

[23] Brief of Retail Litigation Center, Inc., *et al.*, at 23.

[24] *Id.* at 25.

so. While the use of a CSP or its software might fit some businesses, the Court should not infer a lack of undue burden to interstate commerce on the whole. JTV serves as an example of where "off-the-shelf" solutions, which may facially have merit, prove unworkable in practice.

A number of significant technical implementation and other challenges remain in using CSPs, such as:

- Given the criticality of sales order placement, JTV would need to integrate with both a primary and a secondary CSP provider to ensure a reliable, continuing alternative should the primary CSP be down, change, or stop providing the service.
- CSPs lack standard messaging protocols, and thus JTV would require an intermediary integration layer to make transitioning to an alternate service possible in case of a primary CSP failure.
- Introducing external CSP systems into an existing system poses new risks. A third-party, cloud-hosted solution maintained by an unrelated party would expose JTV to the risk of service disruptions such as loss of network connectivity, change in API exposure, planned and unplanned service outages, denial of service attacks, other hacking, and changes in security; all of which could be very seriously disruptive of JTV's business.

- External CSPs may become targets for denial of service attacks once their use becomes more prevalent.
- The integration of a CSP service requires expert integration of data paths, network security, firewall configurations, and communications at very deep levels of JTV infrastructure. Integration at the database stored procedure level that JTV uses for transaction and returns processing would be very difficult for JTV because it would need to externalize and re-implement this logic – converting it from an Oracle stored package into Java code.
- Even with a CSP, JTV would need to duplicate tax data tracking to process returns correctly.
- In addition to the integration with existing JTV software, JTV would need to validate the correctness of the integration and perform its quality assurance function against the provider to make sure that the tax rules are operating properly, and then verify that the integrations were accurate.

The very existence of CSPs implies that tax collection is not as "easy" as has been suggested. Moreover, aside from the additional cost, a requirement that a remote seller use a CSP is unreasonable on its face because, in effect, that would make it dependent upon the CSP for its own viability. Such a mandate would be, *per se*, an undue burden on interstate commerce. In

addition to CSP fees, now or in the future, the integration costs and ongoing maintenance of interfaces to legacy software systems would remain significant. While some CSPs may integrate with some shopping carts, they do not integrate with all, not even with most. CSPs are not the answer.

Thus, JTV submits to the Court that bald assertions of "simplicity" asserted by Petitioner, without proof or adequate record, should be rejected. The practical, real burdens on interstate commerce that would be imposed by a requirement of multi-jurisdictional compliance if *Quill* were abrogated, should be sufficient to warrant rejection of Petitioner's request for a new nexus standard.

II. *QUILL* CONTINUES TO REMAIN IMPORTANT AS A BRIGHT-LINE STANDARD TO BALANCE INTERESTS IN COMMERCE AMONG THE STATES AND THE FEDERAL GOVERNMENT.

A. The Purpose of the Commerce Clause is to Balance Federal and State Interests and Prevent State Conflicts in Commerce, including Local Laws Conflicting with National Interests, Not to Address "Fairness" in Retail Trade.

The Commerce Clause strikes a balance between the power of the federal government and the States, and among the States themselves, and allows federalism to function effectively. Congress can override the

States to protect national interests but, in the absence of Congressional action, the States are free to develop distinctive governmental, regulatory, and tax schemes applicable to affairs within their political boundaries. This diversity and pluralism allow different state cultures, values, and norms to be expressed and, likewise, offer choices to citizens as to the State in which to reside and to conduct business.

However, the Constitution does not give States *carte blanche* to reach beyond their borders and develop what effectively would become a national scheme of taxation. The Framers did not intend to empower cities, municipalities, regional governments, and special taxing districts to overreach either. *See Northeast Bancorp. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (discussing the economic "Balkanization" that would result without the restraints of the dormant Commerce Clause).

The focus of the Court should not be on creating "parity" in retail shopping experiences. The value-added services that a retail merchant with a physical presence in a jurisdiction enjoys are competitive advantages for that retailer. In contrast, the cost efficiencies of a national direct-to-consumer retailer are competitive advantages to that retailer. Retail shoppers can, and will, decide for themselves whether the "touch and feel" experience of a physical store is preferable to the "browse and transact" experience of the Internet, or JTV's "show and tell" experience of television shopping from one's living room. Resolution of the *Quill* issue should not hinge on which experience is

preferable, nor should the Court encourage or favor one over the other.

B. *Quill* is Neither an Outlier Nor Outmoded.

Some retail mediums and platforms have changed, but not in a way that affects the soundness of *Quill*. Catalogs present a retailer's assortment of merchandise to consumers, and Internet retail is simply an electronic form of catalog shopping. An Internet catalog avoids certain costs and inconveniences, but efficiency of presentation should be irrelevant to the Court's analysis.

Nor has the Internet eliminated long-existing methods of remote sales. American mailboxes are still packed with mail-order catalogs. Moreover, JTV's unique television broadcasting business is a clear illustration of why *Quill* remains relevant and is not outmoded. *Quill* has had, and continues to have, relevance in commerce besides retail websites, such as JTV's television broadcasts.

The fact that the Internet is universally available does not change the calculus either. It is merely a matter of degree. The "pervasive" character of the Internet is not determinative, any more than the number of printed mail order catalogs in a State would have been relevant under *Quill*. Similarly, the number of consumers reached by the Internet should not be determinative of the legal principle in issue.

Finally, the Court should note that the expansion of the Internet to millions of websites means that many retail websites are virtual needles in a haystack, have difficulty being found, struggle to succeed, and still compete with physical stores and large department store chains that collectively make up over 90% of U.S. retail shopping. The true outlier is Amazon, a company that accounts for over 43% of all sales made on the Internet,[25] and is expanding into all fields of retail and commerce.

As a result there is another different, but equally profound and pernicious discrimination threatened by abrogation of *Quill*. Were compliance software available, its cost would be relatively modest for behemoths like Amazon, affording such large entities an unfair advantage over everyone else.[26]

The suggestion by the United States through the Solicitor General's Brief that the Court should apply *Quill* to mail order and not e-commerce leaves an interesting gap. What about television broadcasting into the State from which consumers call JTV at its call center in Tennessee to place an order? None of the arguments about the ubiquity of the Internet or use of

---

[25] *Amazon accounts for 43% of U.S. online retail sales, Business Insider* (Feb. 3, 2017, 12:12 PM), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2.

[26] Additional government regulation often encourages consolidation within industries and the eventual extinction of smaller companies. *Cf.* the banking industry and the loss of community banking over the last 20 years with the growing complexity of banking rules.

smartphones for "showrooming" or any of the other arguments for taxing electronic retail apply to JTV's (or anyone else's) phone orders. JTV's customers do not need a computer to place a phone order and JTV transacted business nationwide for years in this manner prior to starting a retail website, and continues to do so.[27]

If it were to be changed at all, any new *Quill* rule should provide even clearer guidance, and indeed it would, if the Court strengthened the physical presence requirement by requiring as a condition for taxable nexus that a remote seller's physical presence would have to be related to the sales activity, and *unrelated* activities would be disregarded.

The principle of *stare decisis* should be applied to protect remote vendors like JTV, who have operated for 25 years or more in reliance on *Quill*'s continued viability, and have developed at great expense national business models with pervasive economic presence even without their Internet operations. For 25 years JTV has reasonably relied upon *Quill* in building and conducting its business in compliance with federal, state, and local laws. There has been no "manifest change in circumstances" since 1992 and the arguments that there has been a "manifest change in circumstances" and there is an "absence of justified reliance" have no application to remote retailers such as JTV.

---

[27] *See supra* n.8 (relevant to QVC, HSN, and the history of television home shopping).

III. IF *QUILL* WERE ABROGATED, A STRONGER TEST THAN "ECONOMIC NEXUS" WOULD BE WARRANTED TO PRESERVE MEANING TO THE DORMANT COMMERCE CLAUSE.

If the Court were to alter the "physical presence" test of *Quill* and *Bellas Hess*, a strong and equally clear replacement would be warranted, because "economic nexus" alone will not adequately constrain state power to Constitutional limits. Applying an "economic nexus" standard would be a blank check to States and their local governments and taxing districts to impose undue burdens on interstate commerce by imposing tax collection obligations on remote vendors outside of their respective borders. Presumably, this will be addressed in Respondents' Brief and is not argued here. Suffice it to say that any replacement "bright-line" test should be consistent with the requirements under the dormant Commerce Clause that are intended to prevent States from imposing requirements that unduly burden interstate commerce.

IV. IN LIGHT OF THE SEVERE BURDEN ON INTERSTATE COMMERCE THAT WOULD RESULT IF *QUILL* WERE ABROGATED, STATE AUTHORITY TO ENFORCE ITS TAX LAWS AGAINST REMOTE SELLERS SHOULD NOT BE FURTHER EXTENDED TO LOCAL JURISDICTIONS.

Were the Court to find that the burdens associated with requiring a remote vendor to collect sales tax for

South Dakota are not constitutionally excessive, there would remain the issue of the extreme burden associated with the process of collecting sales taxes from multiple jurisdictions within the same state. Merely collecting sales tax from a political subdivision is a significant enough burden, but the prospect of being potentially subject to audits, documentation requests, discovery and administrative procedures from 12,000 jurisdictions, merely as a consequence of posting publicly on a website, is an even more daunting proposition. No consideration has been given on this point and no facts have been developed.

A. The Prospect of Having to Comply With Disparate Local Tax Schemes Compounds the Complexity of Collection and Compliance.

The remote vendor faces a quantitatively more daunting task of compliance than do local vendors that operate from a specific physical location in the State and purchasers who reside at a specific place in the State. Each of these latter taxpayers knows where he or it is located, and can easily determine the tax payment due or collection obligations with respect to that discrete location. On the other hand, the remote vendor, in order to correctly determine taxability and ascertain the appropriate tax rate for each item sold, must be potentially prepared to make these same determinations accurately, and in real time, taking into consideration the differences that can and do exist among 12,000 different taxing jurisdictions. Imposing

this burden on remote vendors is precisely what the Advisory Commission on Electronic Commerce recommended against.[28]

The combinations and permutations of outcomes alone would indicate the potential for chaos. With local taxing jurisdictions, each having separate rates, different tax holidays, and different exemptions – the complexity multiplies because each variation of factors results in a different outcome.

Consider resale exemptions for example. JTV has many customers who watch its "Jewel School" programming to learn how to make jewelry. Some of them start businesses to sell jewelry of their own as retailers. Under most state sales tax statutes, each reseller would be entitled to an exemption certificate and legally permitted to require JTV not to withhold sales tax on an exempt sale for resale. JTV estimates that 50,000 to 100,000 customers likely fall into this category in a given year. Administering these exemptions on a jurisdiction-by-jurisdiction basis is an incredible paperwork task, not even considering the software implications.

The Court in *Bellas Hess* correctly recognized that forcing out-of-state vendors to collect sales tax for every taxing jurisdiction would "entangle [their] interstate business in a virtual welter of complicated obligations."[29] "The very purpose of the Commerce Clause

---

[28] *See supra*, p.15.

[29] *Nat'l Bellas Hess, Inc., v. Ill. Dep't of Rev.*, 386 U.S. 753, 760 (1967).

was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control."[30] Continuation of the *Quill* rule will avoid ensnaring out-of-state vendors in these local entanglements and thus prevent an undue burden on interstate commerce.

B. Local Tax Schemes Raise a Novel Constitutional Question as to Differential Treatment if a State Permits Localities to Enforce Disparate Local Rules for Taxation of Interstate Commerce While Concurrently Not Requiring Consistency Among Localities within the Same State.

If the Court were to abrogate the *Quill* rule, it would need to further consider whether the Constitution contemplates and allows schemes for taxation of remote vendors by *local* jurisdictions in situations where the application of local rules creates conflicts with rules within the same state jurisdiction. What would happen if each locality were to define its tax base differently, even though all local, political subdivisions of a State are instrumentalities of the same State?

Local jurisdictions typically may only audit within their physical borders. If *Quill* were abrogated, could a local jurisdiction audit a remote vendor under its own State's laws even though it would not be entitled to

---

[30] *Id.*

audit a vendor in the adjoining county? Could a locality enforce its tax scheme everywhere else in the country even though, within its own State, the local jurisdiction would not have the power to enforce the same scheme with in-state consumers residing outside its physical boundaries?

These questions raise the issue of improper, differential treatment between in-state and out-of-state retailers burdened by disparate local requirements. *See Wynne*, 135 S.Ct. at 1795. The Commerce Clause "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[31]

If a locality were not able to apply its tax base, rates, and exemption policies *intrastate* (e.g., in adjacent counties), and lacked *intrastate* audit jurisdiction, but was not similarly constrained in its *interstate* domain, serious dormant Commerce Clause issues would be implicated.

---

[31] *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-27 (1979)).

C. A National Power of Audit Vested in a Local Taxing Authority is a *Per Se* Burden on Interstate Commerce.

If *Quill* were abrogated, what lawful ability would each locality have to enforce its taxes nationally, even if no sales had been made within a locality? Would the ubiquitous nature of the Internet mean that every remote vendor with a website would be subject to audit, documentation demands, and disclosure requirements by every local taxing jurisdiction in the country, even if the vendor had made no sales to customers in that jurisdiction? Would out-of-state consumers become subject to tax oversight by foreign political subdivisions as well?

In a national economy devoid of the certainty created by the "bright-line" rule of *Quill*, in theory, every local taxing jurisdiction could simultaneously open sales tax audits on every remote vendor with a website, and send a demand letter requesting all of every Internet retailer's tax records to enforce compliance with its local sales tax regime. Even if an Internet retailer were to contend it did no business whatsoever in that locality, what would constrain the local taxing authorities from demanding an audit in furtherance of its effort to search out non-compliance, and in the context of the audit place the burden on the retailer to prove that it had made no sales into that jurisdiction? The mere prospect of national audits initiated by cities, counties, municipalities, and special tax districts is virtually *per se* an undue burden on interstate commerce.

D. Locally-Administered Tax Schemes Imposed Nationally on Remote Vendors Are a Recipe for Tax Chaos.

Every time a rule were to change in any one of the 12,000 local taxing jurisdictions, there is the potential that the tax administration software would have to be changed. The change might be the rate, geographical boundaries defining different rates or classes of consumers, the administrative reimbursement due to the collector, the timing of a tax holiday (such as the constantly shifting "tax-free weekends" so common now), the applicability of a particular exemption, or the "scale" upon which the tax is calculated, where a progressive or tiered rate structure applies. Each time one change occurs, a software update or rewrite would be dictated for each of the systems into which the tax module must be integrated.

The number of permutations and combinations of outcomes would not be merely arithmetically increased, but also increased geometrically which would lead to an unworkable system that required the vendor either to somehow implement costly changes to assure ongoing compliance, or more likely simply forego making sales to customers in those localities and suffer the corresponding loss of revenues that would entail.

As a consequence, such a regime could lead to systems that strongly discriminate in favor of in-state retailers. A local retailer with a physical location need only collect at one tax rate (whatever the local rate might be), and is not required to solicit the name and

address of its customers to determine their place of residence or place where the purchased item will be used. A retailer with a local physical presence may choose its domicile and thereby choose to be under a single taxing scheme, favoring simplicity for the local retailer. In contrast, an Internet retailer whose only connection, besides making a sale, is a virtual presence on the Internet, cannot choose to opt out of any local jurisdiction from which its website may be accessed and orders may be made and shipped to.

Even if a local retailer were to operate in two or three other tax jurisdictions, its tax compliance requirements remain simple – each place of business would collect at one rate and no customer information is required. For the out-of-state retailer, however, the opposite is true. Not only would the retailer be required to track multiple rates, but it would be required to preserve customer information such as the shipping address in order to document that it collected tax at the correct rate applicable to that address. This problem could be mitigated with a one rate per state arrangement, but merely abrogating *Quill* does not lead to that result.

Contrary to Petitioner's assertion that "absentee retailers want to 'preserve' an unfair tax advantage,"[32] JTV does not wish to do so at all. For over a decade, JTV has argued to the States and to Congress for a sensible, one rate per state tax scheme. Local vendors pay one rate. The Court should not choose to replace

---

[32] Petitioner's Brief, at 33.

one perceived unfairness (allowing remote sellers to remain exempt) with another (subjecting remote sellers to complex tax rules that would be virtually impossible to follow).

V. WERE THE COURT TO ABROGATE OR CHANGE THE *QUILL* RULE TO PERMIT STATES TO HAVE TAXING JURISDICTION OVER REMOTE SELLERS, ANY NEW RULE SHOULD BE LIMITED TO STATES THAT ADOPT A SIMPLE TAX COLLECTION SYSTEM.

JTV's software engineers report that developing software that would allow JTV to collect sales tax from its customers in remote States that have a simple sales tax system with only one rate, one base, and one set of rules, all in an easily downloadable format, is workable, and over time could be implemented without undue expense and burden on JTV, or even the smallest electronic retailer. JTV's unsuccessful experience in attempting to comply with Colorado's complex sales tax collection requirements, as compared with its successful effort to comply with Connecticut's simple one rate state system, illustrates this.[33]

Accordingly, to avoid uncertainty and confusion and creating significantly adverse effects on e-commerce, JTV urges that any change in *Quill* be conditioned upon the change being applicable only to

---

[33] JTV has recently begun collecting sales tax in Connecticut, where there is one rate and one set of rules.

States that implement a simplified sales tax collection system for out-of-state vendors that includes at a minimum the simplification requirements in SSUTA, and in addition one tax rate per state, a critical necessity for simplification.[34]

This would, of course, require each State to coordinate with its subordinate local governments and taxing districts, but if implemented would allow the States to recover essentially 100% of sales taxes applicable from sales from remote vendors to customers in the taxing States without significant complexity, cost, or unreasonable interference with or burden on interstate commerce. Of course each State could choose not to opt for simplicity, with the consequence being that it would have to forego requiring remote vendors to collect sales tax from its customers.

Respectfully, the States have spent the past 25 years trying to circumvent *Quill* and complaining about its effect, all the while being in most cases unwilling or unable to take action to make their tax collection systems workable for remote vendors. Their inaction should not be rewarded by the Court.

---

[34] *See* Kendall L. Houghton & Gary C. Cornia, *The National Tax Association's Project on Electronic Commerce and Telecommunication Taxes*, 53:4 Nat'l Tax J. 1351, 1361 (2000) (The Steering Committee consisting of 16 business, 16 governmental, and 7 other representatives "adopted a consensus position that there should be one sales tax rate in each of the states that have adopted the sales tax and granted the use of local option taxes for substate – level governments.").

CONCLUSION

For the foregoing reasons, the decision of the South Dakota Supreme Court should be affirmed. Alternatively, if the Court determines that the *Quill* rule should be altered, any relief should be limited to States that adopt the tax simplification rules in SSUTA and in addition, one rate per state.

Respectfully submitted,

Of Counsel
TIMOTHY B. MATTHEWS
CHARLES A. WAGNER III
JEWELRY TELEVISION
9600 Parkside Drive
Knoxville, Tennessee 37922
(865) 692-1349
tim.matthews@jtv.com
charlie.wagner@jtv.com

CHARLES A. TROST
Counsel of Record
CHRISTOPHER A. WILSON
ANDREW A. WARTH
SARAH F. BOTHMA
WALLER LANSDEN DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
(615) 244-6380
charles.trost@wallerlaw.com
chris.wilson@wallerlaw.com
drew.warth@wallerlaw.com
sarah.bothma@wallerlaw.com

Counsel for Amicus Curiae Jewelry Television

March 28, 2018

No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., and NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF PROFESSOR JOHN S. BAKER, JR. AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

JOHN S. BAKER, JR.
Counsel of Record
Professor of Law Emeritus,
LOUISIANA STATE UNIVERSITY
5209 Sea Chase Dr. 5
Amelia Island, FL 32034
Telephone: (225) 773-5027
John.Baker@law.lsu.edu

LINDSEY KEISER‡
300 Massachusetts Ave. NW
Washington, D.C. 20001
‡Only Admitted in Indiana

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. Internet Sales Often Involve Foreign Commerce and Many Fall Under the Import-Export Clause	4
II. In *Quill*, the Court Did Not Need to Consider International Sales, but the South Dakota Law Requires Such Consideration	5
III. Application of South Dakota's Tax to International Sales Over the Internet Requires Analysis Under the Import-Export Clause	8
IV. South Dakota's Law Also Presents Enforcement Problems in Relation to Foreign Sellers with No Presence in the United States	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Almy v. California, 65 U.S. (24 How.) 169 (1860).....9

Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017).....13

Brown v. Maryland, 25 U.S. 419 (12 Wheat.) (1827).....8, 11

Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997).....7

Dep't of Revenue v. Ass'n of Washington Stevedoring Companies, 435 U.S. 734 (1978).....3, 9

Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015).....7

Direct Mktg. Ass'n v. Brohl, 814 F. 3d 1129 (10th Cir. 2016).....7

Michelin Tire Co. v. Wages, 423 U.S. 276 (1976).....*passim*

Quill Corp. v. North Dakota, 504 U.S. 298 (1992).....*passim*

Thurlow v. Massachusetts, 46 U.S. 504 (5 How.) (1847).....10

Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).....9

STATUTES AND OTHER AUTHORITIES

U.S. CONST. art. I, § 8, cl. 3.....15

U.S. CONST. art. I, § 10, cl. 2.....2, 8

S.B. 106, 2016 Legis. Assemb. 91st Sess. (S.D. 2016).....2, 6, 12

S.D. CODIFIED LAWS § 15-7-2 (2016).....12

TABLE OF AUTHORITIES – Continued

Page

National Science Foundation, *A Brief History of NSF and the Internet* (Aug. 13, 2003) 4

William W. Crosskey, *Politics and the Constitution in the History of the United States* 296-97 (1953).....11

INTEREST OF *AMICUS CURIAE*[1]

Professor John S. Baker, Jr. is Professor of Law Emeritus at Louisiana State University Law School and a Visiting Professor at Georgetown University Law Center. He has taught Constitutional Law and litigated constitutional cases for many years. Professor Baker approaches his legal scholarship and litigation efforts with an Originalist understanding of the Constitution.

SUMMARY OF ARGUMENT

So far, the parties – in the Petition, the Response, and the Petitioner's Brief – have failed to address the impact of South Dakota's tax on transactions over the internet between buyers in the United States and foreign sellers. Simply to argue how the internet has altered the way commerce is conducted in the United States since the decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is too parochial. The internet's World Wide Web has created an international marketplace.

The language of the South Dakota statute applies to all purchases over the internet. The tax scheme

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or his counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have provided blanket consent for *amicus curiae* brief filings.

covers "any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota. . . ." S.B. 106, § 1, 2016 Legis. Assemb. 91st Sess. (S.D. 2016). Nothing in the statute's language would exclude internet purchases delivered into the state from another country. That South Dakota's tax would apply to foreign sellers means the tax should be analyzed under the Constitution's Commerce Clause and Import-Export Clause.

Your *Amicus* respectfully suggests that briefs addressing only the continued viability of the dormant-commerce-clause rationale in *Quill Corp.* are insufficient. This brief points to issues that your *Amicus* believes this Court would wish to consider.

The words of the Import-Export Clause provide that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." U.S. CONST. art. I, § 10, cl. 2. Unlike the extended analyses of the Due Process Clause and Dormant Commerce Clause in *Quill*, the wording of the Import-Export Clause – as applied to foreign commerce – would seem to involve only a determination as to whether a state tax is an impost or a duty on that commerce.

This Court's current reading of the Import-Export Clause came in *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976) (finding the *ad valorem* property taxes on imported goods permissible by reviewing the reasons prompting the inclusion of the Import-Export Clause

in the Constitution); *see also Dep't of Revenue v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 761 (1978) (holding the Washington business and occupation taxes to not be included in the Import-Export Clause prohibition because the application violated none of the constitutional policies identified in *Michelin*).

Michelin Tire adopted a threefold test as to whether a non-discriminatory state tax violates the Import-Export Clause. 423 U.S. at 285-86. The test looked to whether the tax (1) impedes the federal government's ability to "speak with one voice" in implementing the nation's foreign relations, (2) results in diverting import revenues from the federal government to the states, or (3) causes interstate rivalry and friction among states when a state receives import taxes on goods destined for other states. *Id.*

South Dakota's tax would seem to be an impost. That is, it is a tax on the privilege of foreign sellers shipping items or selling services directly into South Dakota and it applies only once the goods arrive in the state. The tax is linked to the time and place of importation. South Dakota's tax would need to be analyzed under the *Michelin* threefold test.

Along with considering the constitutionality of the tax itself, this Court should also consider its enforceability. The South Dakota statute asserts the right to sue out-of-state sellers. To do so, of course, the state would have to invoke its long-arm statute. To reach out-of-state websites with no presence or contacts with

the state, the state would be extending the reach of its jurisdiction beyond what this Court has approved as consistent with the Due Process Clause.

Before this Court issues a major ruling involving state taxes applicable to internet transactions, your *Amicus* respectfully urges the Court to have the benefit of full briefing on the Import-Export Clause, as well as on the foreign component of the Commerce Clause.

ARGUMENT

I. Internet Sales Often Involve Foreign Commerce and Many Fall Under the Import-Export Clause.

The sale of goods over the internet was virtually non-existent when this Court decided *Quill Corp. v. North Dakota*, 504 U.S. 298, in 1992. The general public first gained access to the internet in 1991 with the introduction of the World Wide Web. *See* National Science Foundation, *A Brief History of NSF and the Internet*.[2] It was the creation of the Web and later developments that made internet marketing possible. South Dakota has argued that the unprecedented disruption in the way goods are sold since this Court's decision in *Quill* has rendered its dormant-commerce-clause rationale completely outdated. South Dakota, however, has failed to follow through on its own argument by

[2] *Available at* https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050 (last updated Aug. 13, 2003).

considering the foreign commerce dimension of internet sales.

Internet sales are erasing the line between domestic and foreign commerce. Like others, I have personally ordered a product on the internet from a foreign company, which delivered it directly to me. I could have, but did not, order that particular foreign product through Amazon. Other Americans have undoubtedly ordered from a foreign website while assuming, and without checking whether, it is based in the United States. Some websites with a U.S. address state in their Terms and Conditions that its products may be shipped to the purchaser directly from other countries.

These changes created by internet sales certainly challenge constitutional distinctions within the Commerce Clause and between the Commerce Clause and the Import-Export Clause. Under *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976), it is possible that the Import-Export Clause would block some, but not all, of the international sales covered by the South Dakota law. Your *Amicus* respectfully suggests that any reconsideration of *Quill* would not be well-informed without considering the Import-Export Clause and the foreign component of the Commerce Clause.

II. In *Quill*, the Court Did Not Need to Consider International Sales, but the South Dakota Law Requires Such Consideration.

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court did not need to consider international sales

for at least two reasons. First, internet sales had not yet been born. Moreover, *Quill*'s holding that a state could not tax an out-of-state seller with no location within the taxing state also necessarily protected sellers operating from other countries. If this Court were to overturn *Quill*'s dormant-commerce-clause holding, however, it would not follow that sellers operating from other countries could constitutionally be compelled to comply with the South Dakota law.

Neither South Dakota in its Petition for a Writ of Certiorari or in its brief on the merits, nor respondents in their Brief in Opposition to the Petition for a Writ of Certiorari have addressed international sales over the internet.[3] Yet, the South Dakota statute clearly applies to all goods and services purchased over the internet for delivery into the state:

> [A]ny seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state. . . .

S.B. 106, § 1, 2016 Legis. Assemb. 91st Sess. (S.D. 2016). Nothing in this language would exclude from

---

[3] Given that an *amicus* brief supporting neither party is due within seven days of the filing of the Petitioner's Brief, your *Amicus* did not have the benefit of Respondents' Brief on the Merits.

the tax goods coming into the state from another country.

South Dakota seems to assume that the question to be decided is a simple and straightforward one of whether *Quill*'s dormant-commerce-clause holding should be overturned. *See* Petitioner's Brief for Writ of Certiorari ("Pet. Cert. Brief"). Petitioner may be giving too much significance to past statements by Justices Kennedy, Gorsuch, and Thomas. Neither Justice Kennedy nor then-Judge Gorsuch addressed international internet sales when they expressed their readiness to overturn *Quill* and its dormant-commerce-clause rationale. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J., concurring); *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147-51 (10th Cir. 2016) (Gorsuch, J., concurring). Petitioner is correct that Justice Thomas has advocated for ending the use of the "virtually unworkable" Dormant Commerce Clause, Pet. Cert. Brief at 24, but he has also expressed the view that the Import-Export Clause is the correct analysis. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 620 (1997) (Thomas, J., dissenting) (arguing that the terms "imports" and "exports" in the Import-Export Clause encompassed not only trade with foreign countries, but also trade with other States). Petitioner has failed to consider the international dimension of its tax.

That the South Dakota law would apply to foreign sellers with no presence in the United States necessarily means that the tax involves foreign commerce. The tax, therefore, requires analysis under the

Import-Export Clause. Deciding only whether *Quill*'s dormant-commerce-clause rationale should remain good law will not adequately address the constitutional questions involved.

III. Application of South Dakota's Tax to International Sales Over the Internet Requires Analysis Under the Import-Export Clause.

The words of the Import-Export Clause provide that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." U.S. CONST. art. I, § 10, cl. 2. Unlike the extended analyses of the Due Process Clause and Dormant Commerce Clause in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the wording of the Import-Export Clause – at least as applied to foreign commerce – would seem to involve only a determination as to whether a state tax is an impost or a duty on that commerce.

This Court's relatively few cases on the Import-Export Clause have undergone sharp changes in interpretation. In *Brown v. Maryland*, Chief Justice Marshall gave a dictionary or lexicographical interpretation of the Import-Export Clause's unqualified language and wrote that the Court believed "the principles laid down in this case, to apply equally to importations from a sister State." 25 U.S. (12 Wheat.) 419, 449 (1827) (invalidating state tax on importers of

goods produced abroad). Chief Justice Taney followed Marshall's reading that the clause applies as between states in *Almy v. California*, 65 U.S. (24 How.) 169 (1860) (finding a state tax on bills of lading unconstitutional). *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), however, rejected Marshall's reading that the clause applied as between states, concluding that in "the ordinary use of these terms," impost and import only applied to items brought in from a foreign country.

This Court's current understanding of the Import-Export Clause came in *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976) (finding the *ad valorem* property taxes on imported goods permissible by reviewing the reasons prompting the inclusion of the Import-Export Clause in the Constitution); *see also Dep't of Revenue v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 761 (1978) (holding the Washington business and occupation taxes to not be included in the Import-Export Clause prohibition because the application violated none of the constitutional policies identified in *Michelin*).

While changing the analytical approach, the Court in *Michelin Tire* did so based on its understanding of the purpose of the Import-Export Clause:

> One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased.

> Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States. At the same time, there was no secure source of revenue for the central government.

Michelin, 423 U.S. at 283.

Michelin Tire adopted a threefold test as to whether a non-discriminatory state tax violates the Import-Export Clause. 423 U.S. at 285-86. The test looked to whether the tax (1) impedes the federal government's ability to "speak with one voice" in implementing the nation's foreign relations, (2) results in diverting import revenues from the federal government to the states, or (3) causes interstate rivalry and friction among states when a state receives import taxes on goods destined for other states. *Id.*

Michelin Tire distinguished the non-discriminatory state property tax, at issue and upheld there, from "a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State." 423 U.S. at 301 (quoting *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847)). A tax on goods and services provided directly from abroad to a purchaser in South Dakota would seem to fall within *Michelin Tire*'s interpretation of the Import-Export Clause's prohibition on imposts and duties.

The Petitioner should be asked to explain how the South Dakota tax is not an impost. Imposts and duties

are taxes on the commercial privilege of bringing goods into a country. *Michelin Tire*, 423 U.S. at 287. Specifically, imposts are charges imposed at the time and place of importation. *Id.* at 291 (citing William W. Crosskey, *Politics and the Constitution in the History of the United States* 296-97 (1953)).

South Dakota's tax applies only to sellers who ship more than $100,000 worth of product into the state or make 200 or more shipments into the state. Pet. Cert. Brief at 6. The Petitioner may think that South Dakota has acted reasonably because the tax applies only once sellers meet certain requirements. However, Petitioner would have to explain how those minimums change the nature of the tax. *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) (finding that whether the tax is imposed at the time of sale or the time of importation is irrelevant because it is still a tax on the same privilege at either time). If the South Dakota tax is an unconstitutional impost under *Michelin*, then it must fail.

IV. South Dakota's Law Also Presents Enforcement Problems in Relation to Foreign Sellers with No Presence in the United States.

The South Dakota law provides for enforcement against those who do not comply voluntarily. The law allows for a state-court declaratory judgment process against any out-of-state seller believed to owe state taxes:

> Notwithstanding any other provision of law, and whether or not the state initiates an audit

> or other tax collection procedure, *the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law.* The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

S.B. 106, § 2, 2016 Legis. Assemb. 91st Sess. (S.D. 2016) (emphasis added).

But how will South Dakota assert personal jurisdiction over out-of-state and out-of-country websites with no presence in the state other than its electronic "presence"? South Dakota's long-arm statute asserts the broadest possible personal jurisdiction over out-of-state defendants, ending with a catch-all provision allowing plaintiffs to assert personal jurisdiction over "The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States." S.D. CODIFIED LAWS § 15-7-2.

Consideration of South Dakota's tax law should include the constitutional viability of the state's process for enforcing the tax. Given this Court's Due Process limits on long-arm statutes, South Dakota cannot assert specific personal jurisdiction over most out-of-state websites, much less those operating from abroad,

without going far beyond what this Court has recognized as consistent with Due Process. As this Court reinforced last term in *Bristol-Myers Squibb v. Superior Court of California*, specific jurisdiction requires the lawsuit to arise out of or directly relate to the defendant's contacts with the state. 137 S. Ct. 1773, 1780 (2017). Furthermore, the Court explained that:

> The primary concern in assessing personal jurisdiction is the burden on the defendant. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.

Id. (internal citations and quotations removed).

Enforcement of the South Dakota tax involves obvious practical problems and concerns for the coercive power of the state. Out-of-state and out-of-country websites do not target any particular state. Websites – at least those in English – hope to sell to a worldwide audience.

Websites are "present" only in the state(s) where they have employees, agents, or distribution centers. Otherwise, they are not present in any meaningful way. The vast majority are small operations, which are hoping to – and sometimes do – grow larger. If they do become a large operation, like Amazon, they find

advantages to becoming "present" in more states and, thereby, subject themselves to taxes in those states.

Unless this Court is prepared to expand its Due Process analysis to allow for state long-arm statutes to reach websites with no presence in or meaningful connection to the state, it would be confusing and counterproductive to have states asserting a right that, as a practical matter, is unenforceable against out-of-state web sellers.

Moreover, this Court should consider whether establishing a right (even if unenforceable) for South Dakota to assert personal jurisdiction over a website located outside the United States would be a dangerous precedent. Such a holding would be a precedent available to China and other countries to likewise assert personal jurisdiction over every U.S. website that sells products to citizens in their countries. Having any and every government in the world able to assert jurisdiction over virtually every website would be welcome to those countries seeking control over the internet.

If this Court were both to uphold the South Dakota law and to allow a further expansion of state long-arm jurisdiction, the tax could be enforced within the American judicial system against websites based in the United States. Nevertheless, enforcement against websites in other countries would be unachievable without a treaty. That reality, of course, reinforces the Framers' purpose of protecting, through the Import-Export Clause, the federal government's powers over

foreign commerce. *See also* U.S. CONST. art. I, § 8, cl. 3 (giving power to regulate commerce with foreign countries to the federal government).

CONCLUSION

For all of the foregoing reasons, the Court should require in this case, or in some future case, briefing on the Import-Export Clause as applied to foreign commerce.

Respectfully submitted,

JOHN S. BAKER, JR.
Counsel of Record
Professor of Law Emeritus,
LOUISIANA STATE UNIVERSITY
5209 Sea Chase Dr. 5
Amelia Island, FL 32034
Telephone: (225) 773-5027
John.Baker@law.lsu.edu

LINDSEY KEISER‡
300 Massachusetts Ave. NW
Washington, D.C. 20001
‡Only Admitted in Indiana

Counsel for Amicus Curiae

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF BRILL, KNOLL, MASON, AND VIARD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARGARET WINTERKORN MEYERS
RICHARDS KIBBE & ORBE LLP
200 Liberty Street
New York, NY 10281-1003
(212) 530-1953
mmeyers@rkollp.com

DAVID W.T. DANIELS
Counsel of Record
RICHARDS KIBBE & ORBE LLP
The Portrait Building
701 Eighth Street, NW
Washington, DC 20001
(202) 261-2967
ddaniels@rkollp.com

Counsel for Amici Curiae

March 5, 2018

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF THE CASE 4

ARGUMENT 6

I. S.B. 106 Promotes A Neutral Playing Field For Interstate Commerce While *Bellas Hess* and *Quill* Mandate A Discriminatory Subsidy. 6

II. S.B. 106's Minimal Compliance Burden Should Be Assessed Under A Balancing Test Rather Than Under A Bright-Line Rule. 14

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

American Trucking Associations, Inc. v. Scheiner,
483 U.S. 266 (1987) 6

Armco Inc. v. Hardesty,
467 U.S. 638 (1984) 6

Associated Industries of Missouri v. Lohman,
511 U.S. 641 (1994) 13

Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520 (1959) 18, 19

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 15

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 17

Comptroller of the Treasury v. Wynne,
135 S. Ct. 1787 (2015) ..... *passim*

Henneford v. Silas Mason Co.,
300 U.S. 577 (1937) 12

National Bellas Hess, Inc. v. Department of Revenue,
386 U.S. 753 (1967) ..... *passim*

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 3, 17, 18, 19

Quill Corporation v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

South Dakota v. Wayfair, Inc.,
901 N.W.2d 754 (S.D. 2017) 5

Westinghouse Electric Corporation v. Tully,
466 U.S. 388 (1984) 15

LEGISLATIVE MATERIAL

S.D. Codified Laws § 10-45-2 (2018) 11

S.D. Codified Laws § 10-45C-3 (2018) 15, 16

S.B. 106, 2016 Legis. Assemb., 91st Sess.
(S.D. 2016) ..... *passim*

OTHER AUTHORITIES

Walter Hellerstein et al., State and Local Taxation:
Cases and Materials (10th ed. 2014) 12

Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*,
103 Va. L. Rev. 309 (2017) 7, 8

Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & Pol'y 467
(2016) 8

Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 Yale L.J. 1014 (2012) 8

South Dakota Dep't of Revenue, Sales and Use Tax Guide (July 2017), http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/STGuide.pdf
..... 11

INTEREST OF *AMICI CURIAE*[1]

Amici are scholars who specialize in the economic analysis of tax law and tax policy and who submitted two *amicus* briefs explaining the economic concept of tax neutrality that the Court considered and cited in support of its opinion in the case *Comptroller of the Treasury v. Wynne*.[2] *Amici* submit this brief to assist the Court in assessing the various economic and policy arguments advanced in this case using the same method of inquiry. In particular, the neutrality principle that was important to the Court's reasoning in *Wynne* supports upholding South Dakota's Senate Bill 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) ("S.B. 106").

Alex Brill is a Resident Fellow at the American Enterprise Institute for Public Policy Research ("AEI"). Previously, he served as senior advisor and chief economist to the Committee on Ways and Means of the U.S. House of Representatives and on the staff of the President's Council of Economic Advisers.

---

[1] Petitioner and Respondents have given blanket consent for the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1802, 1804, 1806 (2015) (citing Brief Of The Tax Economists As *Amici Curiae* In Support Of Respondents ("Tax Economists *Wynne* Br."); Brief Of Michael S. Knoll And Ruth Mason As *Amici Curiae* In Support Of Respondents ("Knoll & Mason *Wynne* Br.")).

Michael S. Knoll is Theodore Warner Professor, University of Pennsylvania Law School; Professor of Real Estate, The Wharton School; and Co-director, Center for Tax Law and Policy, University of Pennsylvania.

Ruth Mason is Class of 1957 Research Professor of Law at the University of Virginia School of Law.

Alan D. Viard is a Resident Scholar at AEI. Dr. Viard previously served as Visiting Scholar at the U.S. Treasury Department Office of Tax Policy; a senior economist at the President's Council of Economic Advisers; a senior economist at the Federal Reserve Bank of Dallas; an assistant professor of economics at Ohio State University; and an economist for the Joint Committee on Taxation of the U.S. Congress.

SUMMARY OF THE ARGUMENT

The passage of time and changing circumstances have rendered the physical-presence requirement articulated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 758 (1967), and *Quill Corporation v. North Dakota*, 504 U.S. 298, 324-15 (1992), a harmful anachronism. Standard tools of economic analysis that the Court considered in *Comptroller of the Treasury v. Wynne* reveal that South Dakota's sales and use tax regime,[3] as amended by S.B. 106, promotes neutral treatment of in-state and interstate commerce. By contrast, the bright-line physical-presence requirement set forth in *Bellas Hess*

---

[3] For purposes of this brief, we use "sales tax" to describe any tax collected and remitted by the seller and "use tax" to describe any tax remitted by the consumer.

and *Quill* forces states to extend what is in practice a discriminatory subsidy in favor of a specific class of out-of-state sellers, namely, those sellers who lack a physical presence within the state. On the facts of the challenged statute, there is no valid economic reason to mandate such a discriminatory subsidy.

While there once may have been sufficient concerns as to whether sales tax compliance costs would impose an undue burden on out-of-state sellers so as to justify a bright-line physical-presence rule, such concerns no longer exist here. Given the specific features of South Dakota's sales and use tax regime and the state's adherence to the Streamlined Sales and Use Tax Agreement ("SSUTA"), there is no credible argument that the South Dakota tax regime is excessively burdensome on remote sellers. From an economic standpoint, a bright-line physical-presence requirement prohibiting S.B. 106 makes no sense.

The Court has, in analogous circumstances, utilized the flexible balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), to assess whether a given state law imposes an undue burden on interstate commerce. Such an approach is warranted here. Under the balancing test, South Dakota's important state interest in collecting sales taxes outweighs the minimal tax compliance burden on out-of-state sellers. S.B. 106 should therefore be upheld.

STATEMENT OF THE CASE

More than fifty years ago, the Court held in *Bellas Hess* that a state may not "impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758. Twenty-five years later, the Court in *Quill* upheld *Bellas Hess*'s so-called "physical-presence requirement" on the ground that its "bright-line rule . . . furthers the ends of the dormant Commerce Clause" by "demarcat[ing] a discrete realm of commercial activity that is free from interstate taxation." 504 U.S. at 314-15.

In 2016, the South Dakota legislature passed S.B. 106 in response to the loss of sales and use tax revenue resulting from the increasing volume of purchases from out-of-state sellers without a physical presence within the state. The legislature enacted S.B. 106 with the express purpose of directly challenging the Supreme Court's "doctrine that prevents states from requiring remote sellers to collect sales tax." S.B. 106 § 8(7). S.B. 106 required any seller that "does not have a physical presence in the state" to collect and remit sales tax if the seller met certain sales thresholds during the previous or current calendar year. *See id.* § 1 (to trigger collection requirement, sellers must have $100,000 in sales or 200 separate transactions delivered into the state during the previous or current year).

S.B. 106 included legislative findings regarding South Dakota's "inability to effectively collect the sales or use tax from remote sellers," *id.* § 8(1), and the decreasing cost to remote sellers of collecting sales tax,

id. § 8(6). It also provided South Dakota a right of action to sue out-of-state sellers who failed to comply, *id.* § 2, an expeditious hearing and appeal process, *id.* §§ 2, 4, an automatic injunction staying the law's enforcement during the pendency of any legal challenge to the law, *id.* § 3, and express protections against retroactive tax collection, *id.* § 5.

In April 2016, South Dakota sued four out-of-state sellers that lacked a physical presence in the state and had failed to comply with S.B. 106. *South Dakota v. Wayfair, Inc.*, 901 N.W.2d 754, 759 (S.D. 2017). South Dakota sought a declaratory judgment affirming the law's validity. *Id.* In exchange for dismissal from the action, one of the sellers voluntarily registered for a sales tax license and immediately began collecting the taxes required by S.B. 106. *Id.* The other three sellers moved for summary judgment, arguing that S.B. 106 was unconstitutional under *Quill*. *Id.* at 759-60.

On summary judgment, the sellers stipulated that they (1) lacked any physical presence in South Dakota; (2) had gross revenue in 2015 from the sale of tangible personal property delivered into South Dakota in excess of $100,000 and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (3) were not registered to collect South Dakota's sales tax. *Id.* The South Dakota Circuit Court granted the sellers' motion for summary judgment, and the South Dakota Supreme Court affirmed. *Id.* at 756.

ARGUMENT

I. S.B. 106 Promotes A Neutral Playing Field For Interstate Commerce While *Bellas Hess* and *Quill* Mandate A Discriminatory Subsidy.

An animating concern underlying the Court's dormant Commerce Clause jurisprudence is the "maint[enance of] state boundaries as a neutral factor in economic decisionmaking." *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987). In essence, this principle "precludes States from discriminat[ing] between transactions on the basis of some interstate element." *Wynne*, 135 S. Ct. at 1794 (citation and internal quotation marks omitted). Technically, "[t]his means . . . that a State 'may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Id.* (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)).

There can be no question that S.B. 106 better comports with the goal of making state boundaries neutral as to economic decisionmaking than does the *Bellas Hess-Quill* physical-presence requirement. This is clear from the type of neutrality analysis that *amici* provided and the Court considered and cited in support of its decision in *Wynne*.[4] Specifically, the Court in *Wynne* reaffirmed its internal consistency test as a practical tool that "helps courts identify tax schemes that discriminate against interstate commerce." 135 S. Ct. at 1802. The Court noted that the test "allows courts to isolate the effect of a defendant State's tax

---

[4] *See Wynne*, 135 S. Ct. at 1802, 1804, 1806 (citing Tax Economists *Wynne* Br.; Knoll & Mason *Wynne* Br.).

scheme" by "hypothetically assuming that every State has the same tax structure" and "see[ing] whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* (citation and internal quotation marks omitted).

Although the internal consistency test has its origins in assessing whether multistate taxation of a unitary enterprise is fairly apportioned, *see id.* at 1801-02, as *amici* explained in *Wynne*, the test is actually a reliable indicator of whether any form of taxation is neutral as to interstate commerce.[5] The hypothetical assumption embedded in the internal consistency test—that all other states adopt the challenged state's tax regime—is really an inquiry into whether the tax on residents' in-state activity is equal to the combined taxes on residents' out-of-state activity and nonresidents' in-state activity.[6] As such, the internal

---

[5] *See* Tax Economists *Wynne* Br. 23-27; Knoll & Mason *Wynne* Br. 19-24.

[6] The internal consistency test allows the Court to identify neutral tax regimes by recognizing that interstate commerce flows in two directions across state lines: inbound and outbound. By assuming hypothetically that every state adopts the same tax regime, the test allows the Court to compare that regime's combined burden on inbound *and* outbound interstate commerce to the burden on purely in-state commerce. A neutral tax regime will satisfy the internal consistency test because the combined burden on interstate commerce will be equal to the burden on purely in-state commerce, reflecting a possibility that prices will adjust to preserve incentives to engage in cross-border activity. The test provides an accurate evaluation of the tax regime's neutrality, whether or not other states adopt that regime. *See* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant*

consistency test reflects an important economic insight, namely, that a discriminatory tax cannot be identified by looking solely at how it operates in one market.[7] Rather, to determine whether a tax regime discriminates, one must take into account the fact that a given state tax rule may change incentives for out-of-state actors to do business within the state *and* also may change incentives for in-state actors to do business outside the state. To avoid discouraging cross-border commerce, the tax on residents' in-state activities must equal or exceed the combined tax on residents' out-of-state activities and nonresidents' in-state activities, which is equivalent to satisfying the internal consistency test.

A quintessentially neutral tax—namely, a destination-based tax that applies to all goods sold in a state regardless of their origin—illustrates the point. Even though such a tax may discourage sales and consumption within the taxing state, the tax is nevertheless neutral because it applies equally to residents' in-state sales and to all sales into the state. Consider, for example, widgets sold for $100 apiece in two hypothetical states, A and B. Suppose that State

---

Commerce Clause, 103 Va. L. Rev. 309, 326-30 (2017); Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & Pol'y 467, 495-500 (2016).

[7] *See* Knoll & Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 Va. L. Rev. at 318-26; Lirette & Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & Pol'y at 477-86; Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 Yale L.J. 1014, 1051-71 (2012).

A imposed a 20 percent excise tax on the sale or use of widgets in State A. If the price of widgets in State A rose to $125 in response to the tax, then sellers from both states would continue to have the same incentive to sell widgets in State A as in State B. State-B sellers would receive $100 after paying $25 in tax in State A. State-B sellers would receive the same $100 in State B that they would earn in State A. Similarly, State-A sellers would also receive $100 after tax in State A, and they would earn $100 without tax in State B. Thus, everyone's incentive to engage in cross-border activity could be preserved.[8] Indeed, that incentive would persist even if the price in State A did not rise to $125. If, for some reason, the price remained at $100 in both states, then sellers from both states would prefer to sell in State B, but all sellers would receive the same net after-tax price in State A ($80) and State B ($100). Although the tax would discourage sellers in State B from selling across state lines, it would encourage sellers in State A to do so. On balance, the tax would not discourage interstate commerce relative to in-state commerce and therefore would not be discriminatory.

---

[8] The Tax Economists have described the neutrality condition as satisfied when a tax creates the possibility for prices of commercial activity to adjust so there would be no incentive to shift from cross-border to purely within-state activity—or vice versa. *See* Tax Economists *Wynne* Br. 12-13. Knoll and Mason have described the neutrality condition as satisfied when both in-state and out-of-state sellers retain the same share of proceeds on commercial activity occurring in the state and commercial activity occurring outside the state. *See* Knoll & Mason *Wynne* Br. 14-16. The two descriptions are equivalent because prices can adjust as required by the Tax Economists' condition only when tax rates satisfy the Knoll and Mason condition.

By contrast, a discriminatory tax necessarily distorts incentives to engage in cross-border activity. If State A imposed a 20 percent tariff on the import of widgets from State B, interstate commerce would suffer even if widget prices in State A rose to $125. Because the tariff would not apply equally to State-A sellers' in-state sales of widgets, State-A sellers would prefer to sell in State A at $125 per widget rather than in State B at $100 per widget, whereas State-B sellers would be indifferent to where they sell because they would receive $100 after taxes in both states. With such a tariff, cross-border sales would be discouraged at any set of prices. Whatever the price, either State-A sellers would prefer to sell in State A or State-B sellers would prefer to sell in State B, or both.[9]

The internal consistency test succeeds as a substantive matter because it replicates this analysis. Applying that test to the hypothetical sales tax above, if all states adopted a 20 percent sales tax, then both in-state and cross-border sales would be taxed at 20 percent. Conversely, if all states adopted a 20 percent tariff, then in-state sales would be untaxed while cross-border sales would be taxed at 20 percent. Thus, the internal consistency test confirms what the above economic analysis shows: uniform sales and use taxes do not discourage cross-border commerce whereas tariffs do.

---

[9] If, for example, the price in State A remained $100, then State-A sellers would have an equal incentive to sell in both states, but State-B sellers would prefer to sell in State B where they would receive $100, rather than in State A where they would receive only $80 after tax.

Applying these tools to this case highlights the important difference between South Dakota's sales and use tax regime under S.B. 106 and that same regime with a physical-presence requirement consistent with *Bellas Hess* and *Quill*. Under S.B. 106, South Dakota levies sales tax at the item's destination (*i.e.*, South Dakota)—whether the seller is in-state or out-of-state—and exempts in-state sellers' out-of-state sales from taxation.[10] Under S.B. 106, South Dakota thereby imposes the neutral destination-based sales tax featured in the above example.[11]

As a formal matter, South Dakota's regime without S.B. 106 is similar to this neutral regime. Although the physical-presence requirement imposed by *Bellas Hess* and *Quill* excuses sellers without a physical presence in South Dakota from collecting and remitting sales tax, consumers in South Dakota still owe use tax on all

---

[10] *See* S.D. Codified Laws § 10-45-2 (2018) (imposing a tax on "the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandise, except as otherwise provided in this chapter, *sold at retail in the State of South Dakota to consumers or users*") (emphasis added); South Dakota Dep't of Revenue, Sales and Use Tax Guide 3 (July 2017), http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/STGuide.pdf ("Sales delivered to a location outside South Dakota are not subject to South Dakota sales tax, but may be subject to that state's tax.").

[11] We note that the South Dakota tax regime, as amended by S.B. 106, is still not entirely neutral, as it continues to excuse small out-of-state sellers that do not meet certain minimum sales threshold requirements from collecting and remitting sales tax. *See* S.B. 106 § 1.

items they purchase in or have shipped to the state.[12] Thus, all sales—whether made by in-state sellers, out-of-state sellers with a physical presence in the state, or out-of-state sellers without a physical presence—are formally subject to tax at the same rate.

As a practical matter, however, the two tax regimes are starkly different from the standpoint of neutrality. This is because there is no effective way to collect the use tax imposed on in-state consumers who purchase from remote sellers. As the state legislature found in adopting S.B. 106, "[d]espite the fact that a use tax is owed . . . many remote sellers actively market sales as tax free or no sales tax transactions." S.B. 106 § 8(3); *see also* Walter Hellerstein et al., State and Local Taxation: Cases and Materials 814 (10th ed. 2014) ("With the exception of property that has to be registered, such as automobiles, boats, and airplanes, the practical problems of preventing use tax evasion in cases of goods bought in other states have proved extremely difficult."). *Bellas Hess* and *Quill* preclude South Dakota from requiring remote sellers to collect and remit the applicable tax unless they have a physical presence in the state. This physical-presence requirement effectively mandates a subsidy in favor of interstate commerce. Such a subsidy is the mathematical mirror image of a discriminatory tariff and so necessarily changes incentives to engage in

---

[12] This Court has upheld the constitutionality of non-discriminatory use taxes. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937) ("Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass of property within the state of destination.").

interstate commerce. As a result of these decisions, out-of-state sellers without a physical presence in South Dakota gained a tax advantage over two other groups: (1) in-state sellers and (2) out-of-state sellers with a physical presence in South Dakota. S.B. 106 simply levels the playing field among in-state sellers, out-of-state sellers with a physical presence in South Dakota, and out-of-state sellers without a physical presence in the state.

Neither the internal consistency test specifically nor the dormant Commerce Clause generally prohibits states from enacting laws that discriminate in favor of interstate commerce over domestic commerce. *Wynne*, 135 S. Ct. at 1802; *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 652 n.4 (1994). It does not follow, however, that the Constitution should require states to so discriminate. There is no valid economic reason to make that logical leap. Indeed, the non-neutral nature of the physical-presence requirement leads to the many distortions identified by Petitioners and other *amici* in this case. Favoring out-of-state sellers who lack a physical presence in a state suppresses interstate activity by discouraging companies from building stores, using warehouses, contracting for warehouse services, or otherwise creating a physical presence in that state. *See* Petitioner's Brief ("Pet. Br.") 33-34; Brief of *Amici Curiae* Law Professors and Economists In Support Of Petitioner ("Professors & Economists Br.") 16-18. Favoring out-of-state sellers also leads to economic waste by encouraging consumers to buy and ship items from remote sellers rather than sellers in their own neighborhood. *See* Pet. Br. 35-36; Professors & Economists Br. 13-16. Further, by shifting to

consumers the administrative burden of collecting the use tax, the physical-presence requirement may actually increase compliance and enforcement costs rather than decrease them. *See* Professors & Economists Br. 18-21.

These economic ills occur because the physical-presence requirement contravenes the aim of neutrality. In keeping with underlying dormant Commerce Clause principles, the Court should therefore uphold S.B. 106.

II. S.B. 106's Minimal Compliance Burden Should Be Assessed Under A Balancing Test Rather Than Under A Bright-Line Rule.

The Court's driving concern in establishing the bright-line physical-presence requirement at issue here was to avoid "[u]ndue burdens on interstate commerce." *Quill*, 504 U.S. at 314-15; *see also Bellas Hess*, 386 U.S. at 756 (out-of-state seller argued that requiring it to collect and remit sales tax created "an unconstitutional burden on interstate commerce"). In particular, the Court was concerned that requiring sellers with no in-state physical presence to collect and remit taxes "could entangle [those sellers'] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" *Bellas Hess*, 386 U.S. at 759-60. The Court also hoped that a bright-line rule would "encourage[] settled expectations and, in doing

so, foster[] investment by businesses and individuals." *Quill*, 504 U.S. at 316.[13]

On the facts presented in this case, the burden on out-of-state sellers of complying with South Dakota's sales and use tax regime is negligible. South Dakota is a full member of the Streamlined Sales and Use Tax Agreement.[14] SSUTA § 801; *see also* S.D. Codified

---

[13] In *Quill*, the Court acknowledged that it had not adopted a physical-presence requirement for any type of tax other than sales and use taxes. 504 U.S. at 314, 317. The Court's dormant Commerce Clause jurisprudence, however, does not draw such formalistic distinctions in other situations between taxes with economically equivalent impacts on interstate commerce. In *Wynne*, for example, the Court specifically rejected arguments that attempted to distinguish an income tax that operated like a tariff from actual tariffs. *See* 135 S. Ct. at 1804 ("Maryland has offered no reason why our analysis should change because we deal with an income tax rather than a formal tariff, and we see none."). The Court has also rejected similar formalistic arguments in other dormant Commerce Clause contexts. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) ("A tax on real estate, *like any other tax*, may impermissibly burden interstate commerce.") (emphasis added); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 404 (1984) (states cannot "circumvent the prohibition of the Commerce Clause against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate . . . rather than on individual transactions"). *Bellas Hess* and *Quill* impose a bright-line physical-presence requirement on the ability to collect sales taxes, but this requirement applies to no other kind of tax. That requirement is therefore inconsistent with these other cases.

[14] The text of the SSUTA, as amended on December 19, 2017, is available at http://www.streamlinedsalestax.org/index.php?page=modules. A list of the states that are full members of the SSUTA is available at http://www.streamlinedsalestax.org/index.php?page=gen6.

Laws § 10-45C-3 (2018) (directing South Dakota's Department of Revenue to enter into the SSUTA). The SSUTA is a multistate agreement that "simplif[ies] and modernize[s] sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102. As one of twenty-three full members of the SSUTA, South Dakota has adopted certain features to simplify and standardize the administration of sales tax and minimize the recordkeeping burden on sellers. *See, e.g.*, *id.* § 301 (state-level administration for sales and use taxes); *id.* § 308 (standardized state-wide tax rates); *id.* § 316 (standardized state-wide exemptions). The SSUTA provides for a centralized online registry where sellers can agree to collect and remit sales taxes for all taxable sales in the member states. *Id.* § 401. Importantly, the SSUTA allows out-of-state sellers to use approved service providers—paid for by the state, not the sellers—to handle the work of collecting and remitting taxes, *id.* §§ 203, 501, and it relieves sellers from liability for any errors by those service providers, *id.* §§ 306, 502.

South Dakota's membership in the SSUTA significantly reduces the compliance burden for out-of-state sellers like the Respondents in this case. In addition, by standardizing and centralizing sales tax administration, the states that are full members of the SSUTA have reduced the marginal cost to out-of-state sellers of complying with sales tax rules in additional SSUTA states. Once an out-of-state seller registers with the SSUTA for purposes of selling in South Dakota, compliance with South Dakota's sales tax regime or the regime of any other SSUTA state involves only a minimal burden.

In addition to the streamlined, centralized tax administration provided by the SSUTA, S.B. 106 contains protections for small out-of-state businesses that sell in South Dakota by exempting sellers that do not meet bright-line minimum sales thresholds. *See* S.B. 106 § 1 (200 sales or $100,000 in sales per year delivered in the state). Further, S.B. 106 creates no obligation to remit retroactive sales tax. *Id.* § 5.

The physical-presence requirement is poorly suited to address compliance burdens because that rule automatically precludes any statute akin to S.B. 106 no matter how small a burden it may impose on interstate commerce and no matter what its pro-competitive or other benefits may be. The Court can better achieve the objective of safeguarding interstate commerce from tax compliance burdens by utilizing instead the more flexible balancing test it has applied in analogous dormant Commerce Clause cases. The logic of these cases, which arise in the context of state regulation of interstate commerce, applies equally here in assessing whether the compliance costs of an otherwise neutral state tax unduly burden interstate commerce.[15]

In *Pike v. Bruce Church, Inc.*, the Court struck down an Arizona regulation requiring that any

---

[15] The court's reasoning in *Complete Auto Transit, Inc. v. Brady* is consistent with the approach of separately assessing (i) whether a tax is discriminatory and (ii) whether the tax imposes an undue burden on interstate commerce. *See* 430 U.S. 274, 278 (1977) (observing that appellant "does not claim that discrimination or undue burden exists in fact"). In any event, *amici* agree with Petitioner that S.B. 106 satisfies the four-part test elsewhere articulated in *Complete Auto*. *See* Pet. Br. 22-24; *Complete Auto*, 430 U.S. at 279.

cantaloupe grown in Arizona and offered for sale must be packed in that state, thereby prohibiting the appellee in that case from packing its Arizona-grown cantaloupes in a nearby California facility. 397 U.S. at 138-39. Because the regulation at issue in *Pike* applied to any in-state or out-of-state person who grew cantaloupes in Arizona, it was neutral and non-discriminatory on its face. The Court nevertheless held that the regulation was contrary to the dormant Commerce Clause because the cost of compliance imposed an undue burden on interstate commerce. *Id.* at 140-42. Rather than impose a bright-line rule, the Court assessed the constitutionality of the regulation by balancing the regulation's benefits to the state against its burden on interstate commerce.[16] Applying that test to the facts of the case, the Court held that Arizona's legitimate interest in protecting cantaloupe growers from reputational injuries stemming from deceptive packaging did not outweigh the heavy burden on interstate commerce, and hence the regulation violated the dormant Commerce Clause. *Id.* at 145.

In *Bibb v. Navajo Freight Lines, Inc.*, the Court struck down an Illinois regulation requiring trucking companies to install curved mudguards on all trucks

---

[16] *See Pike*, 397 U.S. at 142 ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.") (citations omitted).

because it was mutually inconsistent with the straight mudguards required in Arkansas and permitted in at least forty-four other states. 359 U.S. 520, 523, 529-30 (1959). Although the Illinois regulation was non-discriminatory, the Court determined that cross-border trucking companies could not simultaneously satisfy Illinois' requirement for curved mudguards and Arkansas' requirement for straight mudguards, thereby placing a "heavy burden . . . on the interstate movement of trucks and trailers." *Id.* at 527, 530. Hence, the regulation imposed an unconstitutional burden on interstate commerce. *Id.*

Neither *Bibb*'s nor *Pike*'s holding required the state to abandon the government interest that justified adopting the challenged regulations in the first place. The safety interest that motivated Illinois to adopt the curved mudguard rule in *Bibb* could be satisfied (at least in part) by Illinois' adoption of a straight mudguard requirement that would conform with the regulations of other states. *See id.* at 529-30. In *Pike*, Arizona sought to protect the reputation of Arizona farmers. But this interest could be served, at least to some extent, by enacting less restrictive measures. *See Pike*, 397 U.S. at 143 (noting that Arizona could ban the interstate sale of "unfit goods"). No such substitution can be made to protect South Dakota's interest in collecting taxes in light of *Bellas Hess* and *Quill*. If this Court upholds the physical-presence requirement, the practical result is that South Dakota must abandon its sovereign entitlement to tax items sold into its state by out-of-state sellers with no physical presence, no matter how much business those sellers do in South Dakota. There is no practical alternative to imposing upon out-of-state sellers the

obligation to collect sales taxes. As such, the state would lose the undeniable benefits of sales tax collection. The minimal burden on interstate commerce resulting from tax compliance in this case does not outweigh that interest.

CONCLUSION

Amici therefore respectfully submit that the Court should reverse the judgment of the Supreme Court of South Dakota.

Respectfully submitted,

DAVID W.T. DANIELS
Counsel of Record
RICHARDS KIBBE & ORBE LLP
The Portrait Building
701 Eighth Street, NW
Washington, DC 20001
(202) 261-2967
ddaniels@rkollp.com

MARGARET WINTERKORN MEYERS
RICHARDS KIBBE & ORBE LLP
200 Liberty Street
New York, NY 10281-1003
(212) 530-1953
mmeyers@rkollp.com

Counsel for Amici Curiae

March 5, 2018

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

PETITIONER,

v.

WAYFAIR, INC., ET AL.,

RESPONDENTS.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Ilya Shapiro
Counsel of Record
Trevor Burrus
Matthew Larosiere
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tburrus@cato.org
mlarosiere@cato.org

April 4, 2018

QUESTION PRESENTED

Can a state compel all businesses engaged in interstate commerce to monitor their sales in that state and collect that state's sales tax, or can such a mandate only be applied to businesses with a physical presence in the state, as this Court held in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. SOUTH DAKOTA'S EXTRATERRITORIAL REGULATION UNDERSCORES WHY THE COMMERCE CLAUSE REQUIRES PHYSICAL PRESENCE AS A PREREQUISITE TO THE COLLECTION OF STATE SALES TAX 3

A. South Dakota's Law Violates the Commerce Clause Principle of Territoriality 4

B. South Dakota's Law Discriminates against Interstate Commercial Activity 6

II. THE PHYSICAL-PRESENCE REQUIREMENT IS AN ESSENTIAL DUE-PROCESS SAFEGUARD 9

A. South Dakota Seeks to Impose Obligations on Entities to Whom It Offers No Services 9

B. Due Process Requires That Businesses Not Be Subject to Onerous Requirements from Jurisdictions Where They Have No Representation and No Intent to Enter 10

III. A DECISION IN SOUTH DAKOTA'S FAVOR WOULD OBVIATE USE TAXES, WHICH ARE A CONSTITUTIONAL SOLUTION TO SOUTH DAKOTA'S PROBLEM 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992) 9-10

Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 6

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) ... 6

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 5

Borders Online v. State Bd. of Equalization, 129 Cal. App. 4th 1179 (2005) 14

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 2, 8

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 7, 8

D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988). 13

Edgar v. MITE Corp., 457 U.S. 624 (1982) 6

Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd., 766 F. Supp. 2d 1122 (W.D. Wash. 2011) 4-5

Granholm v. Heald, 544 U.S. 460 (2005) 4

Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) 5, 6

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 13

Hughes v. Oklahoma, 441 U.S. 322 (1979) 4

In re Nat'l Century Fin. Enters., Inc., Inv. Litig., 755 F. Supp. 2d 857 (S.D. Ohio 2010) 5

Marshall v. Sherman, 148 N.Y. 9 (1895) 5

Midwest Title Loans, Inc. v. Mills,
593 F.3d 660 (7th Cir. 2010) 4

Miller Bros. Co. v. Maryland,
347 U.S. 340 (1954) 9, 12

Molloy v. Gov't of the V.I.,
594 F. Supp. 2d 595 (D.V.I. 2007) 13

Okla. Tax Comm'n v. Jefferson Lines,
514 U.S. 175 (1995) 6-7

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 1, 3, 10

Scripto, Inc v. Carson, 362 U.S. 207 (1960) 8, 12

Wardair Canada, Inc. v. Fla. Dep't of Revenue,
477 U.S. 1 (1986) 4

West Lynn Creamery v. Healy, 512 U.S. 186 (1994) ... 4

Western Live Stock v. Bureau of Rev.,
303 U.S. 250 (1938) 7

Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) . 10

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 6

Statutes

S.B. 106, 2016 Leg., 91st Sess. (S.D. 2016) 1

Other Authorities

2 The Records of the Federal Convention of 1787
(Max Farrand ed., rev. ed. 1937 (1911)) 3

Are your online purchases subject to use tax?, S.D.
Dep't of Revenue, https://bit.ly/2GVru7k (last visited Apr. 3, 2018) 12

Jared Walczack & Scott Drenkard, State and Local Sales Tax Rates 2018, The Tax Foundation (Feb. 12, 2018), http://bit.ly/2uBcmXO 15

Joseph Story, *Commentaries on the Conflict of Laws* (1834) 5

Nina Manzi, "Use Tax Collection on Income Tax Returns in Other States," Minn. House of Representatives Research Dep't Policy Brief (2015), https://bit.ly/2p97kg3 14

U.S. Gov't Accountability Off., GAO-12-651T, *Tax Gap: Sources of Noncompliance and Strategies to Reduce It* (2012) 14

Use Tax Fact Sheet, S.D. Dep't of Revenue (Feb. 2018), https://bit.ly/2pW8wEc 13

Use Tax Form: Everyone's Responsibility, S.D. Dep't of Revenue (Jun. 2016), https://bit.ly/2GsYMvr 13

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because it concerns the regulation and taxation of interstate commerce in our federal system.

SUMMARY OF ARGUMENT

South Dakota's Senate Bill 106 directly targets this Court's decision in *Quill Corp. v. North Dakota*, which made some physical presence in a state a prerequisite to the attachment of tax liability. 504 U.S. 298 (1992). The statute provides, in pertinent part, that "any seller selling . . . into South Dakota, shall be subject to chapters 10-45 and 10-52, and the seller shall collect and remit the sales tax." S.B. 106, 2016 Leg., 91st Sess. (S.D. 2016). If the remote seller either receives gross revenue from delivery into the state exceeding $100,000, or makes 200 separate transactions into the state, "[t]he seller shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state." *Id.*

South Dakota's law is at odds with the Constitution. The Commerce Clause exists to prevent penalties on interstate transactions and foster a robust national

---

[1] Rule 37 statement: All parties filed blanket consents. No counsel for any party authored any part of this brief; only *amicus* funded its preparation or submission.

market. The Framers would not recognize the concern South Dakota poses: that interstate commerce is thriving to such an extent that collection of a particular type of tax has become difficult.

South Dakota and its *amici* fail to give weight to the substantial constitutional underpinnings of *Quill*'s physical-presence requirement. *Quill* followed decades of tax-law developments that struck an important balance under the Due Process Clause and the Commerce Clause. Due process requires some definite link—some minimum contacts—between the state and any person, property, or transaction that a state seeks to tax or regulate. Wayfair does not own property in South Dakota, elects no representatives in South Dakota, and was afforded no protection by South Dakota's police. South Dakota's only justification for binding a foreign entity to its law is that some of Wayfair's many customers happen to live there. To allow South Dakota to compel Wayfair's collection of its state taxes raises serious concerns of taxation without representation. If states can directly compel people who live outside their boundaries to adhere to their standards—standards Wayfair had no chance to influence—the concept of statehood itself is undermined.

South Dakota's law also violates the Commerce Clause principle of territoriality. That the burden kicks in at either the 200th transaction or $100,000 mark does not cure the discrimination against interstate commerce and raises longstanding concerns of the evils of "economic isolation and protectionism" which has long colored Commerce Clause cases. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (internal quotation marks omitted).

A federal constitutional structure inevitably poses such difficulties, particularly if goods flow freely interstate. South Dakota may have to use other means to generate revenue or invest in raising awareness of its use tax, but that's not a justification for abridging the Due Process and Commerce Clauses. Governments around the world are prone to complain about the difficulties of collecting taxes, but our Constitution was not written to bend to states' desire to raise revenue.

ARGUMENT

I. SOUTH DAKOTA'S EXTRATERRITORIAL REGULATION UNDERSCORES WHY THE COMMERCE CLAUSE REQUIRES PHYSICAL PRESENCE AS A PREREQUISITE TO THE COLLECTION OF STATE SALES TAX

James Madison believed that "the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority." 2 The Records of the Federal Convention of 1787, at 625 (Max Farrand ed., rev. ed. 1937 (1911)). Under the Articles of Confederation, "[s]tate taxes and duties hindered and suppressed interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). Those failures are what motivated the inclusion of the Commerce Clause in our Constitution.

This Court's state-taxation precedents supply ample reason to stop South Dakota's scheme to shift its revenue burdens onto the national market. Predictably, many sister states have filed briefs supporting South Dakota, seeking to overcome a series of well-founded decisions that make some kinds of revenue generation a bit more difficult. But for the constraints of the Commerce Clause, it would certainly be easier

for states to raise money from citizens of other states, but *Quill* and the decisions that undergird it, reflect

> a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Granholm v. Heald, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)). *See also Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1 (1986).

To curb the balkanization that rendered the Articles a failure—and which South Dakota seeks to revive—the Commerce Clause invalidates laws that have the effect of discriminating against interstate commerce and regulating extraterritorially. *See, e.g.*, *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994).

A. South Dakota's Law Violates the Commerce Clause Principle of Territoriality

By forcing Wayfair to collect South Dakota's taxes "as if [they] had a physical presence in the state," Joint App. 19, South Dakota is clearly and openly "projecting" its legislation into other states, something the circuits have persistently found to violate the Commerce Clause's territoriality principle. *See e.g., Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 668–69 (7th Cir. 2010) (invalidating state application of consumer credit code to out-of-state title lender making loans to people within state); *Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1142

(W.D. Wash. 2011) (right-of-publicity statute that regulated "a variety of transactions occurring 'wholly outside' Washington's borders" violated the territoriality principle); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 755 F. Supp. 2d 857, 887 (S.D. Ohio 2010) (application of "blue sky" laws to transaction occurring outside the state violated the territoriality principle).

That a state's regulatory reach must be limited to its own borders is a bedrock principle of federalism woven deeply into our legal and societal fabric. As Justice Story wrote in his 1834 *Commentaries on the Conflict of Laws*, "no state or nation can, by its laws, directly affect or bind . . . persons not resident therein." Justice Waite observed in 1881 that "[n]o State can legislate except with reference to its own jurisdiction," *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). The fact that the internet has facilitated interstate commerce does nothing to change the "principle of universal application, recognized in all civilized states, that the statutes of one state have . . . no force or effect in another." *Marshall v. Sherman*, 148 N.Y. 9, 24 (1895).

In *Healy v. Beer Institute*, the Court correctly held that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." 491 U.S. 324, 336 (1989). Although the presumption against extraterritorial regulation has been muddled since *Healy*, South Dakota's law still fails to alleviate the concerns underlying the rule that have colored more recent Commerce Clause cases.

Allowing South Dakota to act as if foreign entities "had a physical presence in the state" does not allevi-

ate the constitutional considerations that the territoriality principle protects. Holding otherwise would allow states to effectively extend their sovereignty by statute. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."); *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."); *Healy*, 491 U.S. at 332 ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause.").

B. South Dakota's Law Discriminates against Interstate Commercial Activity

Whether couched as "dormant" or "negative" for analytical convenience, the clear purpose of the Commerce Clause as it relates to state law is to ensure free trade across state lines. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) ("Our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market."). The Commerce Clause invalidates laws that have the "inevitable effect" of "threaten[ing] the free movement of commerce by placing a financial barrier around the State." *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 284 (1987). When commerce is so burdened, it "jeopardizes the welfare of the Nation as a whole" by "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 180

(1995). By forcing businesses to specifically monitor their customers in South Dakota—or even choose to refrain from selling in the state altogether—South Dakota discriminates against interstate commerce and transgresses the Commerce Clause.

The state attempts to misdirect the Court by framing the Commerce Clause question of discrimination exclusively in terms of cases that discriminate by favoring in-state economic actors. Pet. Brief at 6. In actuality, the question is whether the tax "discriminate[s] against interstate commerce" *and* "is fairly related to the services provided by the state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). South Dakota runs afoul of each of those prongs of *Complete Auto*'s test.

South Dakota does not seek to benefit in-state actors at the expense of those out-of-state, as was the concern in *Granholm*. Instead, South Dakota's law directly burdens commerce because of its interstate character—and no state can burden the privilege of doing interstate business. *Cf. Western Live Stock v. Bureau of Rev.*, 303 U.S. 250, 255–56 (1938) (explaining that courts typically strike down local taxes that could be placed by every state the commerce touches). In a world where South Dakota's law is permissible, a business would be impelled to collect and remit the taxes of foreign jurisdictions based on the localities of its customers, not its own relationship with the taxing state.

It is this lack of regard for the foreign business's availment of South Dakota's law that poses not only due-process concerns, as discussed below, but have no "relat[ion] to the services of the taxing state." *Complete Auto*, 470 U.S. at 279. If South Dakota prevails, all businesses engaged in interstate commerce will be

forced to monitor their customers' locations rather than their own actions. In *Scripto, Inc v. Carson*, 362 U.S. 207 (1960), the Court recognized "use taxes" as constitutional under the Commerce Clause. There, however, the regulated entity directed activities into the taxing state. *Id.* at 209 ("Each salesman . . . is actively engaged in Florida as a representative 'of Scripto for the purpose of attracting, soliciting and obtaining Florida customers' for its mechanical advertising specialties.") South Dakota's law works in very differently: instead of placing a taxing burden on entities that knowingly direct activity towards a state, every single business shipping goods in interstate commerce will have to keep tabs on its customers to remain compliant. It's the customers' behavior, not the businesses', that triggers compliance.

The only firms not subject to South Dakota's law would be those that either refuse to do business with South Dakota at all or cap sales volume. This has no "relationship with the services" South Dakota affords the business, *Complete Auto*, 470 U.S. at 279, but instead forces foreign firms to comply with state law due to the firm's popularity with South Dakotans. It forces the following decision: "This would be my 200th sale to South Dakota. . . . Should I deny it, or accept it and begin collecting and remitting their sales tax?" That Morton's Fork is a clear impediment to engaging in interstate commerce, and an example of the evils of "economic isolation and protectionism" that have animated Commerce Clause jurisprudence for years. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (internal quotation marks omitted).

II. THE PHYSICAL-PRESENCE REQUIREMENT IS AN ESSENTIAL DUE-PROCESS SAFEGUARD

The Fourteenth Amendment's Due Process Clause requires some definite link—some minimum contacts—between a state and the person, property, or transaction it seeks to tax or regulate. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954). "In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation." *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778 (1992).

The fact that South Dakota's law is not directly taxing entities like Wayfair does not cure its constitutional shortcomings. The same concerns of multiple taxation, due process, and taxation-without-representation are not alleviated by gamesmanship enabling a state to get the same revenue benefits as direct taxation through the back door.

A. South Dakota Seeks to Impose Obligations on Entities to Whom It Offers No Services

South Dakota's law predicates collection and remittance of a state sales tax upon either the receipt of "gross revenue . . . exceed[ing] one hundred thousand dollars," or "two hundred . . . separate transactions[.]" Joint App. at 20. There is no regard for any due process quid-pro-quo—that, in exchange for availing itself of South Dakota's government services, a business could reasonably expect to be taxed by the state. The obligation hinges entirely on the choices of third-party customers, not on the "protection, opportunities, and benefits" South Dakota confers. *Allied-Signal*, 504 U.S. at

778. A customer's decision—the 200th customer, specifically—to entangle Wayfair in South Dakota's sales-tax regime is insufficient to satisfy due process. A holding to the contrary would be inconsistent with longstanding principles developed in the due-process-informed Commerce Clause cases discussed above.

The basic idea that legitimizes state regulation of an activity is the "protection, opportunities and benefits" the state confers on those activities. *Allied-Signal*, 504 U.S. at 778; *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). Here, South Dakota engages in sleight-of-hand by complaining of uncollected revenue, Pet. Brief at 35, while distracting the Court from the fact that the state seeks to compel compliance from entities who have no representation in the state.

Although modern due-process jurisprudence rejects a rigid, formalistic definition of minimum contacts, the Court has not abandoned the requirement of a substantial connection between the regulating state and the activity it seeks to touch—rather than a connection only to the peculiar actor the state seeks to tax. *Allied-Signal, Inc.*, 504 U.S. at 778; *Quill Corp. v. North Dakota*, 504 U.S. at 306–08. South Dakota's law does only the latter; its concern is not with the transaction but with revenue from the transaction.

B. Due Process Requires That Businesses Not Be Subject to Onerous Requirements from Jurisdictions Where They Have No Representation and No Intent to Enter

South Dakota claims that the burden of simultaneous compliance with all of America's tax jurisdictions is "marginal." Pet. Brief at 44. This is misleading. A molehill can't be made out of a mountain by referring

to a mass of paid tax-compliance services that everyone engaged in e-commerce could subscribe to should South Dakota get its way. *Id.* at 46. While advanced accounting software may be something most large interstate operations should already have, South Dakota's statute applies not only to e-commerce giants like Wayfair, but also to businesses and individuals who cannot affair a compliance department. Tax software may solve a business's regulatory-compliance issues, but it doesn't remedy a constitutional failing.

Individuals and small shops could be subject to lawsuits based on information they never even considered keeping. Imagine someone selling stickers online for a dollar each. If South Dakota can apply its law to anyone who ships into the state, that person must now keep a log of how many stickers are mailed to which states or be subject to legal action in South Dakota should the number reach 200 in a given year. The small business thus has an obligation not only to manage, but to recalculate and remit every year.

If this Court upholds this tax, states across the country will likely follow South Dakota's example. This patchwork of regulations will require businesses of all sort—from Walmart to a grandma in Poughkeepsie selling handmade doilies on the website Etsy—to monitor whether their sales have exceeded a given state's idiosyncratic thresholds. Those onerous requirements, coupled with "triggering" events that are entirely out of a seller's control—maybe the grandma's doilies become suddenly popular with a sorority in Boulder, thus passing the threshold in Colorado's hypothetical law—create substantial due-process concerns.

III. A DECISION IN SOUTH DAKOTA'S FAVOR WOULD OBVIATE USE TAXES, WHICH ARE A CONSTITUTIONAL SOLUTION TO SOUTH DAKOTA'S PROBLEM

As recognized in *Scripto, Inc. v. Carson*, a use tax is a tax on the privilege of using property that has come to rest in and become a part of the mass of property within the taxing state. 362 U.S. 207, 210. Use taxes are so-named because they focus not on the sale of goods but on the use, storage, or other consumption of tangible personal property within the taxing state. The use tax "was developed as a device to complement [sales tax] in order to prevent evasion . . . by the completion of purchases in a non-taxing state and shipment by interstate commerce into a taxing forum." *Id.*

Use taxes have existed for a long time, and they came about to solve the very problems of which South Dakota complains. If states could simply compel out-of-state businesses to collect and remit their taxes, the use tax would never have come to exist as a logical "complement" to sales taxes, as recognized in *Scripto*. *Id.* The key difference between sales and use taxes is that use taxes are generally self-assessed. Where a sales tax happens at the point of sale, a use tax becomes due when non-taxed or undertaxed property moves into the taxing state. *Are your online purchases subject to use tax?*, S.D. Dep't of Revenue, https://bit.ly/2GVru7k (last visited Apr. 3, 2018).

The levying, collection, and remittance of use taxes have their own distinct history, from which due process and Commerce Clause concerns have required the burden of collecting such taxes to be limited to the state's jurisdiction. *See Miller Bros. Co.*, 347 U.S. at 342 (holding that the burden of collecting tax cannot

fall on a foreign corporation in the absence of a jurisdictional basis because "[i]t is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law").

The constitutionality of use taxes were first tested in *Henneford v. Silas Mason Co.*, where the Court held Washington's use tax to be a permissible means of protecting both its sales tax base and its in-state businesses. 300 U.S. 577, 587–88 (1937). In *Henneford*, the Court concluded that use taxes did not violate the Commerce Clause so long as they were nondiscriminatory and "compensating"—designed to equalize the tax burden on locally sourced and imported goods. *Id.* at 579–80; *cf. Molloy v. Gov't of the V.I.*, 594 F. Supp. 2d 595, 597 (D.V.I. 2007) (invalidating the Virgin Islands' use tax, under which locally sourced goods were tax free, but imported goods subject to a 4 percent tax, regardless of whether they had already been taxed); *see also D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988) (use tax on catalogs printed out-of-state and subsequently shipped to prospective in-state customers did not violate the Commerce Clause).

South Dakota is no stranger to the use tax, as it implemented one shortly after its sales tax upon "discover[y] that consumers were leaving the state to make tax-free purchases." *Use Tax Form: Everyone's Responsibility*, S.D. Dep't of Revenue (Jun. 2016), https://bit.ly/2GsYMvr. According to the South Dakota Department of Revenue, "[t]he use tax makes it impossible to avoid taxes by purchasing from an out-of-state vendor." *Use Tax Fact Sheet*, S.D. Dep't of Revenue (Feb. 2018), https://bit.ly/2pW8wEc.

South Dakota claims that "[c]onditions in South Dakota vividly illustrate [the physical presence requirement's] harm." Pet. Brief at 35. It further asserts that the state "is dependent on its sales tax," and would necessarily need to increase this tax to make up for the shortfall in being unable to compel entities over which it has no jurisdiction to collect the tax for them. *Id.* at 35–36. This is wrong. The state is simply experiencing the pervasive problem of compliance with self-assessed taxes. *See* U.S. Gov't Accountability Off., GAO-12-651T, *Tax Gap: Sources of Noncompliance and Strategies to Reduce It* (2012) (estimating noncompliance at 56 percent for taxes without third-party reporting).

Instead of petitioning the Court to stretch the limits of due process and the Commerce Clause, South Dakota could instead attempt to increase compliance with their existing use tax regime, as many other states have done. As of 2015, 27 states have placed a line item on their state tax forms for the use tax along with instructions and seen increases in compliance as a result. *See*, Nina Manzi, "Use Tax Collection on Income Tax Returns in Other States," Minn. House of Representatives Research Dep't Policy Brief (2015), https://bit.ly/2p97kg3. South Dakota could also work with other states to share information on use tax collection, and of course, pursue their collection efforts through the court system. *See, e.g.*, *Borders Online v. State Bd. of Equalization*, 129 Cal. App. 4th 1179, 1201 (2005) (holding that California's assessment of their use tax against a nonconforming business "does not violate the Commerce Clause of the United States Constitution.")

Moreover, while it may come as a surprise to South Dakota, sales taxes are not the only way for a state to generate revenue. If they were, Delaware, Montana, New Hampshire, and Oregon—which have no statewide sales tax—would be inexplicable anomalies. Jared Walczack & Scott Drenkard, State and Local Sales Tax Rates 2018, The Tax Foundation (Feb. 12, 2018), http://bit.ly/2uBcmXO. The simple fact is that there are multiple mechanisms the state can use to collect revenue, the enforcement of which ranges from easy to hard. Point-of-sale transactions are easy to tax, yes, and user-reported use taxes can be more difficult. However, the fact that a state has chosen a difficult way to generate revenue should not result in the erosion of constitutional safeguards this Court has long recognized in the tax context just to ease its burden, especially where less constitutionally dubious alternatives exist, as they clearly do here.

The Constitution restricts what measures states might take in order to raise revenue, and the fact that South Dakota's conception of revenue generation is struggling in a robust and thriving national economy should counsel the state to restructure its ideas on revenue generation, not direct the Court to abandon decades of constitutionally grounded precedent to ease a self-imposed burden.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
Matthew Larosiere
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tburrus@cato.org
mlarosiere@cato.org

April 4, 2018

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR COLONY BRANDS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JEFFREY R. SURLAS
Vice President & General Counsel
COLONY BRANDS, INC.
1112 7th Avenue
Monroe, WI 53566
(608) 328-8400
Jeff.Surlas@sccompanies.com

WARREN L. DEAN, JR.
Counsel of Record
KATHLEEN E. KRAFT
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900
wdean@thompsoncoburn.com

JAMES M. BURGER
SEAN CROWLEY
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900
jburger@thompsoncoburn.com

April 4, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. STATES ARE OBLIGATED TO CONFORM TO FEDERAL LAW AND POLICY IN THE REGULATION AND TAXATION OF INTERNET SALES	6
A. The Internet Is A Global System, And The Regulation And Taxation Of Internet Sales Implicates The Foreign Commerce Of The United States	6
B. Where The Foreign Commerce Of The United States Is Implicated, State Action Must Conform To Federal Policy And Practice	6
C. The United States And The International Community Do Not Recognize The Availability Of A Website As Creating A "Fixed Place of Business" (A "Presence") Within The Jurisdiction Of A Sovereign State	8
II. ASSERTION OF STATE TAX JURISDICTION BY REASON OF THE "ACCESSIBILITY" OF A WEBSITE WOULD UPSET THE FEDERAL SYSTEM OF GOVERNANCE	17

TABLE OF CONTENTS—Continued

Page

A. The Virtual Capabilities Of The Internet And Its Related Technologies Are In Their Infancy 17

B. The Assertion Of State Jurisdiction On The Bases Of Virtual Technologies Will Eliminate Boundaries On State Sovereignty And Create 50 Subordinate Federal Governments 19

III. IN THE ABSENCE OF FEDERAL LEGISLATION GOVERNING TAXATION OF REMOTE SALES, THE REQUESTED ABROGATION OF *QUILL* THREATENS THE VIABILITY OF THE DIRECT MARKETING INDUSTRY 21

A. Remote Sales By Direct Marketers Is A Historical Business Model That Pre-Dates The Formation Of The Republic 21

B. The Imposition Of State Regulatory And Tax Obligations Occasioned By The Abrogation Of *Quill* Would Unduly Burden Catalog, Direct Mail, And Other Traditional Forms Of Solicitation, As Well As The Consumers That Purchase Through These Sale Methods 23

C. States Have No Authority To Impose On Internet Sales Regulatory And Tax Obligations Not Borne By More Traditional Means Of Direct Marketing 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES	Page(s)
Commissioner of Internal Revenue v. Piedras Negras Broadcasting Co., 127 F.2d 260 (5th Cir. 1942)	10
Comm'r v. Groetzinger, 480 U.S. 23 (1987)	9, 12
Complete Auto Transit v. Brady, 430 U.S. 274 (1977)	5, 7
Direct Marketing Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016), *on remand from* 135 S. Ct. 1124 (2015)	24
ITO v. Right Florists Limited, I.T.A. No. 1336	15
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	5, 6, 7, 8
Michelin Tire Co. v. Wages, 423 U.S. 276 (1976)	8
Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008 (9th Cir. 1994)	7
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	7
Quill Corp. v. North Dakota, 504 U.S. 298 (1992)	*passim*
U.S. v. Locke, 529 U.S. 89 (2000)	6
Webster v. LLR, Inc., 2:17-cv-00225-DSC (W.D. Pa. filed Feb. 17, 2017)	26

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS AND LEGISLATION

Page(s)

Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281 (2016) (codified at 47 U.S.C. § 151 note)) 27, 28

I.R.C. § 872(b) 8, 9

I.R.C. § 882(a) 8, 9

OTHER AUTHORITIES

A. Thierer & A. O'Sullivan, *Projecting the Growth and Economic Impact of the Internet of Things*, Mercatus Center: Technology Policy (June 15, 2015), https://www.mercatus.org/publication/projecting-growth-and-economic-impact-internet-things .. 21

About OECD, http://www.oecd.org/about/... 12

Advisory Commission on Electronic Commerce, *Report to Congress* (2000) 14

Arthur J. Cockfield, *Reforming the Permanent Establishment Principle Through a Quantitative Economic Presence Test*, 38 Can. Bus. L.J. 400 (2003) 14

Barry M. Leiner *et al.*, *Brief History of the Internet*, Internet Society (1997), https://www.internetsociety.org/internet/history-internet/brief-history-internet/..... 17

TABLE OF AUTHORITIES—Continued

Page(s)

David Hardesty, *Electronic Commerce: Taxation & Planning* ¶ 12.02 (Thomson Reuters 2018) 9, 12, 13, 14

Divya Pahwa, *The History of the Catalog*, Medium (Aug. 15, 2014), https://medium.com/@pahwadivya/the-history-of-the-catalog-b5334841e941 23

Dyfed Loesche, *The Biggest App Stores*, Statista: The Statistics Portal (Jan. 9, 2018), https://www.statista.com/chart/12455/number-of-apps-available-in-leading-app-stores/ 18

Emilie Le Beau Lucchesi, *The Lost Charm of Mail-Order Catalogs in America*, CountryLiving (Oct. 25, 2016), https://www.countryliving.com/shopping/news/a40276/mail-order-catalogs/ 23

Jaimy Ford, *Tracking Sales Tax Rates Across Thousands of Jurisdictions*, Avalara (June 25, 2015), https://www1.avalara.com/trustfile/en/blog/tracking-sales-tax-rates-across-thousands-of-jurisdictions.html 24

James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity* (Oct. 2011), https://www.mckinsey.com/industries/high-tech/our-insights/the-great-transformer 20

TABLE OF AUTHORITIES—Continued

Page(s)

Jim Gibbs, *Five Pivotal Moments in Catalog History*, The Dingley Press, http://dingley.com/five-pivotal-moments-in-catalog-history/ (last visited Apr. 1, 2018).... 23

Joel D. Kuntz *et al.*, *U.S. International Taxation* (Thomson Reuters 2018)..... 13

John Stevens, *Internet Stats & Facts for 2017*, Hosting Facts (Aug. 17, 2017), https://hostingfacts.com/internet-facts-stats-2016/..... 6

Kelly Phillips Erb, *Flipping Through History: Online Retailers Owe Popularity and Tax Treatment to Mail Order Catalogs*, Forbes (Aug. 18, 2014, 10:10 PM), https://www.forbes.com/sites/kellyphillipserb/2014/08/18/flipping-through-history-online-retailers-owe-popularity-and-tax-treatment-to-mail-order-catalogs/#7b5b0f414ad9..... 22, 23

KPMG LLP, *Locally Administered Sales and Use Taxes*, Institute for Professionals in Taxation (2016), http://www.ipt.org/IPT/SponsoredResearch.aspx..... 20

Layout Showing the Major ISPs, Internet Mapping Project: Map Gallery, http://www.cheswick.com/ches/map/gallery/isp-ss.gif..... 17

Mail-order business, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Mail-order_business 22, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Monica Gianni, *The OECD's Flawed and Dated Approach to Computer Servers Creating Permanent Establishments*, 17 Vand. J. of Ent. & Tech. L. 1 (2014)..... 14, 15

New Report Calculates the Size of the Internet Economy, The Internet Association (Dec. 10, 2015), https://internetassociation.org/121015econreport/ 20

OECD Comm. on Fiscal Affairs, *Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on the Model Tax Convention on Article 5* (2000), http://www.oecd.org/tax/treaties/1923380.pdf..... 12, 13, 14

OECD, *Model Tax Convention on Income and on Capital: Condensed Version* (2010)..... 12

Office of Tax Policy, U.S. Dep't of Treas., *Selected Tax Policy Implications of Global Electronic Commerce* (Nov. 1996) 9, 16

U.S. Model Income Tax Convention 11

Wendy Woloson, *How Benjamin Franklin Invented the Mail-Order Business*, Bloomberg (Mar. 13, 2013, 1:47 PM), https://www.bloomberg.com/view/articles/2013-03-13/how-benjamin-franklin-invented-the-mail-order-business 22

INTEREST OF *AMICUS CURIAE*[1]

Colony Brands, Inc. (originally known as The Swiss Colony, Inc.) is a Wisconsin corporation that directly or indirectly owns a majority interest in many different corporate subsidiaries and their divisions and brands, including Montgomery Ward, The Swiss Colony, Seventh Avenue, Midnight Velvet, Ginny's, Monroe and Main, Country Door, Ashro, The Tender Filet, and The Wisconsin Cheeseman. All these subsidiaries are catalog mail-order and electronic retail businesses that, in the aggregate, feature extensive offerings to United States consumers in furniture, home decor, apparel, housewares, entertainment products, electronics, and a variety of food products. Combined, they are one of the largest privately-owned direct marketers in the United States and compete with companies located both inside and outside of the United States, including Canada. While today a majority of Colony Brands' subsidiaries' orders from consumers are received by telephone or online attributable mostly to catalog advertising, Colony Brands' subsidiary companies and brands still receive tens of millions of dollars each year from mailed-in orders. In reliance on the "physical presence" substantial nexus standard reaffirmed in

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Frank W. Cawood contributed funds for the preparation or submission of this brief. On January 31, 2018 and February 5, 2018, respectively, Petitioner and Respondents gave blanket consent to amicus briefs. These blanket consents were docketed more than 10 days before the due date of this brief.

Quill Corp. v. North Dakota,[2] each of these retailers making consumer sales collects and remits sales taxes in only the select handful of states in which the retailer has chosen to have a physical presence. In cases where they do not collect and remit sales taxes, the consumers are required to pay use taxes on those transactions; and, where required by state law, the retailers report annual summaries of transactions to the consumers and/or the applicable departments of revenue.

A decision by this Court abrogating the principles reinforced in *Quill* – namely the requirement that a retailer must have a physical presence in a state for that state to force it to collect and remit sales taxes – will have a significant negative impact on the businesses of Colony Brands and its subsidiaries. For that reason and others, Colony Brands has an institutional interest in this case and supports the position of Respondents that the decision of the South Dakota Supreme Court should be affirmed.

SUMMARY OF ARGUMENT

This case raises the question of whether, and to what extent, the Constitution sets limits on the ability of states to collect sales and use taxes from out-of-state sellers.

Petitioner South Dakota asks this Court to abrogate *Quill*'s reaffirmation of the bright line "physical presence" test to show a business's "substantial nexus" with a taxing authority under the Commerce Clause. Pet'r Br. at 17-21. The United States argues in support of Petitioner that the states have ample

---

[2] 504 U.S. 298 (1992).

authority to collect sales taxes from remote sellers because the accessibility of their websites in a state creates a "virtual presence" there. U.S. Br. at 7-10.

Together, Petitioner and the United States effectively request that the Court pave the way for states to impose on any seller of products, no matter how remote their relation to that state may be, a legal obligation to monitor each and every transaction that leads to a "delivery" within the state for the purpose of ensuring compliance with the state's statutory tax collection regime. This monitoring obligation would attach regardless of the location or domicile, domestic or foreign, of the seller and of the purchaser and regardless of the level of actual presence in the taxing state. And, assuming that a state's unilaterally-determined thresholds are met, the remote seller then would be required to collect and remit state sales and use taxes for every transaction that results in a delivery to that state. The seller would be subject to that state's enforcement jurisdiction, regardless of the scope and extent (if any) of its actual contacts or presence in the state. An Illinois resident's purchase of goods from a New York retailer for delivery to South Dakota would trigger this monitoring requirement and South Dakota's enforcement jurisdiction. South Dakota also would have enforcement jurisdiction over a Mexico City, Mexico resident's purchase of goods from a Canadian retailer for delivery to South Dakota, and the Canadian retailer would be obligated to monitor its sales for each such occurrence. Constitutional tests would be satisfied on the basis of the "virtual" reality of new technologies.

To date, this Court's decisions have preserved the viability of the centuries-old business model of remote

direct sales, thereby preventing states from imposing unreasonable burdens that might threaten or harm that model of interstate commerce. This continuing viability is now under review on the basis of technological innovations that were inconceivable only a few years ago.

The Internet is in the process of revolutionizing the conduct of commerce globally. The Internet, however, is not a physical facility or thing. It is a suite or set of intangible protocols that permits electronic communications networks to interconnect and act as a global system. That system links devices in two-way communication on a worldwide basis. It creates a network of networks consisting of private, public, academic, business, and government networks, both local and global in scope, linked by a broad array of electronic, wireless, and optical networking technologies. It interconnects the globe.

The global system does not in any way, however, transfer the location of the devices it connects and therefore creates no additional presence for those devices. What is virtual is, by definition, not real. It does not create a presence. Unlike the switched telephone connections within older dedicated telephone networks that did create a physical link between sellers and purchasers, the Internet does not even create a tangible connection. Whatever reality it may be perceived to create is entirely virtual, and in that respect its capabilities should be considered to be in their infancy.

Whatever those capabilities may be at any given time, a crucial characteristic of the Internet is that it is a global, and not just an interstate, system. If a remote seller in one state were deemed to have a

presence in another state simply by reason of the accessibility of its website in that state, a remote seller in one country might be deemed to have a presence in another country by reason of the accessibility of its website there.

This case is not just an interstate commerce case. Internet commerce is global commerce, and states must conform their policies to the rules for that commerce that have been established by the United States and its trading partners. Therefore, the tax implications of such a result would require scrutiny, not only under the four-factor analysis of *Complete Auto Transit v. Brady*,[3] but also under the more elaborate inquiry of *Japan Line, Ltd. v. County of Los Angeles*.[4] It would fail that scrutiny. Far from being an "outlier," the physical presence test continues to reflect the international norm for the taxation of global e-commerce.

As such, Petitioner urges this Court to establish a new precedent that would contradict established U.S. and international tax policy and obligations and threaten to undermine the centuries of custom and practice that contributed to the growth of the direct-marketing (including by catalog) industry. It is for the above reasons that the Court's determination in *Quill* – that these matters are best left to Congress – remains as valid today as it was when *Quill* was first decided.

---

[3] 430 U.S. 274 (1977).

[4] 441 U.S. 434 (1979).

ARGUMENT

I. STATES ARE OBLIGATED TO CONFORM TO FEDERAL LAW AND POLICY IN THE REGULATION AND TAXATION OF INTERNET SALES

A. The Internet Is A Global System, And The Regulation And Taxation Of Internet Sales Implicates The Foreign Commerce Of The United States

The Internet is a global network connecting hundreds of millions of devices and several billion users in over 190 countries. There are over one billion websites in the world. John Stevens, *Internet Stats & Facts for 2017*, Hosting Facts (Aug. 17, 2017), https://hostingfacts.com/internet-facts-stats-2016/. An assertion of regulatory and/or tax collection jurisdiction by a state that relies on the availability of a website in that state necessarily involves the assertion by that state of its authority over the foreign commerce of the United States. It is not a question of purely interstate commerce. While the states retain a role in interstate commerce subject to the requirements of the Constitution and federal law, the foreign commerce of the United States is "preeminently a matter of national concern." *Japan Line*, 441 U.S. at 449. The states have "no standing" in the realm of foreign relations. *U.S. v. Locke*, 529 U.S. 89, 108 (2000).

B. Where The Foreign Commerce Of The United States Is Implicated, State Action Must Conform To Federal Policy And Practice

The Petitioner argues that a state's assertion of tax collection jurisdiction over the Respondents should be governed not by *Quill*, but by the Court's broader four-

factor analysis set forth in *Complete Auto Transit* (in particular its "substantial nexus" test) and that *Quill's* physical presence test is an "outlier." Pet'r Br. at 22-27. Conversely, the United States argues that not even *Complete Auto Transit* is applicable; rather, the United States suggests that *Pike v. Bruce Church, Inc.*[5] should govern the Court's Commerce Clause analysis of state regulations concerning tax collection.[6] U.S. Br. at 8.

Those arguments are incorrect. Where state action implicates the foreign commerce of the United States, the Court must proceed under the even broader jurisprudence of *Japan Line*. As it applies to the foreign commerce of the United States, the physical presence test would be an "outlier" only if it had not been adopted by the United States (and other countries) as a matter of federal tax law and policy. As demonstrated below, the physical presence test is precisely the test the United States and other nations continue to use in the taxation of e-commerce. As articulated by this Court in *Japan Line*, the United States must be

---

[5] 397 U.S. 137 (1970).

[6] Where state regulation has an effect on foreign commerce, "additional scrutiny is necessary to determine whether the regulations 'may impair uniformity in an area where federal uniformity is essential,' or may implicate 'matters of concern to the whole nation ... such as the potential for international retaliation.'" *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (internal citations omitted); *see also Japan Line*, 441 U.S. at 446 ("When a State seeks to tax instrumentalities of foreign commerce, two additional considerations, beyond those articulated in [the doctrine governing the Interstate Commerce Clause], come into play."). The application of the balancing analysis set forth in *Pike* does not negate the obligation to consider whether the challenged regulations impair uniformity in an area where federal uniformity is essential.

able to speak with "one voice" in the regulation of the foreign commerce of the United States.[7] It would be fundamentally inappropriate for the several states to assert power over foreign commerce that the United States government itself does not exercise.

In sum, this case is not just an interstate commerce case. Internet commerce is global commerce, and states must conform their policies to the rules for that commerce that have been established by the United States and its trading partners.

C. The United States And The International Community Do Not Recognize The Availability Of A Website As Creating A "Fixed Place of Business" (A "Presence") Within The Jurisdiction Of A Sovereign State

With respect to the taxation of foreign taxpayers in the United States not eligible for the benefits of a tax treaty with the United States, United States tax law generally analyzes whether the foreign taxpayer is engaged in a "trade or business" within the United States (which is a lower threshold than a fixed place of business (*i.e.*, presence)). I.R.C. §§ 872(b), 882(a). Commentators have noted that "[a]t a minimum, for an activity to constitute a trade or business the company's business activities within the United States

---

[7] In his amicus brief supporting neither party, Professor John S. Baker argues that the tax collected by South Dakota must be evaluated under the Import-Export Clause and the threefold test articulated by this Court in *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976). J. Baker Br. at 8-11. That test includes consideration of whether the tax impedes the federal government's ability to "speak with one voice" in conducting the nation's foreign relations. That is the same test articulated in *Japan Line*, which the South Dakota tax collection regime fails.

must be regular, continuous, and profit oriented." David Hardesty, *Electronic Commerce: Taxation & Planning* ¶ 12.02 (Thomson Reuters 2018) (citing *Comm'r v. Groetzinger*, 480 U.S. 23 (1987)). Therefore, commentators have noted that "[i]t is unlikely that a foreign online company will be engaged in the conduct of a [United States trade or business] if it has no physical presence in the United States, and no U.S. agents." *Id.*; *see generally* Office of Tax Policy, U.S. Dep't of Treas., *Selected Tax Policy Implications of Global Electronic Commerce* (Nov. 1996).

In general, the accessibility of a foreign website in the United States, by itself, does not cause a foreign taxpayer to be engaged in a United States trade or business.[8] Commentators state, while discussing the taxation of web servers, that "[t]here seems to be no support for the finding [of] a 'U.S. trade or business' without some actual U.S. presence" and, thus, "[i]t follows that a taxpayer with no activities in the United States could not be engaged in the conduct of a 'U.S. trade or business.'" *See* Hardesty, *supra*, ¶ 12.02[3] (analyzing whether the operation of a web server results in a foreign taxpayer being treated as operating a U.S. trade or business). The same commentator also states, in the context of discussing web servers, that "[i]n most cases, a foreign taxpayer will not be considered to be engaged in the conduct of a U.S. trade or business if neither it nor its agents are regularly performing business activities while present in the United States." *Id.* This determination is partly based

---

[8] U.S. tax law taxes the income of a foreign corporation effectively connected with a U.S. trade or business. I.R.C. §§ 872(b), 882(a). To date, the United States has not determined that the accessibility of a website in the United States constitutes a U.S. trade or business.

on *Commissioner of Internal Revenue v. Piedras Negras Broadcasting Co.*,[9] which, in a context different from but analogous to the use of a website, addressed the issue of whether a Mexico company broadcasting radio into the United States would be viewed as doing business simply by accepting payments from customers in the United States.

In *Piedras Negras*, United States-based advertisers compensated a Mexico broadcasting company by sharing gross receipts from United States sales that resulted from ads broadcast by the Mexico company. 127 F.2d at 260. The Mexico company's business was "the operation of a radio broadcasting station located at Piedras Negras, just across the Rio Grande from Eagle Pass, Texas." *Id.* However, the majority of the Mexico company's responses from listeners came from the United States, and 95 percent of its income was from advertisers within the United States. *Id.* With that said, the Mexico company's income-producing contracts were executed in Mexico, and all services required of the Mexico company under the contracts were rendered in Mexico. *Id.* Based on the foregoing, the Fifth Circuit determined that the Mexico company was not treated as doing business in the United States. *Id.* By analogy to *Piedras Negras*, if a foreign company has a website and a web server situated outside the United States and all of the services the foreign company rendered in connection with its website were performed in the foreign country, the foreign company's website should not be treated as doing business in the United States (*i.e.*, a lower threshold than a fixed place of business (*i.e.*, a presence)).

---

[9] 127 F.2d 260 (5th Cir. 1942).

With respect to foreign taxpayers that are eligible for the benefits of a tax treaty with the United States, such tax treaties (see, for example, the United States Model Income Tax Convention) generally analyze whether the foreign taxpayer has a "permanent establishment" within the United States. U.S. Model Income Tax Convention, art. 7, § 1; *id.*, art. 5, § 1. Under the United States Model Income Tax Convention, a foreign taxpayer is subject to taxation on business profits in the United States only to the extent those profits are attributable to a permanent establishment in the United States. *Id.*, art. 5, § 1 (stating that "[f]or the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on"); *id.*, art. 5, § 2 (stating that "[t]he term 'permanent establishment' includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop; and f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources"). A "permanent establishment" is generally defined by the United States Model Income Tax Convention as "a fixed place of business through which the business of an enterprise is wholly or partly carried on." *Id.*, art. 5, § 1. Therefore, with respect to foreign taxpayers that are eligible for the benefits of a tax treaty with the United States, under the United States Model Income Tax Convention, the question is whether a website, by itself, can create a fixed place of business (*i.e.*, a presence) within the United States. As noted, a commentator has stated that, with respect to whether a website constitutes a United States trade or business (*i.e.*, a lower threshold than a fixed place of business (*i.e.*, a presence)), "[i]t is unlikely that a foreign online company will be engaged in the conduct of a [United States trade or business] if it has no

physical presence in the United States, and no U.S. agents." Hardesty, *supra*, ¶ 12.02 (citing *Groetzinger*, 480 U.S. 23). Therefore, similar to a United States trade or business, the accessibility of a foreign website in the United States does not establish a fixed place of business (*i.e.*, a presence) within the United States.

In this regard, the Organization for Economic Co-operation and Development (OECD)[10] has published guidance regarding whether a website constitutes a permanent establishment and, thus, a fixed place of business (*i.e.*, a presence) in a country. *See* OECD, *Model Tax Convention on Income and on Capital: Condensed Version* art. 5 ¶¶ 42.2, 42.3, 42.4 (2010); *see also* OECD Comm. on Fiscal Affairs, *Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on the Model Tax Convention on Article 5* ¶¶ 42.2, 42.3, 42.4 (2000) (hereinafter, the "OECD Commentaries"), http://www.oecd.org/tax/treaties/1923380.pdf. According to the OECD Commentaries, "a distinction needs to be made between computer equipment, which may be set up at a location so as to constitute a permanent establishment under certain circumstances, and the data and software which is used by, or stored on, that equipment." OECD Commentaries ¶ 42.2. The Commentaries go on to state the following:

> For instance, an Internet web site, which is a combination of software and electronic data, does not in itself constitute tangible property.

---

[10] The OECD is an intergovernmental economic organization with 35 member countries, founded in 1961 and headquartered in Paris, France. *See* About OECD, http://www.oecd.org/about/. The mission of the OECD is to promote policies that will improve the economic and social well-being of people around the world. *Id.* The United States is included among the 35 member counties. *Id.*

> It therefore does not have a location that can constitute a "place of business" as there is no "facility such as premises or, in certain instances, machinery or equipment" . . . as far as the software and data constituting that web site is concerned. On the other hand, the server on which the web site is stored and through which it is accessible is a piece of equipment having a physical location and such location may thus constitute a "fixed place of business" of the enterprise that operates that server.

Id. Hardesty notes that "[t]he Commentaries make a careful distinction between a website and a web server because, among other things, the website and web server may each be operated by two separate and independent companies." Hardesty, *supra,* ¶ 11C.03[4][a][i]. The key distinction, consistent with United States tax principles, between a website and a web server is that a (i) website is not comprised of tangible assets and (ii) a web server is comprised of equipment and other tangible assets that can be physically located within a jurisdiction and, thus, constitute a fixed place of business (*i.e.*, a presence). OECD Commentaries ¶¶ 42.2, 42.3, 42.4.

With respect to the authoritative effect of the OECD and the OECD Commentaries, according to a leading commentator in the field of international taxation, "[i]n interpreting a U.S. treaty clause based on a clause in the OECD model treaty, the [Internal Revenue Service] may place great weight on the intent of the model treaty, [and a] court may also look at the OECD model treaty and its commentary." Joel D. Kuntz *et al.*, *U.S. International Taxation* ¶ C4.01[5] (Thomson Reuters 2018). Moreover, many United

States tax treaties "are based on or at least very similar to the OECD Model Tax Convention, so their interpretation may be influenced by the Commentaries." Hardesty, *supra*, ¶ 11C.03[4][a]. In addition, despite the United States not taking an official position with respect to whether a website can create a fixed place of business (*i.e.*, a presence), the United States would, in general, be expected to follow the OECD position.[11] Finally, in a report to Congress, the Advisory Commission on Electronic Commerce proposed "affim[ing] support for the principles of the OECD's framework conditions for taxation of e-commerce, and support[ing] the OECD's continued role as the appropriate forum (1) fostering effective international dialogues concerning these issues and (2) building international consensus." Advisory Commission on Electronic Commerce, *Report to Congress* 42 (2000) (affirming support for the OECD). Based on the foregoing, as one commentator has noted, "[o]ne can only conjecture what the US position might be regarding whether a computer server can create a US trade or business or

---

[11] *See* Monica Gianni, *The OECD's Flawed and Dated Approach to Computer Servers Creating Permanent Establishments*, 17 Vand. J. of Ent. & Tech. L. 1, 26 (2014). According to Joseph Guttentag, a former senior U.S. Treasury official, "[t]he [new server and permanent establishment] rules present a reasonable compromise . . . ." Arthur J. Cockfield, *Reforming the Permanent Establishment Principle Through a Quantitative Economic Presence Test*, 38 Can. Bus. L.J. 400, 406 (2003). In addition, when the OECD issued the OECD Article 5 Commentary that treated a web server as a permanent establishment, the United States did not officially object to this position (however, in contrast, the United Kingdom did officially object to the OECD Article 5 Commentary). Gianni, *supra*, at 26; *see also* OECD Commentaries ¶ 45.5.

permanent establishment. Gianni, *supra* note 11, at 27.

In addition to the OECD, other jurisdictions have analyzed whether a website, by itself, can constitute a fixed place of business (*i.e.*, a presence) within a country and, thus, result in a permanent establishment.[12] For example, the Kolkata (India) Tax Tribunal determined that a website, by itself, could not constitute a fixed place of business (*i.e.*, a presence).[13] In *ITO vs. Right Florists Limited*, the Kolkata Tax Tribunal analyzed whether Google (situated in Ireland) and Yahoo (situated in the United States) had permanent establishments in India under the relevant tax treaties. As part of such analysis, the Kolkata Tax Tribunal considered the OECD's commentary that a website, by itself, could not constitute a permanent establishment due to the absence of a fixed place of business (*i.e.*, a presence). Taking the OECD's commentary into account, the Kolkata Tax Tribunal concluded that, because Google and Yahoo did not have a web server in India through which the website

---

[12] *See, e.g.*, *ITO v. Right Florists Limited*, I.T.A. No. 1336 (Income Tax Appellate Tribunal, Kolkata, 2011). "The United Kingdom has taken the express position that a server that conducts electronic commerce through a website on the server cannot constitute a permanent establishment." Monica Gianni, *supra* note 11, at 27. "Other countries, including Singapore and Hong Kong, have also officially stated that a server by itself cannot create a permanent establishment." *Id.* The Canadian Revenue Agency has determined that a U.S. company managing applications and data from outside Canada "does not cause the [U.S. company] to have a server at its disposal and, hence, a permanent establishment." *Id.*

[13] *ITO*, I.T.A. No. 1336 at ¶ 28.

was hosted, neither Google nor Yahoo had a permanent establishment in India.

Based on the foregoing, the United States and the international community do not recognize the accessibility of a website as creating a fixed place of business (*i.e.*, a presence) within the jurisdiction of the United States. While the nexus requirements of states may differ from the rules established by the United States and the international community for national tax purposes, the states' assertion of global jurisdiction in contradiction of these rules is a bridge too far.[14] Far from being an outlier, the fixed place of business (*i.e.*, a presence) rule standard is the international norm. Therefore, it follows that the accessibility of a website should not create a fixed place of business (*i.e.*, a presence) within the jurisdiction of a subordinate sovereign. A departure from this standard would set a precedent that would have far reaching implications for international tax policy and the conduct of the foreign economic relations of the United States. Those decisions are necessarily reserved to the Federal Government, specifically to the Executive and to the Congress.

---

[14] For an analysis of the complexity of issues surrounding the taxation of global electronic commerce, see Office of Tax Policy, *supra*, at n.10.

II. ASSERTION OF STATE TAX JURISDICTION BY REASON OF THE "ACCESSIBILITY" OF A WEBSITE WOULD UPSET THE FEDERAL SYSTEM OF GOVERNANCE

A. The Virtual Capabilities Of The Internet And Its Related Technologies Are In Their Infancy

In August of 1968, when the Defense Advanced Research Projects Agency ("DARPA")[15] issued a request for quotes for what was to become the Advanced Research Projects Administration Network ("ARPANET"), very few people understood this project's profound implications. In part, ARPANET was designed to connect government, academic, and private research networks to share scarce "high-powered" computer resources. *See* Barry M. Leiner *et al.*, *Brief History of the Internet*, Internet Society (1997), https://www.internetsociety.org/internet/history-internet/brief-history-internet/. ARPANET was designed not to have any direct connections so that if any one connecting network failed, data would continue to flow to its destination over the remaining networks. ARPANET organized information into "packets"[16] and used a common language called Transmission Control Protocol –

---

[15] Originally known as the Advanced Research Projects Agency ("ARPA").

[16] A packet is a small unit of data (IP = 128 bits) with a header section and a data section. The header has information about the packet including the sender's address and the recipient's address. A picture sent over the Internet will consist of thousands of packets or more. Those packets will likely not all travel the same path through the various networks to their final destination. See *Layout Showing the Major ISPs*, Internet Mapping Project: Map Gallery, http://www.cheswick.com/ches/map/gallery/isp-ss.gif (a graphic of the major Internet ISP back in 1999) for a small sample of the network of networks comprising part of the Internet.

Internet Protocol ("TCP/IP"). This language and distributed network of networks enabled today's Internet.

Accordingly, the Internet has no separate physical instantiation. The programming language "spoken" on the Internet is the glue that makes this virtual network an incredible resource for government, academic, corporate, and individual users. It was purposely built to avoid the then-vulnerable switched telephone network, which physically connected users (*e.g.*, operators plugging a cord into a console to connect a user to another user locally or long distance). Thus, Internet sales have far less of a physical presence than a company in Delaware mailing a catalog to a person in North Dakota and that person ordering a product over the phone. This is because the Internet was purposefully built *not* to physically connect users.

The Internet is still in its infancy. It was only as recently as 1985 when the 1200-baud modem for Internet connectivity became widely available. This 1200 bits-per-second device enabled email and simple text bulletin boards services. Today, Internet Service Providers are connecting homes at one billion bits per second. Smartphones and high-speed wireless data services make it possible for a Washingtonian in London to use an application[17] (app) on her iPhone and

---

Packets have a large number of pathways to their final destination and algorithms determine each packet's path.

[17] By 2017, nearly 6.5 million different mobile applications for smartphones were available for download. *See* Dyfed Loesche, *The Biggest App Stores*, Statista: The Statistics Portal (Jan. 9, 2018), https://www.statista.com/chart/12455/number-of-apps-available-in-leading-app-stores/. Many of these apps include the ability to purchase goods.

a hotel wireless network to watch a promotional video, order chocolate from a Parisian company delivered from Brussels to her cousin in North Dakota, and pay in pounds with her U.S. Bank of America credit card. As networks get more capacious and faster, as devices increase in power and ability, and with machine learning/artificial intelligence just beginning to provide useful assistance to Internet users, there is likely a myriad of future business models based on Internet connectivity that few can imagine today.

B. The Assertion Of State Jurisdiction On The Bases Of Virtual Technologies Will Eliminate Boundaries On State Sovereignty And Create 50 Subordinate Federal Governments

As noted above, there is no such identifiable physical "thing" called the Internet. It is a staggering concept to base state jurisdiction on Internet Protocol packets that travel through many different private networks between two users. This is particularly true when there is simply no precedent in history for such an overreach of state authority. The physical network of the U.S. Postal Service creates a far more concrete physical link between buyer and seller (as did the old switched network phone system) than the Internet. Precedent establishing the right of 50 states to regulate commerce with sellers in foreign and U.S. states doing business through a worldwide, distributed system (the Internet) will open a Pandora's Box of unimaginable consequences impacting both interstate and foreign commerce.

While most of the attention is focused on large catalog Internet sellers, the impact may be felt most directly on innovative start-up companies that cannot afford to interpret and apply the varying rules of some

50 states' regulatory regimes when creating new applications, crafting their business plans, and seeking capital.[18] The Internet has been an important engine of domestic and international economic growth. Saddling it with the regulatory burdens of 50 states may very well stall that growth and negatively impact our economy. The Internet economy's contribution to U.S. GDP is significant. In 2014, it doubled in seven years to nearly a trillion dollars creating three million jobs. *See New Report Calculates the Size of the Internet Economy*, The Internet Association (Dec. 10, 2015), https://internetasso ciation.org/121015econreport/; *see also* James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity* (Oct. 2011), https://www.mckin sey.com/industries/high-tech/our-insights/the-great-tr ansformer.[19] Creating a jurisdictional nexus between

---

[18] This does not account for local taxing jurisdictions. Loudoun County, Virginia, for example, charges a one percent gross receipts tax on all entities doing business in the city. While 50 states' regulation of Internet business will be chilling enough for innovative startups, to launch a new Internet business becomes impossible if tens of thousands of local taxing entities are deemed to have jurisdiction for both taxation and administration of local use by such an expansion. For a more complete analysis of the daunting complexities and issues that locally administered use taxes impose in "home rule" states, see KPMG LLP, *Locally Administered Sales and Use Taxes*, Institute for Professionals in Taxation (2016), http://www.ipt.org/IPT/SponsoredResearch. aspx.

[19] The spread of Internet connectivity to other smart devices (the "Internet of Things" ("IoT")) is predicted to have an even greater positive impact on the U.S. economy. In 2015, two scholars wrote:

> The cost savings and productivity gains generated through "smart" device monitoring and adaptation are projected to create $1.1 trillion to $2.5 trillion in value

Internet entrepreneurs and 50 state governments will have a drastic negative impact on the growing Internet economy. Nor does the federal political system envision such a result. Those entrepreneurs and other e-commerce participants are not represented in the legislatures of all 50 states. The potential assertion of national jurisdiction through a rapidly expanding Internet, by the governments of all 50 states, is not a result contemplated by the federal system of government.

III. IN THE ABSENCE OF FEDERAL LEGISLATION GOVERNING TAXATION OF REMOTE SALES, THE REQUESTED ABROGATION OF *QUILL* THREATENS THE VIABILITY OF THE DIRECT MARKETING INDUSTRY

A. Remote Sales By Direct Marketers Is A Historical Business Model That Pre-Dates The Formation Of The Republic

The business practice of soliciting and effecting sales in interstate commerce by remote or out-of-state retailers[20] is a practice that pre-dates the Constitution

---

> in the health care sector, $2.3 trillion to $11.6 trillion in global manufacturing, and $500 billion to $7.57 billion in municipal energy and service provision over the next decade. The total global impact of IoT technologies could generate anywhere from $2.7 trillion to $14.4 trillion in value by 2025.

A. Thierer & A. O'Sullivan, *Projecting the Growth and Economic Impact of the Internet of Things*, Mercatus Center: Technology Policy (June 15, 2015), https://www.mercatus.org/publication/projecting-growth-and-economic-impact-internet-things.

[20] The term "mail-order" refers to the "buying of goods or services by mail delivery." A mail-order business typically publishes a catalog containing a list of the merchandise sold by the

itself and even the formation of the Republic. Benjamin Franklin is believed to have been this country's first cataloger. *Mail-order business*, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Mail-order_business. In 1744, Mr. Franklin "formulated the basic mail-order concept" when he published a catalog of books for sale. *Id.*; Kelly Phillips Erb, *Flipping Through History: Online Retailers Owe Popularity and Tax Treatment to Mail Order Catalogs*, Forbes (Aug. 18, 2014, 10:10 PM), https://www.forbes.com/sites/kellyphillipserb/2014/08/18/flipping-through-history-online-retailers-owe-popularity-and-tax-treatment-to-mail-order-catalogs/#7b5b0f414ad9. His terms were cash only and books were available by mail. Erb, *supra*. He offered: "Those persons that live remote, by sending the Orders and Money to said B. Franklin may depend on the same justice as if present." *Id.*; Wendy Woloson, *How Benjamin Franklin Invented the Mail-Order Business*, Bloomberg (Mar. 13, 2013, 1:47 PM), https://www.bloomberg.com/view/ articles/2013-03-13/how-benjamin-franklin-invented-the-mail-order-business. Other early catalogs sold seeds to farmers. *Mail-order business*, New World Encyclopedia, *supra*. Some of the earliest mail-order enterprises or brands are still familiar names today: Hammacher Schlemmer (first catalog published 1848); the original Montgomery Ward[21] (first catalog published 1872); Sears, Roebuck & Co. (first catalog published 1894); Bloomingdale's (first catalog published 1885); and even Tiffany & Co. (*Blue book catalog* first published

---

business. "Companies who publish and operate mail-order catalogs are referred to as catalogers in the industry." *Mail-order business*, New World Encyclopedia, *supra*.

[21] A subsidiary of Colony Brands acquired the "Montgomery Ward" brand (intellectual property) in 2008.

1845). *See* Erb, *supra*; *Mail-order business*, New World Encyclopedia, *supra*.

Mail-order businesses helped spur economic growth in America. Jim Gibbs, *Five Pivotal Moments in Catalog History*, The Dingley Press, http://dingley.com/five-pivotal-moments-in-catalog-history/ (last visited Apr. 1, 2018). Beginning in the late 1800s, mail-order businesses made it possible for retailers to get a wide variety of products from urban areas to rural America at competitive prices. Emilie Le Beau Lucchesi, *The Lost Charm of Mail-Order Catalogs in America*, CountryLiving (Oct. 25, 2016), https://www.countryliving.com/shopping/news/a40276/mail-order-catalogs/. Following both World Wars, consumerism rose and so did the use and distribution of catalogs. Divya Pahwa, *The History of the Catalog*, Medium (Aug. 15, 2014), https://medium.com/@pahwadivya/the-history-of-the-catalog-b5334841e941. The 1980s saw a boom in the retail catalog business. *Id.* Even today, with the advent of e-commerce, catalogs play an integral role in influencing American consumerism. *See id.*

B. The Imposition Of State Regulatory And Tax Obligations Occasioned By The Abrogation Of *Quill* Would Unduly Burden Catalog, Direct Mail, And Other Traditional Forms Of Solicitation, As Well As The Consumers That Purchase Through These Sale Methods

Ordering by mail did not disappear with the arrival of the Internet. For example, approximately 10 percent of Colony Brands' subsidaries' sales are still received via the mail, and some competitors have much higher percentages of orders received by mail. Some consumers send checks or cash (that certain marketers require to be sent with the order) along

with his or her order form, instead of including credit card information. There are many reasons why a consumer may choose to purchase via the mail, including lack of Internet access, privacy concerns, discomfort with the Internet, and other reasons. Abrogation of *Quill* would place undue and unnecessary burdens and expenses upon remote sellers with no presence in the state in connection with the forced collection of a use tax that is owed by a state's own residents simply because that state does not want to take the time or effort to collect it from its residents.[22]

This is so because the burden on a remote seller of calculating and being responsible for the proper collection of the myriad of sales and use taxes that may apply to a particular purchase made by a consumer in a particular state under the direct-mail business model is so great. Sales tax complexity has only increased since *Quill* was decided. Today, there are more than 12,000 taxing jurisdictions across the country, compared to the mere 6,000 that troubled the Court at the time of *Quill*. *Compare* Jaimy Ford, *Tracking Sales Tax Rates Across Thousands of Jurisdictions*, Avalara (June 25, 2015), https://www1.avalara.com/trustfile/en/blog/tracking-sales-tax-rates-across-thousands-of-jurisdictions.html, *with Quill*, 504 U.S. at 313 n.6. Collection of state and local taxes on

---

[22] Several states have enacted notice and/or reporting laws that require remote sellers to notify their customers of obligations to pay use tax and/or to report summaries of the transactions annually to the customers and in some cases to the state department of revenue. The Tenth Circuit upheld this practice in *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016) (holding that a state's notice and reporting requirements did not violate dormant Commerce Clause), *on remand from* 135 S. Ct. 1124 (2015). Adding further burdens on remote sellers by abrogating *Quill* is neither necessary nor justified.

the sale of goods sold via direct-mail catalogs or order advertisements is not merely burdensome. It is, in most cases, not *feasible* for the remote seller to be responsible for collecting and remitting the correct sales/use taxes. The proper tax to be paid on a single good depends on answers to a number of questions: What is the appropriate taxing district? Is the good taxable in that district? Are there any tax holidays? If taxable, what tax rate applies? Each of these questions evades easy resolution by a remote seller who must communicate with the out-of-state buyer about such taxes if the remote seller must collect and remit them, especially for orders mailed with payments. Identification of the appropriate taxing district is not clear-cut because taxing districts do not easily correlate to a county, city, or zip code. Determination of whether the good is taxable in that district is complicated by varying definitions of taxable goods categories and tax holidays. A decision as to what tax rate applies may depend on the type of product being purchased (*i.e.*, food versus household goods) and how the relevant taxing jurisdiction defines the good (which can vary from district to district). This analysis must be repeated for each product purchased via the mail.

The process is complicated enough for tax accountants with sophisticated software tools.[23] But for a consumer who wants to fill out his mail-order form and write a check, the process is impossible. Take the example of a consumer purchasing a single good via a catalog mail order. The consumer would have to find his taxing district from a list of 12,000 districts, which,

---

[23] Proposed software solutions for online orders still ignore many other economic burdens and real-world complications that would be borne by out-of-state sellers.

if printed at a reasonable font size, would constitute a 40-page insert in the catalog itself. This insert would add considerable cost to the production and distribution of the catalog. The 40-page insert likely would not include information about the dates of back-to-school tax holidays or other special tax holidays, which could alter the amount of the tax owed. The 40-page insert would also not include rates for multiple tax categories, which means a catalog selling both food and household goods would need to include twice the information because many districts tax these items at different rates. The 40-page insert would not help the consumer determine to which category a good belongs because different taxing districts can define the exact same good in different ways. (A baseball hat may be clothing in one district, sports memorabilia in another, or a sun protection device in a third.)

Furthermore, if a consumer miscalculates the tax owed when sending payment with his or her order, the burden falls upon the cataloger to make it right. Overpayment of the tax obligates the cataloger to issue a refund,[24] complete with additional processing and postage costs not chargeable back to the consumer. Underpayment of the tax requires the cataloger to either cancel the order, delay fulfillment of the order until the additional tax payment is received, or take on the financial burden of paying the additional tax itself. There is no justification for placing these collection burdens on remote sellers who have no

---

[24] The potential for overpayment of state and local taxes is not unique to the catalog industry or mail-in orders. *See Webster v. LLR, Inc.*, 2:17-cv-00225-DSC (W.D. Pa. filed Feb. 17, 2017) (class action lawsuit alleging consumer overpayments of sales taxes calculated based on location of consultant rather than location of consumer).

ability to influence the laws of states where they have no physical presence, instead of continuing to require the state's own residents to pay the proper use tax to their own state.

C. States Have No Authority To Impose On Internet Sales Regulatory And Tax Obligations Not Borne By More Traditional Means Of Direct Marketing

In its amicus brief in support of South Dakota, the United States suggests that one way to re-invent *Quill* in the age of e-commerce is to limit *Quill* "to its precise holding, involving traditional mail-order retailers whose only connection to a State is by mail or common carrier." U.S. Br. at 8. While *amicus* agrees that *Quill* should continue to apply to traditional mail-order retailers without a physical presence, having a website should not deprive any remote seller without a physical presence from the same protections absent Congress passing appropriate legislation setting precise rules.[25]

The United States' proposal to apply *Quill* only to traditional remote sellers (direct-mail marketers and catalogers), but not Internet vendors, has already been rejected by Congress. In 1998, Congress passed the Internet Tax Freedom Act ("ITFA") to prevent commerce over the Internet from being subjected to burdensome taxation. *See* Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281 (2016) (codified at

---

[25] There are many details to be addressed in any future Congressional legislation in order to establish simple, clear, and fair rules for imposing such burdens on interstate commerce before requiring a remote seller without a physical presence to collect and remit sales taxes, including finding a solution for dealing with mailed-in orders with checks or cash as payments.

47 U.S.C. § 151 note)). Of particular importance here, ITFA *forbids* "[m]ultiple or discriminatory taxes on electronic commerce." ITFA, § 1101(a). Colony Brands agrees with other *amici* that the existence of ITFA, and its prohibition on discriminatory taxes on e-commerce, would, among other things, preclude this Court from adopting the United States' proposal. Certainly, a tax collection obligation that would apply to a chocolate bunny rabbit purchased over the Internet, but not the same chocolate bunny rabbit purchased out of a mail-order catalog is *per se* discriminatory and in violation of Federal law as embodied in ITFA. Absent new legislation by Congress, this Court should not retreat from *Quill*.

CONCLUSION

For these reasons, *amicus* Colony Brands respectfully urges this Court to affirm the decision of the South Dakota Supreme Court.

Respectfully submitted,

JEFFREY R. SURLAS
Vice President & General Counsel
COLONY BRANDS, INC.
1112 7th Avenue
Monroe, WI 53566
(608) 328-8400
Jeff.Surlas@sccompanies.com

WARREN L. DEAN, JR.
Counsel of Record
KATHLEEN E. KRAFT
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900
wdean@thompsoncoburn.com

JAMES M. BURGER
SEAN CROWLEY
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 585-6900
jburger@thompsoncoburn.com

April 4, 2018

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR COLORADO AND 40 OTHER STATES, TWO UNITED STATES TERRITORIES, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING PETITIONER

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General

MELANIE J. SNYDER
Chief Deputy Attorney General

GRANT T. SULLIVAN
Assistant Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway
6th Floor
Denver, Colorado 80203
Grant.Sullivan@coag.gov
(720) 508-6000

Additional Counsel listed on signature page

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Should this Court abrogate the physical-presence rule of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. *Quill*'s physical-presence rule should be abrogated 4

A. *Quill* impairs the States' ability to deliver crucial government services 5

B. The physical-presence rule unlawfully infringes on the States' sovereignty 12

C. *Quill*'s purported virtues do not merit keeping its broken physical-presence rule . 14

D. The burdens of collection that prompted the physical-presence rule have drastically faded 21

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 21

City of Detroit v. The Murray Corp.,
355 U.S. 489 (1958) 13

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 14

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 1

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) ..... *passim*

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) ..... *passim*

Dows v. City of Chicago,
78 U.S. 108 (1871) 2, 13

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993) 20, 21

Henneford v. Silas Mason Co.,
300 U.S. 577 (1937) 12

Int'l Harvester Co. v. Wis. Dep't of Taxation,
322 U.S. 435 (1944) 12

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 21

Lobato v. State,
304 P.3d 1132 (Colo. 2013) 8

M'Culloch v. State of Maryland,
17 U.S. 316 (1819) 13

National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) ..... *passim*

Nunez-Reyes v. Holder,
646 F.3d 684 (9th Cir. 2011) 21

Overstock.com, Inc. v. N.Y. State Dep't of Taxation and Fin., 987 N.E.2d 621 (N.Y. 2013) 10, 16

Perez v. Ledesma,
401 U.S. 82 (1971) 19

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

United States v. Carlton,
512 U.S. 26 (1994) 20

W. Live Stock v. Bureau of Revenue,
303 U.S. 250 (1938) 24

STATUTES AND REGULATIONS

1 Colo. Code Regs. § 201-1:39-21-120(3) 23

COLO. REV. STAT. § 39-26-105(1)(c)(II)(A) (2017) .. 24

COLO. REV. STAT. § 39-26-105.3 (2017) 25

COLO. REV. STAT. § 204.5 (2017) 25

COLO. REV. STAT. § 39-26-202 (2017) 5

IOWA ADMIN. CODE r. 701-107.8(423B) (2018) 19

MO. CODE REGS. ANN. tit. 12, § 10-114-100 (2017) 19

OTHER AUTHORITIES

Gary S. Becker & Casey B. Mulligan, *Deadweight Costs and the Size of Government*, 46 J. L. & ECON. 293 (2003) 6

Donald Bruce, et al., *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537 (2009) 7, 8, 9

Waltreese Carroll, *Can Technology Lessen the Tax Burdens on Interstate Commerce*, 2012 ST. TAX TODAY (2012) 26

Colo. Dep't of Revenue, *FYI General 10: Consumer Use Tax* (July 2017), https://tinyurl.com/y87c7pfd 19

Colo. Dep't of Revenue, *FYI Sales 5: Sales Tax Information for Out-of-State Businesses* (Apr. 2013), https://tinyurl.com/y746jwa9 19

Colo. Dep't of Revenue, *Sales Tax Efile: Approved Colorado Sales Tax Efile Vendors* (July 19, 2016), https://tinyurl.com/yd55qzc8 25

Lila Disque & Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163 (June 2016) 10

Charles Duhigg, How Companies Learn Your Secrets, The New York Times Magazine, Feb. 16, 2012) 26

THE FEDERALIST NO. 32 (A. Hamilton) 2, 12

THE FEDERALIST NO. 33 (A. Hamilton) 13

Federation of Tax Administrators, *State Sales Tax Rates and Vendor Discounts* (Jan. 2018), https://tinyurl.com/ybvbw25r 24

Helen Hecht & Lila Disque, *DMA v. Brohl—Is it Time to Stop Fighting the Last War?*, 26-JUL J. Multistate Tax'n 14 (2016) 26

Hanns Kuttner, *Future Marketplace: Free and Fair*, Hudson Institute, (May 2012), https://tinyurl.com/ybqauxoz 8

Brian Lawson, *Proposed cuts for Alabama courts 'crazy, devastating*, al.com, May 5, 2015, https://tinyurl.com/yacfe2p9 8

Multistate Tax Commission, *Multistate Voluntary Disclosure Program: Overview of Multistate Voluntary Disclosure Process*, https://tinyurl.com/y9jpug5f 24, 26

National Conference of State Legislatures, *State Balanced Budget Requirements* (Apr. 12, 1999), https://tinyurl.com/ozphoqv 6

PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate* (Apr. 7, 2006), https://tinyurl.com/j32k2xt 24

S.D. Bureau of Finance & Mgmt., *Revenue Forecasts*, (March 2015), https://tinyurl.com/yasyeot5 6

State of Tennessee, *The Budget: Fiscal Year 2017-2018* (Feb. 2016), https://tinyurl.com/yapb6tt9 6

U.S. Census Bureau News, U.S. Dep't of Commerce, Quarterly Retail E-Commerce Sales, 3rd Quarter 2017, CB17-182 (Nov. 17, 2017) 9

U.S. General Accounting Office, *Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain* (June 2000), https://tinyurl.com/y6uk7fzf 11

William V. Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U. L. REV. 649 (2001) 11

Jared Walczak & Scott Drenkard, *State and Local Sales Tax Rates in 2017*, Tax Foundation (Jan. 2017), https://tinyurl.com/zymow6g 6

Wash. Economic & Revenue Forecast Council, *Washington State Economic and Revenue Forecast* (Sept. 2017), https://tinyurl.com/ya95n6m4 6

Ray Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 VAND. L. REV. 1097 (1986) 22

Erica Williams, et al., *State Budget Cuts in the New Fiscal Year are Unnecessarily Harmful*, Center on Budget and Policy Priorities (July 28, 2011), https://tinyurl.com/yby7jc7u 8

INTEREST OF *AMICI CURIAE*

Amici curiae are 41 States, two United States territories, and the District of Columbia—all jurisdictions that have a compelling interest in supporting South Dakota and seeing that the physical-presence rule is abrogated. As jurisdictions that rely on various forms of consumption taxes to fund their critical government operations, including sales and use taxes, the *amici* States seek to eliminate the artificial barriers that currently block the efficient and full collection of owed tax revenue or infringe their sovereign authority to enforce their tax laws. The physical-presence rule does both, to the States' detriment. The *amici* States thus strongly support abrogating the unprincipled physical-presence rule in favor of adhering to the Court's standard dormant Commerce Clause jurisprudence. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

SUMMARY OF THE ARGUMENT

I.A. The physical-presence rule announced in *Bellas Hess* and reaffirmed in *Quill* has left the States in an increasingly untenable position. While the rule at the time of those decisions was largely confined to the mail-order catalog industry, today the thriving online retail industry claims the rule's protection to give itself a competitive advantage over brick-and-mortar retailers who must collect the owed tax. The net effect is that the *amici* States lose billions of dollars in tax revenue each year, requiring cuts to critical government programs. And as the pace of e-commerce continues to accelerate, the States' losses continue to compound at an ever-increasing rate. As Justice Kennedy put it, the physical-presence rule "now harms

States to a degree far greater than could have been anticipated earlier." *Direct Mktg. Ass'n v. Brohl* ("*DMA*"), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

I.B. The *amici* States' dilemma is the product of an artificial rule that the Constitution never contemplated in the first place. The States have always been sovereign entities that hold the power to tax, enabling them to "raise their own revenues for the supply of their own wants." THE FEDERALIST NO. 32 (A. Hamilton). Exercising that power, the *amici* States long ago elected to impose a complementary sales and use tax scheme on retail transactions. This Court has repeatedly upheld the constitutionality of those taxes and recognized that interstate businesses are not immune from reasonable tax-related regulations. But the traditional physical-presence rule nonetheless persists. When it shields retailers, it infringes the States' sovereignty by stripping them of the most effective method of sales tax enforcement—direct collection by the retailer—but without doctrinal support under the Commerce Clause. Because it constitutes an unwarranted intrusion on the States' sovereignty, this Court should discard the outdated physical-presence rule and reaffirm the principle that the "modes" adopted by the States to enforce their taxes "should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871).

I.C. Defenders of the physical-presence rule cite its supposed virtues—including certainty and reduced litigation. But those virtues have never been realized. Instead, the physical-presence rule has engendered extensive *Quill*-related litigation and created

widespread confusion over how the rule applies in today's modern e-commerce economy.

Nor does the possibility of retroactive tax liability constitute a valid reason for maintaining the physical-presence rule. South Dakota's law bans retroactive tax liability, eliminating that question as an issue in this case. Even if retroactive liability were a concern, existing regulations in many States will prevent retroactive application of a new post-*Quill* rule. Should other States choose to take a different approach, their normal procedures for implementing significant regulatory changes—including advance notice—provide adequate safeguards to abate any surprise that might accompany a new Supreme Court rule. And finally, if those safeguards do not resolve the question, this Court has the authority to craft a holding that applies prospectively only for all retailers and taxpayers.

I.D. Allowing the physical-presence rule to "wash away with the tides of time" is appropriate in light of the extraordinary advances in technology since *Bellas Hess* was decided in 1967. *Direct Mktg. Ass'n v. Brohl ("DMA II")*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Today's retailers are no longer laden with cumbersome hand calculations or hard-copy returns that must be mailed to far-away States. The Internet and modern software—the very same technology that allows online retailers to flourish in the first place—enables retailers to automatically generate the required tax returns and electronically file those returns with ease. In many States, the entire collection and remittance process can be outsourced, free of charge, to certified third-party service providers. And even if a retailer elects to keep the task in-house,

the *amici* States have provided numerous online tools and financial incentives to make the process as simple as possible. In short, the troublesome burdens that led the *Bellas Hess* majority to announce the physical-presence rule in the first place are no longer present in today's modern e-commerce economy.

ARGUMENT

I. *Quill*'s physical-presence rule should be abrogated.

The *amici* States agree with South Dakota that *Quill* should be abrogated. South Dakota's law comports with this Court's standard dormant Commerce Clause doctrine for the simple reason that *Quill* is an outlier that was wrongly decided in the first place, as the recent criticisms of the physical-presence rule by members of this Court illustrate. *See DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (stating *Quill* was "questionable even when decided"); *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring) (observing *Quill* is "surrounded by a sea of contrary law"). This Court should therefore reverse the lower court's decision that *Quill* bars South Dakota's law, and provide guidance for other States that wish to enforce their own sales and use tax schemes against remote online retailers.

As for *Quill*, the *amici* States will not dwell here on the reasons why it was wrongly decided as a doctrinal matter—those arguments are fully presented elsewhere. Pet. Br. at 21–27. Instead, this brief will focus on the physical-presence rule's harmful effects on the *amici* States and why *stare decisis* offers no compelling justification to retain it.

A. *Quill* impairs the States' ability to deliver crucial government services.

Quill's physical-presence rule causes "a serious, continuing injustice" to the States in the form of a "startling revenue shortfall" that has no justification under the Constitution. *DMA*, 135 S. Ct. at 1134–35 (Kennedy, J., concurring). The revenue shortfall mentioned by Justice Kennedy hits the States where it hurts the most. As they have for decades, the *amici* States today rely heavily on sales and use tax revenue to fund their essential government operations. The States' education systems, healthcare services, and vital infrastructure projects, among others, all depend in large part on the States' ability to effectively collect the sales tax owed on the millions of retail transactions that occur daily across this country. *See id.*

From a tax administration perspective, the States' historical reliance on sales and use taxes for their crucial government functions made good sense.[1] When a retailer is required to collect the owed sales tax from the consumer at "check out," compliance approaches nearly 100 percent, perhaps the highest compliance rate of any tax. *See DMA II*, 814 F.3d at 1132 n.1. Compliance is made easy because of the sales tax's simplicity—consumers are relieved of any obligation to gather information or complete paperwork (as with the income tax), the tax is collected immediately when the

[1] Although equal in amount, the use tax differs slightly from the sales tax; it is typically owed by the consumer on the storage, use, or consumption of any article brought into the State when sales tax has not already been paid to the seller. *E.g.*, COLO. REV. STAT. § 39-26-202 (2017); *DMA*, 135 S. Ct. at 1127. Thus, when a remote online retailer does not collect the States' sales tax at "check out," the consumer continues to owe the use tax.

taxable event occurs (unlike the estate tax), and local governments need not send an annual bill (as with the property tax).[2]

Because of the efficiency of this arrangement, it comes as no surprise that 45 States and the District of Columbia have elected to enact a complementary sales and use tax scheme.[3] Nor is it surprising that sales tax revenue makes up a sizeable portion of the States' budgets. In South Dakota, it accounted for 61 percent of its 2016 general fund; in Tennessee, the figure is 60 percent; in Washington, nearly one half.[4] The States' ability to effectively collect this tax revenue is thus vital because, unlike the federal government, the States must balance their budgets each year.[5]

---

[2] *See also* Gary S. Becker & Casey B. Mulligan, *Deadweight Costs and the Size of Government*, 46 J. L. & ECON. 293, 317 (2003) (explaining sales taxes are among the "most efficient taxes because they are relatively broad based and often have a flat rate structure").

[3] Jared Walczak & Scott Drenkard, *State and Local Sales Tax Rates in 2017*, Tax Foundation, p. 1 (Jan. 2017), https://tinyurl.com/zymow6g (last visited Feb. 14, 2018).

[4] S.D. Bureau of Finance & Mgmt., *Revenue Forecasts*, p. 1 (March 2015), https://tinyurl.com/yasyeot5 (last visited Feb. 14, 2018); State of Tennessee, *The Budget: Fiscal Year 2017-2018*, p. A-7 (Feb. 2016), https://tinyurl.com/yapb6tt9 (last visited Feb. 1, 2018); Wash. Economic & Revenue Forecast Council, *Washington State Economic and Revenue Forecast*, p. 50 (Sept. 2017), https://tinyurl.com/ya95n6m4 (last visited Feb. 14, 2018).

[5] Vermont is the only State without a legal requirement to balance its budget. National Conference of State Legislatures, *State Balanced Budget Requirements* (Apr. 12, 1999), https://tinyurl.com/ozphoqv (last visited Feb. 14, 2018).

But with the exponential growth of e-commerce, *Quill*'s outdated physical-presence rule throws a wrench into the States' tax machinery. Remote online retailers, claiming *Quill*'s protection, largely refuse to collect the sales tax at the point of sale, even though the consumer undisputedly owes the tax. Some remote online retailers even advertise—falsely—that their online sales are "tax free," Pet.App. 22a, thus compounding the problem by placing local, physically-present retailers at an apparent price disadvantage. *See DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring) (summarizing remote online retailers' argument that *Quill* entitles them to "a competitive advantage over brick-and-mortar competitors"). Local businesses and communities in turn suffer "concomitant unfairness" through *Quill*'s deleterious side effects—rental rates for retail space become depressed, brick-and-mortar merchants employ fewer local residents, and reduced economic activity erodes local tax bases. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring); *see also* Pet. 14–15.

Given remote online retailers' position, the confluence of the traditional physical-presence rule and the spike in e-commerce means the States' treasuries are losing sales tax revenue at alarming rates. A 2009 study places the States' combined tax losses from e-commerce sales at nearly $7 billion that year. Donald Bruce, et al., *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537, 545 (2009) (Table 5). A study three years later is even starker,

estimating the States' combined losses at more than $23 billion in 2012.[6]

The pain felt by the States and their most vulnerable citizens is real, not theoretical. Alabama slashed $17 million from its state court budget in 2012; it lost $170 million on e-commerce transactions that year.[7] Colorado's largest school district cut $58 million from its budget in 2012; the State was owed more than $170 million on e-commerce transactions that year.[8] And New York eliminated $337 million from its Medicaid spending in 2012; according to the 2009 Bruce study, its estimated losses from e-commerce transactions in 2012 topped $865 million.[9] This is just a sampling of the extensive program cuts the States have been forced to endure. And as these examples show, the lost tax revenue from e-commerce transactions could readily help fill—or eliminate altogether—the States' burgeoning budget shortfalls in these important areas.

---

[6] Hanns Kuttner, *Future Marketplace: Free and Fair*, Hudson Institute, p. 7 (May 2012), https://tinyurl.com/ybqauxoz (last visited Feb. 1, 2018).

[7] Brian Lawson, *Proposed cuts for Alabama courts 'crazy, devastating*, al.com, May 5, 2015, https://tinyurl.com/yacfe2p9 (last visited Feb. 5, 2018); Bruce, *supra*, at 545.

[8] *Lobato v. State*, 304 P.3d 1132, 1150 (Colo. 2013) (Bender, C.J., dissenting); *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring); Bruce, *supra*, at 545.

[9] Erica Williams, et al., *State Budget Cuts in the New Fiscal Year are Unnecessarily Harmful*, Center on Budget and Policy Priorities, p. 19 (July 28, 2011), https://tinyurl.com/yby7jc7u (last visited Feb. 5, 2018); Bruce, *supra*, at 545.

As it has been for years, the trajectory of the States' tax losses is sharply upward, not down. Bruce, *supra*, at 545; *see DMA*, 135 S. Ct. at 1127 (noting e-commerce "more than tripled" between 2000 and 2010). By way of example, e-commerce sales in the third quarter of 2017 increased 15.5 percent over the previous year, while total retail sales increased just four percent.[10] The scope of the problem, and the resulting harm to the States, thus grows with each passing day.

Although the States have attempted to counteract these steep tax losses through a wide array of legislative and regulatory alternatives to direct collection by the retailer, none has proved an adequate substitute for direct collection itself.[11] When the States have attempted to coax remote online retailers into joining alternative solutions, either through voluntary or mandatory regulatory measures, the result has been disappointingly low tax collections or *Quill*-related legal challenges. Neither is surprising—remote online retailers understandably wish to protect what then-Judge Gorsuch described as a tax "arbitrage opportunity." *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring).

The States' attempts to spur *consumers* into submitting their owed tax directly to the appropriate taxing agency have likewise proved unsuccessful. As

---

[10] U.S. Census Bureau News, U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales, 3rd Quarter 2017*, CB17-182, p. 1 (Nov. 17, 2017), https://tinyurl.com/nfcfkv8 (last visited Feb. 1, 2018).

[11] *See Br. for Colo. & 34 other States and the Dist. of Columbia as Amici Curiae Supporting Petitioner's Certiorari Petition*, pp. 7–11 ("*States' Cert. Br.*") (cataloging alternative collection measures the States have attempted without considerable success).

this Court and others have recognized, collecting the tax from the individual consumer after the taxable transaction has already transpired is "exceedingly difficult." *Overstock.com, Inc. v. N.Y. State Dep't of Taxation and Fin.*, 987 N.E.2d 621, 626 (N.Y. 2013); *see also DMA*, 135 S. Ct. at 1127 (recognizing voluntary consumer compliance with the use tax is "relatively low").

In most cases, the consumer fails to retain records of their many taxable-but-uncollected purchases, preventing them from accurately reporting the owed tax. *See* Lila Disque & Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1180 (June 2016) (explaining "that most individuals do not regularly keep records of all purchases so that the tax owed can be verified"). Colorado's recently-upheld notice-and-reporting law, for example, contemplates that the consumer will submit his or her owed tax directly to the taxing authority, yet it is expected to close Colorado's growing "tax gap" by only 60 percent at most.[12]

Nor are audits of individual consumers practical. Creating the desired deterrent effect would require auditing a "significant percentage" of consumers. Disque & Hecht, 65 AM. U. L. REV. at 1180. But audits are one of the most expensive enforcement tools available, and unpaid sales and use taxes at the individual consumer level are relatively small amounts. Simply put, the low per-audit dollars at stake, coupled with the resource-intensive nature of audits, renders

---

[12] Brief for Respondent at 9, *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (No. 13-1032) (citing record).

consumer audits impractical. *See* William V. Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U. L. REV. 649, 751 (2001) ("Auditing all of the individuals in a state to determine if they owed use taxes would, obviously, be a losing proposition."). Importantly, while that means that small sellers and individual consumers bear little audit risk, it also means that the States need other practical solutions.

These logistical challenges, combined with *Quill*'s physical-presence rule, have yielded a dismal use tax compliance rate. In 2000, the United States General Accounting Office estimated that compliance with the States' use tax laws hovers between zero and five percent.[13] Nothing indicates it has improved since then. To the contrary, in his *DMA* concurrence three years ago, Justice Kennedy pegged California's compliance rate at just four percent. 135 S. Ct. at 1135. These statistics are consistent with the *amici* States' overall experience. At bottom, collection of the tax directly from the consumer is not practical and does not result in meaningful tax revenue that might otherwise substitute for direct collection by remote online retailers.

Accordingly, because remote online retailers' invocation of the traditional physical-presence rule causes sizeable and rising tax losses to the States, resulting in critical program cuts, this Court should

---

[13] U.S. General Accounting Office, *Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain*, p. 35 (June 2000), https://tinyurl.com/y6uk7fzf (last visited Feb. 14, 2018).

abrogate *Quill* and hold that it presents no bar to South Dakota's law.

B. The physical-presence rule unlawfully infringes on the States' sovereignty.

Beyond *Quill*'s significant financial impact on the States, there is a more fundamental problem. The traditional physical-presence rule violates the States' sovereignty. This Court has long upheld the constitutionality of the States' complementary sales and use tax schemes. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). But the traditional physical-presence rule prevents the States from fully implementing and enforcing these tax laws that have been on the books for decades and upheld by this Court. *See Int'l Harvester Co. v. Wis. Dep't of Taxation*, 322 U.S. 435, 444 (1944) (recognizing that a "practically effective device [is] necessary in order to enable the state to collect its tax"). The rule thus violates the bedrock principle of State sovereignty underlying our federal system.

The historical record recognizes the "justness" of the States "possess[ing] an independent and uncontrollable authority to raise their own revenues for the supply of their own wants." THE FEDERALIST NO. 32 (A. Hamilton). This State taxing power exists, Alexander Hamilton said, because the States "clearly retain all the rights of sovereignty which they had before" and which were not delegated to the federal government's exclusive authority. *Id.* "An attempt on the part of the national government to abridge them in the exercise of [their taxing power] would be a violent assumption of power, unwarranted by any article or clause of its Constitution." *Id.* Put another way, "preventing the

collection of a tax laid by the authority of the State ... would not be the supreme law of the land, but a usurpation of power not granted by the Constitution." THE FEDERALIST NO. 33 (A. Hamilton).

This Court, too, has affirmed the States' sovereign taxing power. As far back as *M'Culloch v. State of Maryland*, 17 U.S. 316, 429 (1819), the Court recognized that "[a]ll subjects over which the sovereign power of a state extends, are objects of taxation." *Accord City of Detroit v. The Murray Corp.*, 355 U.S. 489, 495 (1958) (citing *M'Culloch* and upholding Michigan tax on airplane subcontractor doing business under contract with the federal government). Underpinning this uncontroversial holding is the corollary principle that "the modes adopted [by the States] to enforce the taxes levied should be interfered with as little as possible." *Dows*, 78 U.S. at 110. Such interference with the States' modes of taxation risks "derang[ing] the operations of government," causing "serious detriment to the public." *Id.*

Yet this danger is precisely what *Quill*'s traditional physical-presence rule visits upon the States. Not only does the rule exact an ever-increasing toll on the States' budgets and social safety-net programs, it paralyzes the States' ability to respond effectively to the economic and societal problems within their borders. By taking off the table the most productive form of sales tax collection, *Quill*'s traditional physical-presence rule forces the States to cast about for different, workable alternatives. But as the *amici* States have already shown, those alternatives have been extensively tested and shown to be inadequate. *States' Cert. Br.*, pp. 7–11. Even if an alternative were

viable, the mere act of removing the straightforward direct-collection option from the States' slate of choices still constitutes an unwarranted infringement on the States' sovereignty.

While the *amici* States do not question Congress' ability to affirmatively regulate tax collection practices to the extent they impact interstate commerce, to date Congress has chosen not to wade into this area. *See id.* at 23. And "[u]nder our federal system, the determination [regarding the wisdom of a tax] is to be made by state legislatures in the *first instance* and, if necessary, by Congress . . . ." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628 (1981) (emphasis added). Against this backdrop, the traditional taxing authority of the States provides an unusually strong justification to not over-read the Commerce Clause to strip the States of a sovereign power in the absence of Congressional action.

Accordingly, this Court should abrogate *Quill*'s traditional physical-presence rule to prevent further encroachment on the States' taxing sovereignty.

C. *Quill*'s purported virtues do not merit keeping its broken physical-presence rule.

Those who support *Quill*'s physical-presence rule emphasize that the benefits supposedly offered by the rule—certainty and reduced litigation—outweigh the deep financial harm to the States and the intrusion on their sovereignty. They also suggest that overturning *Quill* will lead to unfair surprise by imposing retroactive tax liability on unsuspecting retailers. BIO at 34–36. But *Quill*'s purported benefits and the concerns over retroactivity were questionable the day

that *Quill* was announced. *See Quill*, 504 U.S. at 329–30 (White, J., concurring in part and dissenting in part) (predicting that it is "very doubtful" that the majority's goal of reducing litigation will be accomplished); *id.* at 332 (stating "such [retroactivity] fears are groundless because no one can sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system." (internal quotations omitted)). Even starting from a low bar, such concerns have grown far weaker with the passage of time.

Quill-related litigation and confusion. History teaches that *Quill*, far from reducing confusion and litigation, has actually led to the opposite. When the States attempt to implement alternative *Quill*-compliant collection measures to shore up their treasuries, they are met with expensive and time-consuming *Quill*-related litigation. *See States' Cert. Br.*, pp. 18–20.

In Colorado, the State spent seven years litigating whether *Quill* barred its consumer-notification-and-reporting law. *Id.* at 17–18. The lower courts were understandably puzzled, unsure whether and to what extent *Quill* might bar Colorado's attempt to impose obligations that are similar to, but distinct from, those that *Quill* rendered off limits. After three appellate reversals involving two different preliminary injunctions in both state and federal court, the Tenth Circuit finally provided the last word: the "exceptional narrowness" of *Quill*'s "ratio decidendi" is rooted in *stare decisis* only, and thus does not bar the States from enacting "other comparable regulatory and tax duties[.]" *DMA II*, 814 F.3d at 1149, 1151 (Gorsuch, J., concurring).

Similarly, New York spent five years defending its "click-through nexus" law against a *Quill* challenge from Overstock.com, a respondent in this case. *See Overstock.com, Inc.*, 987 N.E.2d 621. There, the courts wrestled with whether the physical-presence rule protected an out-of-state retailer that advertised through an in-state affiliate's website—a situation never contemplated by either the *Quill* or *Bellas Hess* majorities. *Id.* at 625–27. So too in Massachusetts. It was recently sued over its regulation that recognizes nexus over large Internet vendors that have certain elements of e-commerce technology present in Massachusetts. *See States' Cert. Br.*, p. 12 n.16. That case remains ongoing.

In these cases, and many others like them, *Quill*-related litigation has led to confusion over the States' ability to implement alternative solutions. The lengthy string of litigation shows that *Quill*'s supposed "bright line" is no longer bright due to changed economic markets and improved technology. As Justice Kennedy has recognized, in today's modern Internet age, "a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). But *Quill*'s antiquated rule, designed for a pre-Internet economy, does not take account of these "far-reaching systemic and structural changes" caused by the Internet. *Id.* It has thus led to widespread uncertainty over how the rule should be applied in today's modern e-commerce market.

Beyond protracted litigation, the confusion caused by *Quill* has also hindered State taxing authorities' ability to administer and enforce their sales and use

taxes. State lawmakers are left with no principled method for predicting whether their attempted legislative strategies for mitigating the *Quill* problem will pass constitutional muster. State Attorneys General are hampered in their ability to counsel their government clients, not knowing the contours of *Quill*'s reach in today's modern Internet age. In turn, State tax agencies and rulemaking bodies must fashion rules and provide guidance knowing that their efforts will be challenged in court as violating a rule meant to address the marketplace as it existed a half-century ago.

This cycle of uncertainty will no doubt continue if the traditional physical-presence rule is retained. Facing increasing revenue shortfalls, State and local governments will have little choice but to continue experimenting with alternative—and suboptimal—methods for collecting the owed tax. As they do so, the degree of uncertainty for retailers and consumers will continue to grow as the concept of physical presence becomes an increasingly less useful proxy for in-state economic activity. Does offering a virtual "trunk club" subscription service, where a retailer ships customers monthly packages of designer clothes, constitute physical presence?[14] What if the remote online retailer provides a courier return service?[15] What about an online engineering company that provides global website security services and enhanced content delivery through its network of data centers that are

---

[14] Stitch Fix, Inc., https://www.stitchfix.com (last visited Feb. 22, 2018).

[15] Casper Sleep, Inc., *Tell Me More About the 100 Night Trial*, https://tinyurl.com/y6tvlofp (last visited Feb. 22, 2018).

scattered across multiple (but not all) States?[16] The traditional physical-presence rule does not answer these complex questions posed by today's Internet-based marketplace.

By any reasonable measure, the traditional physical-presence rule—first announced in 1967, two years before the moon landing—has proved unworkable in today's interconnected market. Absent this Court abrogating the rule, *Quill*-related litigation and confusion will continue to proliferate, costing the States, retailers, and ultimately the public, millions in litigation expenses and lost resources.

Retroactive tax liability. Defenders of the physical-presence rule often cite the possibility of retroactive tax liability if *Quill* is abrogated. BIO at 34–36. That concern was also present in *Quill*, and the *amici* States acknowledge that this Court has said imposing retroactive tax liability can raise "thorny questions." *Quill*, 504 U.S. at 318 n.10.

But those questions are not presented in this case. By its terms, South Dakota's law is prospective in operation only; imposing retroactive tax liability is prohibited and an injunction bars enforcement of the law while the instant case remains pending. Pet. Br. at 2a–3a. Because of these features of South Dakota's law, any holding by this Court abrogating *Quill* will not apply retroactive tax liability on Respondents. Their tax liability, if any, will be on a prospective basis only. South Dakota's law thus removes the retroactive-tax-liability issue from this case.

---

[16] Cloudflare, Inc., *Step 1: How Does Cloudflare Work?* (Feb. 11, 2018), https://tinyurl.com/j59oh2b (last visited March 1, 2018).

Even if certain States, implementing a holding by this Court abrogating the physical-presence rule, chose to apply their laws retroactively, other legal and pragmatic safeguards will address any constitutional concerns. Pet. Br. at 48–49. For one, many States have regulations or other administrative guidance in place that bar imposing collection obligations on remote retailers that currently fall within *Quill*'s ambit.[17] Pet. Br. at 7a–8a. This guidance would limit retroactive enforcement of a new "post-*Quill*" rule announced by this Court.

For another, as tax collectors and administrators, the *amici* States have incentives to ensure that large-scale regulatory changes are implemented carefully and fairly. After all, "[t]he procedures for mass assessment and collection of state taxes ... are generally complex and necessarily designed to operate according to established rules." *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). For this reason alone, the *amici* States generally provide, as a matter of course, advance notice of significant regulatory changes, announcing both the nature of the change and its effective date.[18]

---

[17] *See, e.g.*, IOWA ADMIN. CODE r. 701-107.8(423B) (2018); MO. CODE REGS. ANN. tit. 12, § 10-114-100 (2017); Colo. Dep't of Revenue, *FYI Sales 5: Sales Tax Information for Out-of-State Businesses* (Apr. 2013), https://tinyurl.com/y746jwa9 (last visited Feb. 14, 2018).

[18] *See, e.g.*, Colo. Dep't of Revenue, *FYI General 10: Consumer Use Tax* (July 2017) (advising Internet retailers of the effective date for enforcement of Colorado's notice-and-reporting law), https://tinyurl.com/y87c7pfd (last visited Feb. 13, 2018).

If South Dakota prevails here, there is no reason to suspect that the *amici* States will deviate from their normal administrative procedures—including advance notice—when implementing this Court's new post-*Quill* precedent.[19] While there is no one formula that all States must follow, providing this type of notice benefits the States by giving them time to prepare intake procedures, increasing taxpayers' compliance, and satisfying potential State and federal due process requirements. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 100 (1993) (indicating the States "retain[] flexibility" under the Due Process clause when responding to a determination that a tax unlawfully discriminates).

In the unlikely event that a future retailer believes this Court's decision abrogating *Quill* is being retroactively applied to them in an impermissible manner under either federal or State law, the States' customary procedures for resolving tax disputes, and the right to judicial review, will provide the retailer with an appropriate opportunity to be heard. *Cf. id.* at 101–02 (stating Virginia is "free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal [due process] requirements we have outlined." (internal quotations omitted)). The States are well equipped to structure their tax laws to both comply with due process and avoid unconstitutional retrospective applications of new rules. *Cf. United States v. Carlton*, 512 U.S. 26, 30–31 (1994) (stating the legislature may structure its tax laws to have retroactive effect if "supported by a

[19] This is not to suggest that the *amici* States will forgo conventional enforcement proceedings against those retailers who *improperly* rely on *Quill*'s protection.

legitimate legislative purpose furthered by rational means . . . ." (internal quotations omitted)).

If, after consideration of the foregoing, the Court remains concerned about retroactivity issues in abrogating *Quill*, the Court of course retains flexibility to fashion a holding that operates prospectively only, thus avoiding the surprise that may accompany retroactive application of a new rule. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971). Although this Court's precedent since *Chevron Oil* now disfavors "selective temporal barriers" to full retroactive application of a new rule, *Harper*, 509 U.S. at 97, the absence of prior-period liability in this unique case leaves open the option of a "prospective only" rule. *See id.* (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539 (1991) (opinion of Souter, J.,)) (stating an opinion "announcing a rule of federal law 'is properly understood to have ... retroactive application'" *unless* the Court "'reserve[s] the question whether its holding should be applied to the parties before it'").[20]

Accordingly, because the purported virtues of the physical-presence rule do not outweigh its harms, this Court should rule in South Dakota's favor.

D. The burdens of collection that prompted the physical-presence rule have drastically faded.

In *DMA*, Justice Kennedy called for *Quill*'s physical-presence rule to be abrogated unless "a powerful

[20] A number of lower federal courts have concluded that *Harper* did not overrule *Chevron Oil*'s three-part test for determining whether a new rule should be applied prospectively only. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 691–92 (9th Cir. 2011) (collecting cases).

showing can be made that its rationale is still correct." 135 S. Ct. at 1135 (Kennedy, J., concurring). *Quill*'s rationale was based not on its own constitutional force, but instead on *stare decisis* and the precedential value of *Bellas Hess*. That decision, in turn, was based on the marketplace as it existed in 1967, and the Court's view that burdening the mail-order catalog industry with the duty to collect might stunt the industry's growth. *See Bellas Hess*, 386 U.S. at 759–60. Because business models and technology have dramatically changed since *Bellas Hess*, and because the burdens of collecting have been all but eliminated, this Court should not hesitate to give the physical-presence rule the "complete burial it justly deserves." *Quill*, 504 U.S. at 321 (White, J., concurring in part and dissenting in part).

In 1967, when *Bellas Hess* was decided, the process for an out-of-state retailer to collect and remit another State's sales tax was perhaps daunting. Retailers were forced to manually look up the current tax rate by State and city—a task that was "not only time consuming, tedious, and expensive," but "also prone to error." Ray Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 VAND. L. REV. 1097, 1099 (1986). When *Quill* was decided 25 years later, however, the majority did not dispute the dissent's observation that "modern computer and software technology" had significantly reduced the burden of collection. *Quill*, 504 U.S. at 332 (White, J., concurring in part and dissenting in part).

Today, with the Internet's near-ubiquitous use by retailers, the burden of collection (if any) has become miniscule. The days of manual calculations and mailing

hard-copy returns at the Post Office are gone. Retailers today are generally able to file their returns electronically over the Internet without ever leaving the comfort of their home or workplace.[21] In many cases, including in the 24 States that are members of the Streamlined Sales and Use Tax Agreement ("SSUTA"), a uniform electronic return format eases compliance even more.[22] In fact, the entire collection and remittance process under SSUTA can be accomplished through certified third-party service providers that are paid for by the member States and made available to retailers at no charge.[23] The availability of these service providers and electronic filing methods removes any conceivable burden that collection obligations might otherwise impose on retailers.

Other States that have not or cannot join SSUTA similarly eliminate or reduce the financial burdens of collection. For example, a majority of States compensate collecting retailers by allowing them to retain both a small portion of the tax collected—sometimes called a vendor discount—and the "net float" income that is earned from investing the tax

---

[21] California, for example, has implemented an electronic registration system for retailers to register with the State and pay their use taxes online. https://tinyurl.com/y9fc3ndc (last visited March 2, 2018); *see also* 1 COLO. CODE REGS. § 201-1:39-21-120(3) (2018) (discussing Colorado's electronic data interchange method for filing tax returns).

[22] *See Br. for Amicus Curiae Streamlined Sales Tax Governing Board, Inc. Supporting Petitioner's Certiorari Petition*, p. 11 ("*Streamlined Cert. Br.*").

[23] *Streamlined Cert. Br.*, p. 12–13.

funds prior to periodic remittance to the State.[24] Retailers are permitted to keep both components of this compensation even if their collection costs are zero or negligible, and even though this Court has said that interstate business "must pay its way." *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("[T]he bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business." (internal citations omitted)).

The financial burden of compliance is also made easy on the backend for those retailers that discover they may have inadvertently failed to accurately collect and remit the tax. Thirty-eight States and the District of Columbia participate in the Multistate Voluntary Disclosure Program.[25] The program allows retailers with potential tax liabilities in multiple States to negotiate a penalty-free settlement through the Multistate Tax Commission. By negotiating a single settlement through the Commission that satisfies all obligations in the participating States, the program offers retailers a faster, more efficient, and less costly resolution than approaching each State separately.

---

[24] *E.g.*, COLO. REV. STAT. § 39-26-105(1)(c)(II)(A) (2017); Federation of Tax Administrators, *State Sales Tax Rates and Vendor Discounts* (Jan. 2018), https://tinyurl.com/ybvbw25r (last visited Feb. 13, 2018); PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate*, p. 9 (Apr. 7, 2006), https://tinyurl com/j32k2xt (last visited Feb. 13, 2018).

[25] Multistate Tax Commission, *Multistate Voluntary Disclosure Program: Overview of Multistate Voluntary Disclosure Process*, https://tinyurl.com/y9jpug5f (last visited Feb. 14, 2018).

Several States go even further by eliminating not only the financial burden of collection, but also the logistical burdens retailers may experience. Some States, for example, provide certified address databases that retailers can utilize to look up the tax rate where the consumer resides.[26] Assuming the retailer uses the certified database, they are held harmless for any resulting tax or other liability that may arise from errors in the database. Certain States also provide lists of sales tax software that retailers may use to automatically create an electronic return that may then be uploaded to the taxing agency; Colorado, for example, has ten approved vendors that provide e-file software and services at minimal cost.[27] If those do not work, retailers remain free to search out their own solutions on the open market; "end-to-end" sales tax compliance solutions can be obtained for as low as $50 per year for small businesses.[28]

Of course, the sophisticated online retailers whose sales generate the bulk of the States' tax losses do not need such software or service providers. Their advanced online platforms boast impressive technology that enables them to not only comply (easily) with State collection laws, but also capture extensive data about their customers. According to one commentator, an online retailer can effortlessly track demographic

---

[26] *E.g.*, COLO. REV. STAT. §§ 39-26-105.3 & 204.5 (2017); SSUTA § 331.

[27] *See* Colo. Dep't of Revenue, *Sales Tax Efile: Approved Colorado Sales Tax Efile Vendors* (July 19, 2016), https://tinyurl.com/yd55qzc8 (last visited Feb. 13, 2018).

[28] Avalara, Inc., *AvaTax Pricing*, https://tinyurl.com/yaf6wk9r (last visited Feb. 20, 2018).

information that includes "'your age, whether you are married and have kids, which part of town you live in, how long it takes you to drive to the store, your estimated salary, whether you've moved recently, what credit cards you carry in your wallet and what Web sites you visit ... data about your ethnicity, job history, the magazines you read, if you've ever declared bankruptcy or got divorced, the year you bought (or lost) your house, where you went to college, what kinds of topics you talk about online, whether you prefer certain brands of coffee, paper towels, cereal or applesauce, your political leanings, reading habits, charitable giving and the number of cars you own.'"[29]

The very technology that makes online retailers so successful at targeting their customers also allows them to collect and remit the owed sales tax through an automated process that requires minimal effort.[30] This is evident in this very case—one of the four retailers that South Dakota sued, Systemax, agreed to voluntary comply rather than assert a *Quill* defense; it began collecting South Dakota's sales tax the very next day. Pet. 30. Because they can readily "flip a switch" to begin collecting, today's online retailers are, to say the least, in a far superior position compared to their 1967

---

[29] Helen Hecht & Lila Disque, *DMA v. Brohl—Is it Time to Stop Fighting the Last War?*, 26-JUL J. Multistate Tax'n 14, 46 (2016) (quoting Charles Duhigg, How Companies Learn Your Secrets, The New York Times Magazine, Feb. 16, 2012).

[30] *See* Waltreese Carroll, *Can Technology Lessen the Tax Burdens on Interstate Commerce*, 2012 ST. TAX TODAY 143-2 (2012) (quoting Charles Collins, Vice President of Governmental Affairs at Automatic Data Processing, Inc.—a certified service provider under the SSUTA—as stating that "technology has moved in a direction that has alleviated the burdens at issue in *Quill*").

predecessors whose logistical challenges prompted the physical-presence rule in the first place.

Accordingly, because the burdens of collection have largely disappeared since the time of *Bellas Hess* and *Quill*, this Court should abrogate the physical-presence rule.

CONCLUSION

For the foregoing reasons, the decision of the South Dakota Supreme Court should be reversed.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General

MELANIE J. SNYDER
Chief Deputy Attorney General

GRANT T. SULLIVAN
Assistant Solicitor General
Counsel of Record

Office of the Colorado Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203
(720) 508-6000
Grant.Sullivan@coag.gov

March 5, 2018

Counsel for Additional *Amici*

STEVE MARSHALL
Attorney General of
Alabama

MARK BRNOVICH
Attorney General of
Arizona

LESLIE RUTLEDGE
Attorney General of
Arkansas

XAVIER BECERRA
Attorney General of
California

GEORGE JEPSEN
Attorney General of
Connecticut

KARL A. RACINE
Attorney General for the
District of Columbia

PAMELA JO BONDI
Attorney General of
Florida

CHRISTOPHER M. CARR
Attorney General of
Georgia

RUSSELL A. SUZUKI
Acting Attorney General of
Hawaii

LAWRENCE G. WASDEN
Attorney General of
Idaho

LISA MADIGAN
Attorney General of
Illinois

CURTIS T. HILL, JR.
Attorney General of
Indiana

THOMAS J. MILLER
Attorney General of
Iowa

DEREK SCHMIDT
Attorney General of
Kansas

ANDY BESHEAR
Attorney General of
Kentucky

JEFF LANDRY
Attorney General of
Louisiana

JANET T. MILLS
Attorney General of
Maine

BRIAN E. FROSH
Attorney General of
Maryland

MAURA HEALEY
Attorney General for the
Commonwealth of
Massachusetts

LORI SWANSON
Attorney General of
Minnesota

JIM HOOD
Attorney General of
Mississippi

DOUGLAS J.
PETERSON
Attorney General of
Nebraska

ADAM PAUL LAXALT
Attorney General of
Nevada

GURBIR S. GREWAL
Attorney General of
New Jersey

HECTOR BALDERAS
Attorney General of
New Mexico

ERIC T.
SCHNEIDERMAN
Attorney General of
New York

JOSH STEIN
Attorney General of
North Carolina

WAYNE STENEHJEM
Attorney General of
North Dakota

MICHAEL DeWINE
Attorney General of
Ohio

MIKE HUNTER
Attorney General of
Oklahoma

ELLEN F. ROSENBLUM
Attorney General of
Oregon

JOSH SHAPIRO
Attorney General of
Pennsylvania

WANDA VÀZQUEZ-GARCED
Attorney General for the
Commonwealth of
Puerto Rico

PETER F. KILMARTIN
Attorney General of
Rhode Island

HERBERT H. SLATERY III
Attorney General and
Reporter of Tennessee

KEN PAXTON
Attorney General of
Texas

SEAN D. REYES
Attorney General of
Utah

THOMAS J. DONOVAN, JR.
Attorney General of
Vermont

CLAUDE EARL WALKER
Attorney General for the
Virgin Islands of the
United States

MARK HERRING
Attorney General of
Virginia

ROBERT W. FERGUSON
Attorney General of
Washington

BRAD D. SCHIMEL
Attorney General of
Wisconsin

PETER K. MICHAEL
Attorney General of
Wyoming

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

SAM KAZMAN
THEODORE H. FRANK
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW
Washington, DC 20005
(202) 331-2265

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of *Amicus Curiae* 1

Statement 1

Summary of Argument 3

Argument 10

I. The Constitution's Horizontal Federalism Uses Territoriality, Mobility, and Access to National Markets to Create Systemic Checks on State Abuse or Overreach. 11

A. Horizontal Federalism Embodies a Firm Principle of State Territoriality 11

B. The Constitution's Horizontal Safeguards Ensure Citizen Mobility and Access to a National Market. 14

C. Horizontal Federalism Ensures Competition among States and Political Accountability. 16

II. The Erosion of Constitutional Safeguards Necessitates Compensatory Doctrines to Preserve the Fundamentals of Horizontal Federalism. 19

III. *Quill*'s Territorial Limit on State Authority Is Superior to an Unbounded Economic Nexus Test. 23

Conclusion 28

TABLE OF AUTHORITIES

Cases

Allstate Insurance Co. v. Hague, 449 U.S. 311 (1981) 7

Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) 3, 12

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) 13

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 1, 7, 16, 19

Crawford-El v. Britton, 523 U.S. 574 (1998) 2

Daimler AG v. Bauman, 571 U.S. --, 134 S. Ct. 746 (2014) 13

Farmers' Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930) 13

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 3

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4, 6, 18

Home Bldg. & Loan Asso. v. Blaisdell, 290 U.S. 398 (1934) 7

McDonald v. City of Chicago, 561 U.S. 742 (2010) 1

National Bellas Hess, Inc. v. Dept. of Revenue of Ill., 386 U.S. 753 (1967) 2

New York Life Ins. Co. v. Head, 234 U.S. 149 (1914) 5, 13

Polar Tankers v. City of Valdez, 557 U.S. 1 (2009) 12

Printz v. United States, 521 U.S. 898 (1997) 23

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 2, 7, 13, 21

Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) 19

Toomer v. Witsell, 334 U.S. 385 (1948) 14

Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987) 8

Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905) 13

United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) 7, 20

Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869) 7

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 8

Other Authorities

Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941) 15

Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) 4, 11

Federalist No. 7, THE FEDERALIST (Easton Press 1979; Carl Van Doren, ed.) 19

Federalist No. 10, THE FEDERALIST (Easton Press 1979; Carl Van Doren, ed.) 6, 18

Federalist No. 51, THE FEDERALIST (Easton Press 1979; Carl Van Doren, ed.) 11, 17

Michael S. Greve, THE UPSIDE-DOWN CONSTITUTION (2012) 18, 21, 22

Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267 (1988) 7, 19, 20

Robert J. Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93 (2004) 4

Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997) 21

Constitutional Provisions

U.S. CONST., art. I, sec. 2 ..... 11, 17

U.S. CONST., art. I, sec. 3 11

U.S. CONST., art. I, sec. 8 ..... 5, 15

U.S. CONST., art. I, sec. 9 5

U.S. CONST., art. I, sec. 10 ..... 5, 15, 16
U.S. CONST., art. IV, sec. 2 ..... 5, 14
U.S. CONST., art. IV, sec. 3 11
U.S. CONST., art. IV, sec. 4 12
U.S. CONST., Amend. X 15, 28
U.S. CONST., Amend. XIV, sec. 1 ..... 5, 14
U.S. CONST., Amend. XIV, sec. 2 17

INTEREST OF *AMICUS CURIAE* [1]

Amicus Curiae the Competitive Enterprise Institute ("CEI") is a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI engages in policy research, litigation, and education in the areas of property rights, markets, free enterprise, and liberty.

STATEMENT

Before overruling precedent, it is important to evaluate that precedent from a broader constitutional perspective. Precedents that may seem doubtful in isolation may nonetheless merit retention insofar as they compensate for earlier errors in the law. *See McDonald v. City of Chicago*, 561 U.S. 742, 756-58 (2010) (despite narrow reading of Privileges and Immunities Clause being widely considered " 'egregiously wrong,' " no need to reconsider interpretation where work of incorporation was being done by the Due Process Clause); *id.* at 791 (Scalia, J., concurring) (acquiescing, despite "misgivings," in incorporation via the Due Process Clause); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 636 (1997) (Thomas, J., joined by Scalia, J., dissenting) (noting deep disagreement with negative Commerce Clause jurisprudence, that "much of what the Import-Export Clause appears to have been de-

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the written blanket consent of all parties, on file with this Court.

signed to protect against has since been addressed under the negative Commerce Clause," and that "[w]ere it simply a matter of invalidating state laws under one clause of the Constitution rather than another, I might be inclined to leave well enough alone."); *cf. Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., joined by Thomas, J., dissenting) (noting it is "perhaps just as well" that broad qualified immunity arose given that it compensates for erroneous broadening of § 1983; "Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.").

The physical-presence rule of *National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is best viewed as such a second-best, compensatory rule. While the decisions behind that rule may look odd or inconsistent on their own narrow terms, they fill an erroneously vacated niche in the constitutional order. *Quill's* physical-presence rule helps maintain the essential territorial aspects of federalism that were meant to order horizontal relations between the States but that have been weakened by earlier mistakes in constitutional jurisprudence.

The broader constitutional perspective is an essential counterpoint to the tendency to consider cases only in their narrow and legal and factual context. The competing economic and political interests in this case naturally emphasize the immediate economic and administrative consequences of revising, or not, this Court's decision in *Quill*. Structural constitutional principles recede into the background. Howev-

er, an intimate connection between economic interest and state authority has been with us from the beginning. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), was a quarrel among business enterprises. And yet, it was decided in light of high constitutional principle. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), was a seemingly narrow dispute about a state-imposed business tax, but it, too, prompted this Court's serious reflection on the nature of the Union, and its federalism.

This case should be decided from that same broader perspective. Properly viewed in constitutional context, *Quill*'s physical-presence rule is not merely an arbitrary protection for some participants in interstate commerce; it is an essential, albeit imperfect, element of the horizontal aspect of the Constitution's federalism. Whatever the shifting doctrinal pedigree of that rule, the rule itself remains constitutionally sound as a means of enforcing federalism principles otherwise eroded by earlier flawed precedent. To uproot such gap-filling precedent without also revisiting in some way the earlier gap-creating precedent would leave the law at odds with the overall constitutional text and structure.

SUMMARY OF ARGUMENT

This case involves federalism in both of its dimensions: vertical, between the States and the general government; and horizontal, between and among the States. Nobody disputes that Congress could legislate federal "rules of the road" regarding taxation and tax collection on interstate commerce. The question

is, what default rules should govern in the absence of affirmative congressional intervention.

Contemporary federalism doctrine emphasizes the vertical "balance" between the States, collectively, and the general government. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Robert J. Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 97-103 (2004). This perspective tends to distract from the Constitution's commands with respect to *horizontal* state-to-state conflicts and the judiciary's role in enforcing horizontal federalism rules. Due attention to the Constitution's structure of horizontal federalism, however, supports maintaining or even strengthening *Quill*'s physical-presence rule; not necessarily on its own reasoning, but as a suitable embodiment of territorial limitations of horizontal federalism, at least until the related missteps that necessitated such a rule can be adjusted to preserve the overall structure of horizontal federalism.

1. The text and structure of the Constitution show that the Founders understood federalism as having both vertical and horizontal elements. The Constitution organizes horizontal relations among States on principles of (partial) state autonomy, equality, territoriality, non-aggression, and mutual recognition, and it assigns to the judiciary a prominent role in maintening that order. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250-51 (1992). The intended result of that arrangement is a *competitive* federalism order: citizens of the United States choose their State, not the other way around.

a. Horizontal federalism is profoundly territorial: States are territorial, and they are equal for constitutional purposes. These principles, firmly enshrined in the Constitution's architecture and in numerous specific provisions, logically entail a prohibition against the *extra*-territorial exercise of state power. Each State's sovereign authority over its own territory and citizens must be consistent with, and therefore limited by, each other State's equal authority. *See, e.g.*, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). While the horizontal limits of state authority are not always easy to identify, the irreducible constitutional necessity of such limits remain.

b. Two fundamental components of horizontal federalism in the text and structure of the Constitution involve the mobility of persons and businesses and national access to interstate markets.

Mobility is protected by the Privileges and Immunities Clause of Article IV, section 2, and by section 1 of the Fourteenth Amendment, which ensure that persons may move freely between the States, may not be discriminated against based on their State of origin, and may relocate and become citizens of whichever State they choose. Access to interstate markets is ensured by delegation of power over interstate commerce to the national government and by various restrictions on market impediments, notably including a prohibition on unauthorized state Imposts and Duties on Imports and Exports. U.S. CONST., art. I, sec. 8, cl. 3; *id.*, art. I, secs. 9 & 10. Because many of the limitations are self-executing, the Constitution necessarily assigns the judicial branch,

and this Court in particular, a prominent role in enforcing the safeguards of horizontal federalism.

c. Horizontal federalism turns out to be highly competitive. The structure of horizontal federalism – unimpeded mobility across state lines; nondiscrimination; prohibitions against extraterritorial taxation and regulation – promotes and ensures independent States that must compete for citizens and businesses. States can compete on the scope and quality of their laws, the scope and quality of their services, and, critically, on the burden of their taxation.

State competition for productive citizens and enterprises is among federalism's foremost, and intended, advantages. *Gregory v. Ashcroft*, 501 U.S. at 458. Competition acts as a check on States overreaching or colluding with some or all of their sisters against the interests of citizens or of other States. Just as competition among rival political groups provides protection against the evils of factionalism and against the most dangerous faction of all, the "superior force of an interested and overbearing majority," Federalist No. 10, THE FEDERALIST 55 (Easton Press 1979; Carl Van Doren, ed.), competition among States provides a safeguard against factional abuse within and among those States.

2. Notwithstanding the critical role of horizontal federalism in maintaining the constitutional order, various of its foundations have been eroded by unfortunate decisions overlooking this broader perspective. In several instances, central constitutional provisions designed to prevent state-to-state conflicts have lost much of their force due to judicial misconstruction. *See, e.g., Woodruff v. Parham*, 75 U.S. (8 Wall.) 123

(1869) (Import-Export Clause); *Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398 (1934) (Contract Clause); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (Compact Clause); *Allstate Insurance Co. v. Hague*, 449 U.S. 311 (1981) (Full Faith and Credit Clause, Due Process Clause).

The market-access protections of the Import-Export Clause, for example, were narrowed to foreign imports and exports, *Camps*, 520 U.S. at 621-36 (Thomas, J., dissenting), mistakenly excluding interstate commerce and the imposition of taxes thereon. The Contract Clause also was narrowly construed, with the effect of depriving out-of-state creditors of constitutionally intended protection. *See Blaisdell*, 290 U.S. at 434-36, 439-40; Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 284-85, 293-94 (1988) (Hamiltonian view of Contracts Clause was to protect contracts involving interstate commerce). And territorial contraints on state projection of power were weakened by expanding notions of judicial and regulatory jurisdiction that made it harder for citizens and businesses to exit or escape from any given State's control without forfeiting access to interstate markets. *Quill*, 504 U.S. at 307-08 (discussing change in due process jurisprudence away from "more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry" involving forseability and general fairness).

Despite the erosion of various supports for horizontal federalism, the Constitution's genius and logic could not be suppressed entirely. Rather, echoes of

those foundational principles often manifest themselves through alternative, if somewhat ill-fitting and less coherent, clauses and doctrines such as the dormant Commerce Clause. Viewed in isolation, that doctrine and many of its particular progeny may seem doubtful, or worse. *See, e.g., Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring in part and dissenting in part). However, viewed in broader constitutional context and against the erosion of textually and structurally grounded doctrines, the dormant Commerce Clause can serve a vital compensatory function. *Quill*'s physical-presence rule is one example of a compensatory doctrine maintaining some of the territorial foundations of horizontal federalism. To review *Quill*'s physical-presence rule in isolation from the constitutional context, would miss the forest for the trees. *Amici* respectfully submit that a second-best, under-theorized rule is better than no constitutional rule at all.

Providing default rules consistent with the constitutional structure has been, and remains, a quintessentially judicial task. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 293-94 (1980) (noting Court's role in applying due process to ensure that "the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system" and in enforcing " 'territorial limitations on the power of the respective States.' ") (citation omitted). This Court should take the opportunity presented in this case to re-assert, rather than bury, the basic precepts of constitutional order.

3. Allowing the physical-presence rule to remain the judicially enforceable default limit on state projection of power over out-of-state sellers is the best practicable means of enforcing some of the structural principles of horizontal federalism. The physical-presence rule would have a more sensible grounding if defended based on constitutional antipathy to extraterritorial state action and constitutional support for open access to interstate markets and the ability of persons and businesses to escape particular state jurisdiction as prerequisite to competitive checks on state power.

Amici recognize that the dormant Commerce Clause often has been defended by ever-changing policy considerations and suspiciously legislative *ad hoc* balancing. But petitioner's current attack on *Quill* likewise relies on that same questionable approach. While changeable policy determinations are best left to Congress, core horizontal federalism principles barring extraterritorial taxation or regulation of interstate commerce should be the default rule enforced by the Courts in the first instance. And a physical-presence or territoriality principle should be the minimum default rule for any of the tax-collection issues in this case.

Whatever the internal flaws of *Quill*, the concerns animating respect for precedent still support leaving it in place, at least until a more encompassing reconsideration of horizontal state power is possible. Selectively disposing of that precedent, without revisiting the earlier questionable precedent for which it compensates, ensures nothing more than a cosmetic consistency in a narrow area of the law at the cost of

worsening a broader inconsistency in the Constitution's structure and operation. Furthermore, businesses have relied upon the existing precedent when structuring their operations and when choosing where to locate physical facilities and how to conduct their interstate commerce. Indeed, such choices exactly reflect the mobility and exit options that allow competition among the States and that horizontal federalism was designed to foster. Those locational choices had financial and practical consequences, led to investments that might not otherwise have been made under a different rule, and will now have further costs if the rule is reversed.

This Court should decline to abandon *Quill*'s physical-presence rule and should affirm.

ARGUMENT

The fundamental contention of this *amicus* brief is that the text and structure the Constitution establish a horizontal federalism whereby citizens and the States themselves are protected not merely against the centralized power of the national government, but also against encroachment by other States or factions of States. The territorial restraint on state taxing and regulatory power contained in *Quill* and *National Bellas Hess* is one imperfect, but necessary, substitute for some of the degraded textual and structural requirements of horizontal federalism.

I. The Constitution's Horizontal Federalism Uses Territoriality, Mobility, and Access to National Markets to Create Systemic Checks on State Abuse or Overreach.

"The great difficulty" in forming "a government which is to be administered by men over men," James Madison wrote, is that "you must first enable the government to control the governed; and in the next place oblige it to control itself." Federalist No. 51, *supra*, at 348. The horizontal and competitive structure of federalism does precisely the latter vis-à-vis the States. It sets them up to provide competitive checks on each other by limiting their extraterritorial authority and by ensuring citizens and businesses the option of effective exit from any given State's control without forfeiting access to interstate commercial markets.

A. Horizontal Federalism Embodies a Firm Principle of State Territoriality.

States, for constitutional purposes, are *equal* States, and they are *territorial* States. Laycock, *Equal Citizens of Equal and Territorial States*, 92 COLUM. L. REV. at 250-51. Those postulates, and territoriality in particular, run through the entire constitutional structure. States are the places where Senators and Representatives come from, and those delegates must be "Inhabitant[s]" of the electing State. U.S. CONST., art. I, secs. 2, 3. States may not be joined, and a new State may not be established within the jurisdiction of an existing State, "without the Consent of the Legislatures of the States concerned as well as of Congress," *id.*, art. IV, sec. 3.

The United States "shall" guarantee each State protection against invasion. *Id.*, art. IV, sec. 4. A duty on imports or exports is a duty on goods that cross a physical state border. Commerce *among* the States is commerce that originates in one State, crosses a physical and jurisdictional border, and ends up in another State.

The territoriality principle goes hand-in-hand with a prohibition: as a matter of elementary federalism logic, States may not tax, regulate, or otherwise exercise authority over parties or transactions beyond their jurisdiction. This injunction follows naturally from the principles of state autonomy and equality: each State's right to tax and regulate its own citizens entails the right of sister-States to do likewise.

The Constitution's text and structure powerfully illustrate the Founders' apprehension of extraterritorial exercises of state authority, prominently including the power to tax. For example, the Import-Export Clause is a prohibition on extraterritorial imposts or duties (regardless of the precise form of the imposition). *See Brown v. Maryland*, 25 U.S. (12 Wheat.) at 437-38. The Tonnage Clause serves the same purpose. *Polar Tankers v. City of Valdez*, 557 U.S. 1, 6-7 (2009). These particularized prohibitions embody the overarching structural constitutional command that power be tied to territory. "[I]t would be impossible to permit the statutes of [one State] to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the

Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. at 161.

That elementary insight has remained with us to this day. For example, for purposes of general jurisdiction, a defendant corporation must have its physical home in the jurisdiction (or else, consent to jurisdiction by way of incorporation). *Daimler AG v. Bauman*, 571 U.S. --, 134 S. Ct. 746, 760 (2014). Somewhat closer to the present question, "[t]he mere fact that the effects of [a State law] are triggered only by sales of [a commodity] within the State * * * does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986).

Time and again, this Court has emphasized that this jurisdictional principle applies with full force to state taxation. *See, e.g.*, *Farmers' Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 210 (1930) ("[N]o state may tax anything not within her jurisdiction without violating the Fourteenth Amendment") (case citations omitted). While this Court derived the principle in varying forms and formulations, it considered the principle "so obvious that no adjudication should be necessary" to establish it. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905).

Admittedly, "formalistic" distinctions – between interstate commerce and the States' internal affairs; between "direct" and "indirect" imposition on interstate commerce; between a non-citizen's consent to jurisdiction and forbidden, extraterritorial exercise of jurisdiction – often have proven difficult. *See, e.g.*, *Quill*, 504 U.S. at 309-10 (describing the difficulties

in the context of the dormant Commerce Clause). But whatever the efforts to overcome such line-drawing difficulties, the resulting rules must remain constitutionally – *i.e.*, territorially – grounded.

B. The Constitution's Horizontal Safeguards Ensure Citizen Mobility and Access to a National Market.

While the Constitution imposes territorial limits on States, it simultaneously ensures national mobility of persons, goods, and capital among the States. Through various structural and textual means, it guarantees each citizen free entry and exit to and from different States, and access to a national commercial market.

The Privileges and Immunities Clause of Article IV, sec. 2, and section 1 of the Fourteenth Amendment, promote mobility of persons and allow entry and exit between States without facing discrimination from destination or transit States. *See, e.g.*, *Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948) (purpose of the Privileges and Immunities Clause was to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy" and "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State"). And section 1 of the Fourteenth Amendment provides that citizens of the United States are citizens of any State in which they choose to reside, ensuring free exit and entry between and among the States. U.S. CONST., Amend. XIV, sec. 1. The Commerce Clause committs to Congress, ra-

ther than to the States, the power "to regulate Commerce * * * among the several States." U.S. CONST., art. I, sec. 8. It thus provids, at a minimum, the opportunity to check state interference with access to the national market for interstate commerce.[2]

Other provisions likewise protected access to the national market. Article I, sec. 10 includes a number of absolute or conditional restrictions on state conduct that would interfere with national access to interstate markets or allow States to exercise control beyond their individual borders. For example, States may not, absent congressional consent, "lay any imposts or duties on imports and exports" except for the narrow purpose of funding inspection laws (and even then, any excess must be remitted to the national government). U.S. CONST., art. I, sec. 10, cl. 3. As Justice Thomas comprehensively documented, this clause is properly understood as applying to imports

---

[2] The delegation of the commerce power to the national government arguably went further and removed from the States the power to regulate interstate commerce, at least as such commerce was originally and narrowly conceived. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 493 (1941) ("On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority pari passu from the states."). Regardless whether one agrees with such a strong preclusive view, the delegation certainly negated any otherwise-extant *presumption* that such power was "reserved" to the States. *See* U.S. CONST., Amend. X (defining those rights "reserved" to the States or to the people to include only those "*not delegated* to the United States by the Constitution" nor otherwise "prohibited" to the States) (emphasis added).

and exports between the States, not merely to or from foreign countries. *Camps*, 520 U.S. at 621-36 (Thomas, J., dissenting). Similarly, the Compact Clause, U.S. CONST., art. I, sec. 10, cl. 3, prohibits States from entering into any Agreement or Compact with one another (or with a foreign power) without the consent of the Congress. Each of these provisions, and various others, helps reduce barriers to interstate commerce, prevent collusion among States that might undermine effective exit or interstate market access, and generally limits a State's authority to its own territory.

Critically, many of these safeguards are self-executing and judicially enforceable. Unapproved compacts can be challenged by persons injured thereby. Denials of privileges and immunities are likewise subject to challenge in the courts. Indeed, the judiciary plays a central role in maintaining the conditions and rules under which political actors can operate to check each other in the manner the Constitution intended.

C. Horizontal Federalism Ensures Competition among States and Political Accountability.

The various elements of horizontal federalism directly serve to check specific potential abuses of power by state governments. But perhaps the most meaningful check created by horizontal federalism is state competition for freely mobile citizens and businesses that can exit and escape any State or States that seek to overreach. That systemic check exemplifies the Constitution's structural approach.

The Constitution uses the familiar approach of arranging government relations such that "rival institutions can be made to check one another. The occupants of the various branches of government must be given the necessary constitutional means, and personal motives, to resist encroachment of the others * * * Ambition must be made to counteract ambition." Federalist No. 51, *supra*, at 347-48. While such an approach is oft-celebrated at the national level in the separation-of-powers context, it manifests also in the roles and limits the Constitution sets out for the States.

Given the horizontal structures of federalism – territorial constraints on state power, mobility, and access to the national market – "voting with one's feet" becomes a more viable option. Mobile citizens and businesses thus become "consumers" of State government and States must compete for their presence and citizenship.[3]

Where the preconditions for such competition are protected, the motives and ambitions of separate States each operate to check the behavior of the others. The mobility provided by horizontal "federalism will enable citizens to choose among varying bundles of public services and the taxes that come with them, and it will force the [state] governments to compete

---

[3] State representation in the House of Representatives based on population, U.S. CONST., art. I, sec. 2; *id.*, Amend. XIV, sec. 2, demonstrates both a residency/territorial basis for participation in the national legislature and establishes an incentive to compete for citizens. In such circumstances, citizens voting with their feet quite literally translates to greater or lesser political power – votes in the House – for any given State.

for productive citizens and firms." Michael S. Greve, THE UPSIDE-DOWN CONSTITUTION 6 (2012). If one State overreaches or abuses those within its territory, citizens and businesses will relocate to more appealing States without having to forfeit access to commerce with the market in their former State or in other States. The "principal constitutional advantage" of such citizen mobility "is to discipline governments." *Id.* at 7; *see also Gregory v. Ashcroft*, 501 U.S. at 458 (structure of federalism "makes government more responsive by putting the States in competition for a mobile citizenry").

In many ways, promoting horizontal competition among the States is a constitutional safeguard comparable to Madison's solution for political factionalism. The solution to factionalism, and the particularly dangerous faction of the "superior force of an interested and overbearing majority," was to have multiple competing factions that would rival and check each other, thereby making more difficult any dangerous combination or exercise of power. Federalist No. 10, *supra*, at 48-49. Ensuring horizontal state competition operates in an analogous manner.

It bears emphasizing that federalism's "numerous advantages," *Gregory*, 501 U.S. at 458, depend on federalism's horizontal safeguards and especially on a principle of territoriality. Little if anything would be left of those advantages if States could erect trade barriers, troll after their own citizens (or for non-citizen taxpayers), export the costs of their experiments, and escape accountability for the results. "[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be

alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 n. 2 (1945). Territorial constraints on state power, coupled with the other foundations of horizontal federalism, thus are critical to the competitive safeguards the Constitution created.

II. The Erosion of Constitutional Safeguards Necessitates Compensatory Doctrines to Preserve the Fundamentals of Horizontal Federalism.

While horizontal federalism is woven deep into the fabric and structure of the Constitution, various elements of such federalism have been eroded by the progressive creep of overly narrow constitutional construction. Justice Thomas has comprehensively detailed the erroneous demise of the Import-Export Clause as a restriction on state taxation of interstate commerce. *Camps*, , 520 U.S. at 621-36.

The Contract Clause, another provision intended to protect interstate trade from state machinations, likewise is much diminished. *See* McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. at 284-85, 293-94. In the view of Hamilton and others, laws interfering with contracts were often directed against citizens of other States. "Laws in violation of private contracts * * * amount to aggressions on the rights of those States whose citizens are injured by them." Federalist No. 7, *supra*, at 40. The Contract Clause and other prohibitions were "needed principally to protect against parochial legislation with effects on out-of-state business that disrupt the flow of

national commerce." McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. at 285. Current jurisprudence, however, has significantly diminished the Contract Clause's application to interference with private contracts and has tended to emphasize interference with a State's own contracts. But that "modern thrust of contracts clause jurisprudence is precisely backwards," and it was state aggression against the citizens of other States and their private contracts in interstate commerce that was the primary object of the Clause. *Id.* at 293-94. As a result of such inverted jurisprudence, the Contract Clause is weakened as a component of horizontal federalism.[4]

Territorial contraints on the States likewise suffered in the wake of expansive notions of state-court

---

[4] The Compact Clause suffered a similar diminishment, with many agreements among States no longer deemed subject to the Clause's congressional approval requirements. *See Multistate Tax Comm'n*, 434 U.S. 452 . Agreements not deemed to threaten vertical federalism were largely excluded from the otherwise straight-forward language of the Clause, and the previously recognized additional role of the Clause in regulating the horizontal relations among States, and restricting collusion against each other, largely faded away. *Compare Id.* at 471 (limiting Compact Clause to agreements or combinations "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.") (citation and internal quotation marks omitted), *with id.* at 495-96 (White, J., dissenting) (noting that "encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority," criticizing the majority for minimizing such concerns, and concluding that the "Compact Clause is an important, intended safeguard within our constitutional structure" that requires Congress to "review interstate agreements that are capable of affecting federal or other States' rights").

personal jurisdiction over out-of-state defendants. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 558-561 (1997) (describing shift from territorial approach of *Pennoyer v. Neff*, under which " 'no State can exercise direct jurisdiction and authority over persons or property outside its territory' " to the "minimum contacts" approach of *International Shoe*, which depended on notions of general fairness rather than state territorial sovereignty) (citations omitted); Greve, THE UPSIDE-DOWN CONSTITUTION 234 (noting erosion, beginning with *International Shoe*, of "[t]raditional territorial rules of jurisdiction" in favor of a rule where "virtually any passing contact with the forum jurisdiction subjects an out-of-state party to suit"). Because the exercise of judicial authority compatible with the Due Process Clause was no longer thought to require the defendant's physical presence in a jurisdiction, States quite literally were able to exert increased extraterritorial authority over out-of-state defendants. *Quill*, 504 U.S. at 307-08.

These and other available examples illustrate the erosion of fundamental assumptions regarding territorial and other limits on state power, and have had the likely unintended consequences of threatening the basic textual and structural foundations of horizontal federalism.

But where past errors created a structural gap, alternative jurisprudence often arose to fill that gap. Such alternatives were sometimes underinclusive, overbroad, or both, relative to the original structure and textual provisions. Even so, they preserved some of the functionality of horizontal federalism.

The dormant Commerce Clause, for example, filled the vacuum created by the removal of textual and structural checks to state interference with interstate commerce and mobility. The theory was less tied to the text and structure, had internal inconsistencies, and smacked of judicial policy making, but it was ultimately necessary to shore up the overall structure and function of the Constitution's horizontal federalism. *Quill*'s operative physical-presence rule is a territorial rule. In that crucial respect, the rule preserves, however awkwardly, a piece of the constitutional architecture. Such background federalism concerns should frame how this Court approaches the case at hand, and the broader role *Quill* plays in that now-precarious architecture.

Amicus recognizes that many of these problems arise from this Court's other binding precedents. But, if the point of the current case is to *question* precedent, we should question the relevant area in its entirety, not merely single out one isolated example of a twisted branch growing from a twisted tree. Allowing narrowly framed individual decisions to push horizontal federalism down the garden path to destruction is neither sensible nor appropriate. A broader perspective is required because otherwise a "federal judiciary that surrenders at the horizontal federalism front has surrendered the Constitution's competitive architecture." Greve, THE UPSIDE-DOWN CONSTITUTION 71.

III. *Quill*'s Territorial Limit on State Authority Is Superior to an Unbounded Economic Nexus Test.

Notwithstanding the flaws in the current *Quill* rule, a strong territorial principle limiting the exercise of a State's power to its own physical territory or citizens is a proper default rule in many areas, but particularly in the area of interstate commerce. The territorial limits imposed by *National Bellas Hess* and preserved by *Quill* are both quite consistent with the result that would derive from faithful application of horizontal federalism provisions and structure. That those cases rely on imperfect theories under the Due Process or dormant Commerce Clauses is no reason to reject their otherwise appropriate rule. Indeed, the challenge to the physical-presence rule depends just as much on the oft-criticized judicial policy making of dormant Commerce Clause analysis as did the cases adopting that rule.[5]

---

[5] Arguments regarding the economic efficiency of tax neutrality, tax harmonization, or tax efficiency are little more than efforts to drag this Court into an inappropriate policy-making role and have no constitutional warrant. Just as efficiency is manifestly not the point of the separation of powers, technical efficiency likewise is not the point of federalism. Vertically, federal-state relations might work much more smoothly if Congress could commandeer States; but it may not. *Printz v. United States*, 521 U.S. 898, 931-32 (1997) (declining to balance efficiency concerns against structural constraints imposed by state sovereignty). In many ways, structural inefficiency is the intended barrier to overreaching, collusion, or the threat of a majority faction. A *de facto* tax collection cartel would undoubtedly promote the "efficient" collection of sales and use taxes. It is nonetheless antithetical to the Constitution's federalism.

A territorial baseline limit for state taxation and regulation of interstate commerce is superior to South Dakota's economic nexus theory of state power. Participation in the national market and interstate commerce is protected from state regulation, not a justification for it. A foundational assumption of the Constitution is that all States and their citizens benefit from interstate commerce, and that citizens of all States are the market for such commerce. To treat access to consumers as a resource belonging to the State and for which the State can demand payment or compel services creates the very economic balkanization the Constitution sought to avoid.

Furthermore, the principle is limitless. If consumption by South Dakotans is a benefit for which the State can charge, then it would apply equally to all manner of goods and services. Legal services provided anywhere in the country to clients from South Dakota would be subject to taxation or regulation as a means of compensating South Dakota for providing legal consumers. Purchases by South Dakotans at brick and mortar stores in other States likewise provide the retailers with the benefits of South Dakota's support for its citizens and hence their purchasing power. The logic of consumers as a resource provided by the State, and for which the State may exact payment, means that an economic nexus is *always* satisfied for interstate commerce.[6]

---

[6] The seeming limits on state authority suggested by South Dakota – significant economic activity, ease of compliance, presence of virtual store-fronts via the internet, apportionment – are ephemeral and unrelated to the legal theory it proposes. If sellers must pay or provide services for the "benefit" of inter-

South Dakota's touting of the virtues of a Congressionally unapproved agreement among a faction of the States to facilitate an interstate sales-tax collection scheme, Pet. Br. 13, thumbs its nose at the text of that Clause and illustrates how its approach undermines horizontal and competitive federalism in favor of state collusion and tax cartelization.[7]

By contrast, physical presence is not a proxy for some inchoate "nexus" that would justify regulation as a policy matter. Pet. Br. 1-2. Rather, it is a structural element of competitive horizontal federalism that cabins state projection of power beyond its borders and allows mobility, exit, and competition to discipline state tendencies to overreach and collude. That structural principle does not ask the courts to balance competing claims to fairness or the economic costs and benefits of varying tax regimes. It simply asks courts to enforce territorial boundaries because that is the constitutional scheme.

---

state access to South Dakota consumers, then the level of activity, ease of collection, and even apportionment are irrelevant, except from a strictly utilitarian perspective. Likewise, basing claimed authority "vitual" storefronts in South Dakota targets a near-universal circumstance that provides no limit on state power, but merely an excuse to regulate interstate commerce.

[7] That the States have *needed* a multilateral sales and use tax agreement demonstrates the national nature of the activity and the broader policy issues involving rates, apportionment, and interstate enforcement that should be addressed, or at least approved, by Congress. And it demonstrates how a faction of the States can combine in a manner potentially adverse to the interests of their sister States or their own citizens by replacing competition with collusion.

Viewed in isolation, the reasoning of *Quill* may seem questionable on its narrow terms but, understood in relation to the prior deviations from constitutional text and structure, the physical-presence rule helps restore the original functioning of the Constitution's horizontal and competitive federalism. While flawed rationales for rules should be corrected where appropriate, it makes no sense, and is affirmatively destructive, to correct only the compensatory doctrine without correcting the underlying errors that drove such compensation.

Acceding to South Dakota's request to eliminate *Quill*, without reanimating the horizontal protections for which it substituted, would invert the architecture of competitive federalism and lead to the very ills the Constitution sought to prevent: state predation on citizens of other States, weakening of exit as a means of escaping state authority, and state collusion against the public and against sister-States. The courts, enforcing a structural default rule, are the proper agents for defending and maintaining the constitutional structure of horizontal federalism.

The lack of Congressional legislation providing the interstate taxing and collection authority South Dakota desires, Pet. Br. 21, 54, is reason to maintain the *Quill* rule, not abandon it. It is *supposed* to be difficult to legislate at the national level, and such difficulty often reflects a lack of consensus. That South Dakota and other States seeking to commandeer outsiders for tax-collection services have failed to win Congress to their cause is the *result* of the political process, not a failure thereof. Such failure to reach a compromise agreeable enough to be enacted shows

exactly the political nature of the issue and exactly why the Court should not step in now. Sometimes the process says "no," or perhaps merely "not yet." This is ultimately a policy debate regarding core interstate commerce, and that debate must be resolved by Congress.

This Court long ago placed the choice for further action on this issue firmly in Congress's hands, and there it should remain. Indeed, businesses have relied on the current default rule for many years when deciding how to structure their activities and investments.[8] Those choices carried both costs and benefits, and either way involve the type of reliance justifying adherence to precedent. Congress is far better suited to determining to what degree such investment decisions and economic interests should be respected or accommodated, and to devising a compromise, if needed, that balances the competing interests involved.

Regardless whether this Court would agree, *ex ante*, with its original placement of the presumption against state commandeering the tax-collection services of those not physically present, it is the choice it made and one Congress can overcome at will. Far from the States having to "beg Congress to devolve its own power back to the States," Pet. Br. 49, there is certainly no *presumption* that States retain the power to compel tax collection on interstate Commerce given that only those "powers *not delegated* to the United

---

[8] Indeed, those businesses have done what horizontal federalism contemplates – used their mobility and confined state jurisdiction to exit States deemed undesireable and limit their physical presence to more favorable or less burdensome States.

States by the Constitution, *nor* prohibited by it to the States" are deemed "reserved" to the States or to the people. U.S. CONST., Amend. X (emphasis added). Even absent a partially preemptive theory of the Commerce Clause, the Constitution itself implicitly recognizes that States have a weaker claim to powers delegated to the United States. That weaker claim supports leaving the default rule as it currently stands.

For precedential purposes, this case is far more akin to a statutory case where Congress retains the power to alter the net result than it is like a constitutional case imposing an unchangeable substantive rule. The only rule imposed here is to determine that if States are to project power beyond their borders, they must do so with the consent or legislative authorization of Congress. That default rule has ample basis in the text and structure of the Constitution, leaves room for Congress to respond to any policy concerns raised by petitioner, and hence does not warrant this Court's reconsideration.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Supreme Court of South Dakota.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

SAM KAZMAN
THEODORE H. FRANK
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW
Washington, DC 20005
(202) 331-2265

Counsel for Amicus Curiae

Dated: April 4, 2018

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

MATT SCHRUERS
Counsel of Record
ALI STERNBURG
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
655 15th Street NW, Suite 410
Washington, DC 20005
(202) 783-0070
mschruers@ccianet.org

Counsel for Amicus Curiae

April 4, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Extraterritorial Taxation Would Burden Internet Services, and the Startups and Small Businesses That Rely on Them 2

A. The Digital Economy Has Thrived Under a Limited Regulatory Framework 2

B. Online Tools That Facilitate Tax Compliance Do Not Fully Resolve the Burden on Small Businesses Using the Internet to Operate Nationally 6

II. Departing from Precedent Could Have a Significant International Impact, and Encourage Protectionist Policies Abroad 9

III. E-Commerce Retailers Do Not Live a Tax-Free Existence 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, *cert. denied*, 137 S. Ct. 593 (2016) 11

Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) 5, 6

National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967) 4, 5

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

MISCELLANEOUS

Alan Rappeport et al., *Europe's Planned Digital Tax Heightens Tensions With U.S.*, N.Y. Times, Mar. 19, 2018 10

BEA, *Initial Estimates Show Digital Economy Accounted for 6.5 Percent of GDP in 2016*, BEA Blog, Mar. 15, 2018 3

Daniel T. Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. Rev. 1423 (2010) 3, 6

David Dean et al., *The Internet Economy in the G-20: The $4.2 Trillion Growth Opportunity* (Boston Consulting Group, Mar. 2012) 3

eBay, *2015 U.S. Small Business Global Growth Report* (2015) 4

TABLE OF AUTHORITIES – Continued

Page

eBay, *Small Online Business Growth Report: Towards an Inclusive Global Economy* (Summer 2017) 5

GAO, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (Nov. 2017) 7, 8

H. Res. 95, 112th Cong. (2011) 11

Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – An Economic Analysis* (Mar. 2018) 8

James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity* (McKinsey Global Institute, Oct. 2011) 4

Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax* (True Simplification of Taxation Coalition 2013) 7

Mark Walsh, *The future of e-commerce: bricks and mortar*, The Guardian, Jan. 30, 2016 13

Matthew C. Le Merle et al., *The Impact of Internet Regulation on Investment* (Fifth Era 2016) 3

Matthias Bauer, *Digital Companies and Their Fair Share of Taxes: Myths and Misconceptions* (ECIPE 2018) 12

TABLE OF AUTHORITIES – Continued

Page

Matthieu Pélissié du Rausas et al., *Internet matters: The Net's sweeping impact on growth, jobs, and prosperity* (McKinsey Global Institute, May 2011) 4

Press Release, Secretary Mnuchin Statement On OECD's Digital Economy Taxation Report, Mar. 16, 2018 10

Press Release, Wyden Statement on Republican Efforts to Include Marketplace Fairness Act in Spending Bill, Mar. 8, 2018 10

Retail Sales Tax Compliance Costs: A National Estimate (PriceWaterhouseCoopers 2006) 7

Should States Require Online Retailers To Collect Sales Tax?, Wall St. J., Nov. 15, 2011 7

United States Census Bureau, Quarterly Summary of State and Local Government Tax Revenue for 2017: Q4, Released Mar. 20, 2018 13

United States Trade Representative, Fact Sheet, Key Barriers to Digital Trade (Mar. 2017) 10

INTEREST OF *AMICUS CURIAE*

The Computer & Communications Industry Association (CCIA) represents over twenty companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than $540 billion in annual revenues.[1] For more than 45 years, CCIA has promoted open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries. CCIA has long been concerned about negative implications for online commerce if the relationship between taxes and physical presence is broken. Maintaining the *Quill* standard, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is essential to online retailers across the country, and the many Internet services they rely on, including CCIA members.

SUMMARY OF ARGUMENT

Departing from established Supreme Court precedent to allow states to engage in extraterritorial taxation would burden Internet services, and the startups and small businesses that rely on them to engage in

[1] No counsel for any party authored this brief in whole or in part and no entity or person made any monetary contribution toward the preparation or submission of this brief. On January 31, 2018 and February 5, 2018, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs. A list of CCIA members is available at https://www.ccianet.org/members.

commerce. The digital economy has thrived under a limited regulatory framework. Changing that in this case would have substantial ramifications for U.S. industry beyond taxation. Despite claims to the contrary, online tools that facilitate regulatory compliance do not fully resolve the burden on small businesses using the Internet to operate nationally that a change in U.S. tax policy would create. Departing from precedent could also have a significant international impact, and encourage protectionist policies abroad. E-commerce retailers do not live a tax-free existence, as they already collect and pay sales tax anywhere they have a physical presence, as well as use taxes in many other jurisdictions. The Court should reject Petitioner's calls to overturn decades of precedent, in contravention of *stare decisis*, and uphold the constitutional principles embodied in *Quill*.

ARGUMENT

I. Extraterritorial Taxation Would Burden Internet Services, and the Startups and Small Businesses That Rely on Them.

A. The Digital Economy Has Thrived Under a Limited Regulatory Framework.

Internet commerce, including online retail, has prospered in the U.S. under existing law. Researchers forecast that this growth will continue, provided these innovation-friendly conditions persist. Estimates released in March 2018 from the Bureau of Economic

Analysis found that from 2006 to 2016, the digital economy grew at an average rate of 5.6% per year, outpacing overall U.S. economic growth of 1.5% per year, with the digital economy accounting for 6.5% of U.S. GDP in 2016.[2] In developed markets, the Internet economy has been projected to be one of the fastest growing sectors, with estimates anticipating that the growth rate will be "far outpacing just about every traditional economic sector, producing both wealth and jobs."[3] In the United States, this growth has been possible under existing regulatory regimes, and changes to taxation rules could have a significant impact on investment and innovation. A 2016 study found that 97% of U.S. investors would be uncomfortable investing in Internet businesses if there were to be tax rules which would make Internet businesses operating overseas subject to double taxation.[4] The Court's bright-line rule on taxation under *Quill* remains important for online retailers.[5]

---

[2] BEA, *Initial Estimates Show Digital Economy Accounted for 6.5 Percent of GDP in 2016*, BEA Blog, Mar. 15, 2018, https://blog.bea.gov/2018/03/15/initial-estimates-show-digital-economy-accounted-for-6-5-percent-of-gdp-in-2016/.

[3] David Dean et al., *The Internet Economy in the G-20: The $4.2 Trillion Growth Opportunity* (Boston Consulting Group, Mar. 2012), http://img-stg.bcg.com/The_Internet_Economy_G-20_tcm9-106842.pdf, at 6.

[4] Matthew C. Le Merle et al., *The Impact of Internet Regulation on Investment* (Fifth Era 2016), http://www.fifthera.com/perspectives-blog/2016/1/7/report-the-impact-of-internet-regulations-on-investment, at 91.

[5] Daniel T. Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. Rev.

The Internet has also increased exports, particularly for small to medium-sized enterprises (SMEs). SMEs that heavily utilize the Internet bring in more than double the amount of revenue through exports as a percentage of total sales than those that rarely use the Internet,[6] with 75% of the positive impact of the Internet accruing to traditional industries through efficiency gains and expanded markets.[7] A 2015 study found that 95% of U.S. SMEs that sell products on eBay's online platform exported to foreign markets, in contrast with Census Bureau data finding that less than 5% of businesses in the U.S. export.[8] Data from

---

1423, 1446-47 (2010) ("[T]he rationales articulated by the Supreme Court in *Quill* for maintaining such a bright-line rule apply with equal force to today's Internet retailers. It is thus crucial either for the Supreme Court to reaffirm that its bright-line rule, first articulated in *Bellas Hess* and reaffirmed in *Quill*, remains good law and applies to Internet retailers, or for Congress to pass uniform, national legislation regulating taxation of Internet retailers. Without such assurance, the area of Internet taxation will remain complicated and unclear.").

[6] James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity* (McKinsey Global Institute, Oct. 2011), https://www.mckinsey.com/~/media/McKinsey/Industries/High%20Tech/Our%20Insights/The%20great%20transformer/MGI_Impact_of_Internet_on_economic_growth.ashx, at 6.

[7] Matthieu Pélissié du Rausas et al., *Internet matters: The Net's sweeping impact on growth, jobs, and prosperity* (McKinsey Global Institute, May 2011), https://www.mckinsey.com/~/media/McKinsey/Industries/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_full_report.ashx.

[8] eBay, *2015 U.S. Small Business Global Growth Report* (2015), https://www.ebaymainstreet.com/sites/default/files/2015-us-small-biz-global-growth-report_0.pdf, at 6.

2017 found that the export rates of "micro, small and medium-sized enterprises" engaged in technology-enabled commerce exceeded traditional businesses by at least fourfold.[9] Inviting taxation of these small businesses abroad could have dramatic repercussions on U.S. exports.

While the Internet may be revolutionary in many ways, its existence does not change basic principles about the scope of taxation and the requirement for a physical presence, nor does it nullify precedents preceding the Internet. The Internet is the latest technological development in facilitating commerce, but the same principles that first applied to catalog mail orders and later orders via telephone, now apply to orders via websites.

Just as the Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), followed *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), providing businesses and consumers with a bright-line, physical-presence requirement,[10] the Court should do the same in this case. Petitioner has not demonstrated a "special justification," *see Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (citation omitted), to justify the extraordinary act of abandoning precedent to change the requirement for a physical presence discussed in *Bellas Hess* and upheld in

---

[9] eBay, *Small Online Business Growth Report: Towards an Inclusive Global Economy* (Summer 2017), https://www.ebaymainstreet.com/sites/default/files/ebay_global-report_0.pdf, at 9.

[10] *Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992).

Quill. Similarly, the Court's clear interpretation of the Commerce Clause and the due process considerations in these cases remains sound.

Stare decisis is "a foundation stone of the rule of law." *Kimble*, 135 S. Ct. at 2409 (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). As Justice Scalia noted in *Quill*, *stare decisis* has a "special force" where Congress "remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). In the more than two dozen years since *Quill*, Congress has not chosen to overturn the ruling, and so the Court's dormant Commerce Clause interpretation remains undisturbed.[11]

B. Online Tools That Facilitate Tax Compliance Do Not Fully Resolve the Burden on Small Businesses Using the Internet to Operate Nationally.

While software tools exist to facilitate tax compliance, acquiring a software program does not alone accomplish compliance. Ultimately, small businesses

---

[11] Daniel T. Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. Rev. 1423, 1445 (2010) ("[T]he *Quill* Court itself believed that interstate taxation of mail-order companies (or Internet retailers) was a matter better resolved in the halls of Congress. Under dormant Commerce Clause jurisprudence, Congress always remains free to disagree with the Court and 'overrule' cases by passing national legislation.").

could spend, according to a 2013 study, as much as $80,000 to $290,000 for setup and integration costs, with annual costs of $57,500 to $260,000 for maintenance, updates, audits and service fees,[12] to document what may be "only 0.5% of total state and local tax revenue"[13] – much of which is already being collected.[14]

Proponents of abandoning the *Quill* precedent have cited fairness as a rationale for rejecting the physical presence rule. Even assuming that this is the proper yardstick, regulations are only fair if they apply to all firms equally. Yet abandoning the physical presence requirement would put online retailers in a very different position than brick-and-mortar stores, compelled to procure services or software solutions to manage tax and regulatory compliance for users in 45 states and the District of Columbia, and thousands of different tax regimes. Brick-and-mortar retail stores,

---

[12] Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax* (True Simplification of Taxation Coalition 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf, at 2; *see also Retail Sales Tax Compliance Costs: A National Estimate* (PriceWaterhouseCoopers 2006), http://netchoice.org/wp-content/uploads/cost-of-collection-study-sstp.pdf, at E-3, E-4 (listing additional compliance costs).

[13] *Should States Require Online Retailers To Collect Sales Tax?*, Wall St. J., Nov. 15, 2011, https://www.wsj.com/articles/SB10001424052970204528204577007511298359048.

[14] GAO, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (Nov. 2017), https://www.gao.gov/assets/690/688437.pdf, at 41-42 (estimating high collection rates for online retailers: 78-86% overall, and 87-96% for the top 100 online retailers).

on the other hand, must comply only with the taxing jurisdiction where they are located, regardless of where their customers may travel from. It is hardly self evident that fairness dictates that an online merchant serving ten customers spread across ten jurisdictions should have ten times the compliance obligations as a brick-and-mortar merchant with ten customers in one jurisdiction.

A recent GAO report discussed additional costs for businesses if they were to be regulated by additional states and tax jurisdictions – including the cost of having to understand new compliance obligations in various states and tax jurisdictions.[15] Compliance costs could also limit competition by serving as a barrier to entry for small businesses.[16]

---

[15] *Id.* at 22 ("The related liability cost increases along with an increase in exposure to more tax jurisdictions. These costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions.").

[16] Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – An Economic Analysis* (Mar. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948, at 24 ("Needless to say, these compliance costs alone may be absolutely prohibitive for a small retailing enterprise that is just about to launch its operations. Existing small remote retailers may consequently decide to exit the market altogether, or limit themselves to serving only very specific tax jurisdictions.").

II. Departing from Precedent Could Have a Significant International Impact, and Encourage Protectionist Policies Abroad.

The impact of this case will be felt well beyond the realm of taxation, having broad ramifications for American companies globally. Not only would extraterritorial taxation have a significant impact on Internet companies, it may invite policymakers to impose other regulations of interstate commerce on online businesses in the guise of taxation, across the country and around the world.

The magnitude of businesses that would be burdened by a change in the established rule is likely to go far beyond online businesses. This impact will be felt on small businesses in particular, which rely on the Internet to engage in commerce. Maintaining an online presence is important for small businesses of a wide variety of industries to engage in commerce. Merely operating with a web presence, whether self-hosted or on an online platform like WordPress, Tumblr, or Etsy, should not expose a business to regulation in every jurisdiction where that presence is visible.

This is particularly salient as changes in U.S. policy may have international ramifications. U.S. businesses, especially small to medium-sized enterprises, face a rising tide of protectionism abroad, as legislatures implement regulations which disproportionately

impact U.S. companies.[17] State and localities' efforts to tax e-commerce businesses could encourage international regulators to engage in similar practices. Indeed, the European Commission is considering a new revenue tax on digital companies,[18] about which the U.S. Treasury Secretary recently expressed concern.[19]

Congress is best positioned to address the international ramifications of any potential policy changes, and has been engaged on issues of online taxation. In March 2018, Senator Ron Wyden, Ranking Member on the Senate Committee on Finance, noted that Congress recently enacted legislation, making the Internet Tax Freedom Act permanent just two years ago.[20]

---

[17] *See* United States Trade Representative, Fact Sheet, Key Barriers to Digital Trade (Mar. 2017), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/march/key-barriers-digital-trade ("[I]n recent years, many governments have sought to control digital trade in blunt and disruptive ways. Some of these government actions are explicitly protectionist; others have imposed unnecessary burdens on digital trade while seeking to address legitimate public policy goals.").

[18] Alan Rappeport et al., *Europe's Planned Digital Tax Heightens Tensions With U.S.*, N.Y. Times, Mar. 19, 2018, https://www.nytimes.com/2018/03/19/us/politics/europe-digital-tax-trade.html.

[19] Press Release, Secretary Mnuchin Statement On OECD's Digital Economy Taxation Report, Mar. 16, 2018, https://home.treasury.gov/news/press-releases/sm0316 ("The U.S. firmly opposes proposals by any country to single out digital companies. Some of these companies are among the greatest contributors to U.S. job creation and economic growth. Imposing new and redundant tax burdens would inhibit growth and ultimately harm workers and consumers.").

[20] Press Release, Wyden Statement on Republican Efforts to Include Marketplace Fairness Act in Spending Bill, Mar. 8, 2018,

Seventeen members of Congress introduced a resolution several years ago against "grant[ing] State governments the authority to impose any new burdensome or unfair tax collecting requirements on small online businesses and entrepreneurs, which would ultimately hurt the economy and consumers in the United States."[21] This is hardly evidence of Congressional inactivity.

In *Quill*, this Court wrote that "the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions." *Quill*, 504 U.S. at 318. As then-Judge Gorsuch noted, "judges distinguish themselves from politicians by the oath they take to apply the law as it is, not to reshape the law as they wish it to be." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147-48 (Gorsuch, J.), *cert. denied*, 137 S. Ct. 593 (2016).

III. E-Commerce Retailers Do Not Live a Tax-Free Existence.

Any change to tax law and policy that would affect companies across the U.S. economy should be based on empirical evidence. The Court in *Quill* reiterated that

---

https://www.finance.senate.gov/ranking-members-news/wyden-statement-on-republican-efforts-to-include-marketplace-fairness-act-in-spending-bill-.

[21] H. Res. 95, 112th Cong. (2011).

"the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312. Research published earlier this year by the European Centre for International Political Economy (ECIPE) found that digital companies in fact pay a higher effective corporate tax rate than traditional companies. Digital companies have real effective corporate tax rates many times higher than the European Commission's estimated 8.9%, paying in actuality average rates between 26.8% and 29.4%.[22]

The notion that Internet businesses are untaxed is simply wrong. U.S. companies, including online retailers, collect sales tax in every state where they have a physical presence. Buyers are compelled to pay tax in the form of use tax and sales tax. Remedying difficulties associated with collecting these taxes does not require overturning decades of Supreme Court precedent interpreting the Commerce Clause. In fact, states' lack of investment in taxpayer education on consumer use tax collection may suggest that the amount which states stand to collect may be inconsequential. Furthermore, states are hardly struggling to collect taxes, and saw "significant increases" in tax revenue in the

---

[22] Matthias Bauer, *Digital Companies and Their Fair Share of Taxes: Myths and Misconceptions* (ECIPE 2018), http://ecipe.org//app/uploads/2018/02/ECI_18_OccasionalPaper_Taxing_3_2018_LY08.pdf, at 8.

fourth quarter of 2017, according to recently-released data from the U.S. Census Bureau.[23]

Finally, Internet companies are not shielded from state taxation if they open brick-and-mortar stores. Online retailers open brick-and-mortar locations with increasing regularity.[24] In doing so, and availing themselves of the services and infrastructure of a locality, these companies would clearly be considered to have a physical presence in those locations, and thus would be subject to taxation by the jurisdictions in which their stores exist.

---

[23] United States Census Bureau, Quarterly Summary of State and Local Government Tax Revenue for 2017: Q4, Released Mar. 20, 2018, https://www.census.gov/content/dam/Census/library/publications/2017/econ/g17-qtax4.pdf.

[24] Mark Walsh, *The future of e-commerce: bricks and mortar*, The Guardian, Jan. 30, 2016, https://www.theguardian.com/business/2016/jan/30/future-of-e-commerce-bricks-and-mortar.

CONCLUSION

For the foregoing reasons, the Court should reject Petitioner's calls to overturn decades of precedent, in contravention of *stare decisis*, and uphold the constitutional principles embodied in *Quill*.

Respectfully submitted,

MATT SCHRUERS
Counsel of Record
ALI STERNBURG
COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION
655 15th Street NW, Suite 410
Washington, DC 20005
(202) 783-0070
mschruers@ccianet.org

Counsel for Amicus Curiae

April 4, 2018

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF CHRIS COX, FORMER MEMBER OF CONGRESS, JAMES S. GILMORE III, FORMER GOVERNOR OF VIRGINIA, AND NETCHOICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CARL SZABO
Counsel of Record
GENERAL COUNSEL, NETCHOICE
1401 K St., N.W., Suite 502
Washington, DC 20005
(202) 420-7498
czsabo@netchoice.org

Counsel for Amici Curiae

April 4, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. SOUTH DAKOTA'S LAW VIOLATES THE COMMERCE CLAUSE BY VIRTUE OF THE INTERNET TAX FREEDOM ACT AND THE FEDERAL POLICY TOWARD INTERNET COMMERCE IT ESTABLISHED	6
A. Congress Has Recognized the Unique Vulnerability of Internet Commerce to Tax Compliance Burdens from Multiple States	10
B. State Sales Taxes Can Violate the ITFA's Ban on Burdensome Taxes	11
C. The ITFA Applies to the Taxes on Internet Transactions That Are the Subject of South Dakota's Law	13
D. South Dakota's Preferred National Policy Is Directly at Odds with the ITFA's Policy Against Multiple and Discriminatory Taxation	16
E. The Solicitor General's Proposal to Reinterpret *Quill* to Discriminate Against Internet Commerce Violates the ITFA	20

TABLE OF CONTENTS—Continued

Page

II. SOUTH DAKOTA'S LAW VIOLATES THE DUE PROCESS CLAUSE 21

III. SOUTH DAKOTA'S PETITION IS NOT A LEGAL BUT A POLICY ARGUMENT WHICH LACKS EVIDENTIARY BASIS. 27

A. This Action Provides No Factual Record to Support South Dakota's Alternative National Policy for Interstate Commerce 28

B. South Dakota's Policy Arguments Are Flawed and Unproven 29

C. Since *Quill* and *DMA II*, 'Changed Circumstances' Have Continued Changing, With Local Facilities Now Key to Retail e-Commerce..... 32

IV. CONGRESS, NOT INDIVIDUAL STATES OR THE COURTS, IS BEST SUITED TO DEVISE A SOLUTION TO THESE COMPLEX MULTISTATE TAX POLICY ISSUES 35

CONCLUSION 37

TABLE OF AUTHORITIES

CASES Page(s)

Bristol-Myers Squibb Co. v. *Superior Court*, 137 S. Ct. 1773 (2017) 27

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462 (1985) 23, 24

Coit Indep. Joint Venture v. *Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989) 37

Direct Mktg. Ass'n v. *Brohl*, 135 S. Ct. 1124 (2015) 32, 34

Direct Mktg. Ass'n v. *Brohl*, 814 F.3d 1129 (10th Cir. 2016) 15, 32

Edgar v. *MITE Corp.*, 457 U.S. 624 (1982) 15

Int'l Shoe Co. v. *Washington*, 326 U. S. 310 (1945) 8, 22

MeadWestvaco Corp. v. *Ill. Dep't of Revenue*, 553 U.S. 16 (2008) 21

Quill v. *North Dakota*, 504 U.S. 298 (1992) ..... *passim*

State v. *Wayfair Inc.*, 901 N.W.2d 754 (S.D. 2017) 29

Tenn. Valley Auth. v. *Hill*, 437 U.S. 153 (1978) 36

Walden v. *Fiore*, 134 S. Ct. 1115 (2014) 23

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 23, 24

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page(s)

U.S. Const. art. I 4, 15, 37

U.S. Const. art. I, § 8, cl. 3 ..... *passim*

U.S. Const. art. VI, cl. 2 15-16

U.S. Const. amend. XIV ..... *passim*

STATUTES

Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) ..... *passim*

§ 1101(a) 11

§ 1102(g)(2)(D) 17

§ 1105(2) 15

§ 1105(2)(A) 3, 12

§ 1105(2)(A)(i) 11, 14, 20

§ 1105(2)(A)(ii) 20

§ 1105(2)(A)(iii) 11, 15, 20

§ 1105(2)(B) 3

§ 1105(2)(B)(i) 12, 15, 21

Pub. L. No. 114–125, § 922(a), 130 Stat. 281 (Feb. 24, 2016), 47 U.S.C. § 151 ..... *passim*

S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016):

§ 1 24

§ 1(2) 22

§ 8 ..... 28, 29

TABLE OF AUTHORITIES—Continued

Page(s)

§ 8(1) 29

§ 8(6) 29

S.D. Codified L. § 10-45 25

S.D. Codified L. § 10-52 25

COURT FILINGS

Oral Argument Transcript, *United States* v. *Microsoft*, No. 17-2 (Feb. 27, 2018), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-2_9pl4.pdf 6

LEGISLATIVE MATERIALS

144 Cong. Rec. E1288-03 (June 23, 1998) ... 12, 13

H.R. 1054, 105th Cong. (1st Sess. 1997) 7

H.R. 3849, 105th Cong. (2d Sess. 1998)..... 7

H.R. 4105, 105th Cong. (2d Sess. 1998), Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/house-bill/4105/all-actions..... 7

H.R. 3086, 113th Cong. (2d Sess. 2014)..... 9

H.R. Rep. No. 113-510 (2014)..... 9

S. 442, 105th Cong. (2d Sess. 1998), Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/senate-bill/442/actions 7, 9, 10

S. Rep. No. 105-184 (1998)..... 9, 10, 12

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

Amazon Accounts for 43% of US Online Retail Sales, BUS. INSIDER (Feb. 3, 2017), *available at* http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2 34

Andrew Nehring, *Internet Sales Taxes: To Kill or Not to Kill Quill?*, WASH. EXAMINER (Apr. 7, 2017, 3:23 PM), *available at* https://www.washingtonexaminer.com/internet-sales-taxes-to-kill-or-not-to-kill-quill/article/2619704 14

Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WOMEN'S WEAR DAILY (Apr. 7, 2017), *available at* http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796 33

Barbara Thau, *Five Signs That Stores (Not E-Commerce) Are The Future Of Retail*, FORBES (June 27, 2017), *available at* https://www.forbes.com/sites/barbarathau/2017/06/27/five-signs-that-stores-not-online-shopping-are-the-future-of-retail/#b1b1ddb4641c 34

Framework for Global Electronic Commerce, THE WHITE HOUSE (1998) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – An Economic Analysis* (Mar. 15, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948 ..... 32, 33, 34, 35

Jennifer Kaplan & Matthew Boyle, *Amazon Cuts Whole Foods Prices as Much as 43% on First Day*, BLOOMBERG TECH. (Aug. 28, 2017), *available at* https://www.bloomberg.com/news/articles/2017-08-28/amazon-cuts-prices-at-whole-foods-as-much-as-50-on-first-day 33

Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUST (Sept. 2013), *available at* http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf 29

Report to Congress of the Advisory Commission on Electronic Commerce (2000), *available at* https://govinfo.library.unt.edu/ecommerce/acec_report.pdf ..... *passim*

Richard Wolf, *Supreme Court will decide if online retailers must collect sales tax*, USA TODAY (Jan. 12, 2018), *available at* https://www.usatoday.com/story/news/politics/2018/01/12/supreme-court-decide-if-online-retailers-must-collect-sales-tax/1021423001 33

TABLE OF AUTHORITIES—Continued

Page(s)

Ryan Derousseau, *You Can Now Return Amazon Purchases at a Real Store*, TIME (Oct. 23, 2017) 34

Sales Tax, Avalara Resource Center, https:// www.avalara.com/learn/sales-tax (last visited Apr. 2, 2018) 19

SALES TAXES: STATES COULD GAIN FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, GAO REPORT (Nov. 2017)..... 34

S.D. Bureau of Finance & Management, Economic and Revenue Update (Dec. 2017), *available at* https://bfm.sd.gov/econ/current.pdf 31

S.D. Bureau of Finance & Management, General Fund Condition Statement (2017), *available at* https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf..... 30

S.D. Dep't of Revenue, Annual Reports (2015 and 2016), *available at* http://dor.sd.gov/Publications/Annual_Reports/ 30

S.D. Dep't of Revenue, Sales and Use Tax Guide (July 2017)..... 13

South Dakota GDP, DEP'T OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ (last visited Apr. 2, 2018) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Terence P. Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, CNSNEWS.COM (Mar. 22, 2018), *available at* https://www.cnsnews.com/news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hit-records-2017 31

What Percentage of Small Businesses Have Websites?, SMALLBUSINESS.COM (Mar. 18, 2017), *available at* https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-web sites/..... 32

INTEREST OF *AMICI CURIAE*[1]

Chris Cox is a former United States Representative (R-CA), who with current United States Senator Ron Wyden (D-OR) is the co-author of the Internet Tax Freedom Act ("ITFA").[2] The Act prohibits specific kinds of taxes affecting Internet commerce. It also established a process by which Congress and the States can address the subject of State efforts to impose sales and use tax collection responsibilities on out-of-state vendors. Mr. Cox has for many years been a leading participant in that ongoing process and in congressional deliberations on these issues. He is thus able to bring to the attention of the Court relevant matters not already addressed by the parties.

James S. Gilmore III is a former Governor and Attorney General of Virginia. He also served as Chairman of the Advisory Commission on Electronic Commerce, created by the ITFA. In this capacity he led the discussions and debates that resulted in recommendations to the Congress for an approach to State taxation of Internet commerce that would achieve the congressionally mandated goals of simplicity, efficiency, and fairness. As a former Governor, he is sympathetic to the regulatory and taxing prerogatives and needs of the States.

NetChoice is a national trade association of e-commerce businesses and online consumers who

---

[1] This brief is filed pursuant to the parties' blanket consent. No party or counsel for a party has authored or contributed monetarily to the preparation or submission of any portion of this brief.

[2] Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note)).

share the goal of promoting convenience, choice, and commerce on the Internet. For over a decade, NetChoice has participated in the deliberations of the Streamlined Sales Tax Governing Board, of which 23 states are currently members, with a view to minimizing burdens on small business, making the Internet more accessible, and promoting economic growth through e-commerce.

SUMMARY OF ARGUMENT

South Dakota has enacted a law that it acknowledges violates this Court's precedents. Its transparent purpose was to provoke litigation that, it hopes, will be rewarded by the Court's reversal of its prior rulings. But the law that has thus far been held unconstitutional under the Commerce Clause violates both the letter and the policy of the ITFA as well. It does so in ways that should impact this Court's analysis under both the Commerce Clause and the Due Process Clause.

This Court's decision in *Quill* v. *North Dakota*[3] rested upon the Court's dormant Commerce Clause jurisprudence, under which the Court assesses the constitutionality of state regulation of interstate commerce "in the absence of any action by Congress."[4] The present case, however, is not of this type, because Congress has not been dormant in this area.

Indeed, Congress repeatedly has expressed its view of the tax issues in this case. Exercising its authority over interstate commerce, Congress enacted the ITFA in 1998, after this Court's decision in *Quill*. On eight subsequent occasions Congress revisited the law and

---

[3] 504 U.S. 298 (1992).

[4] *Id.* at 309.

reaffirmed its policy. Most recently, Congress made the law permanent in 2016.

The principal purpose of the ITFA is to prevent commerce over the Internet—uniquely interstate because of its decentralized, packet-switched architecture—from being subjected to burdensome taxation across thousands of state and local taxing jurisdictions. To this end, the ITFA flatly prohibits state and local governments from establishing unique tax rules for Internet transactions.[5]

South Dakota's law violates the ITFA by imposing burdens on Internet transactions that retailers using other channels are not required to bear. South Dakota's law also violates the ITFA by assigning the tax collection burden to a different person than in the case of interstate transactions accomplished through other means. And it does so based solely on the fact that consumers in South Dakota access a remote seller's out-of-state computer servers. Each of these features of the South Dakota law violates the explicit language of the ITFA. The Solicitor General's suggestion that the Court can simply limit *Quill* to catalog sellers and discriminate for Commerce Clause purposes between catalog sellers and Internet commerce also would violate the ITFA.[6]

South Dakota also would have this Court ignore the explicit policy aims of the ITFA, by substituting its own preferred national policy for that established by Congress. If this Court were to follow South Dakota and its *amici*'s recommendation, it would, in effect, expand the dormant Commerce Clause to an area

---

[5] See ITFA §§ 1105(2)(A)-(B).

[6] See U.S. Br. 24-25.

where Congress has exercised its Article I power, in order to overrule that very exercise. The result of overturning *Quill* would be to force small Internet sellers to comply with the conflicting rules of thousands of differentiated taxing sub-jurisdictions. The non-Internet merchant would have no such burden. This is precisely the result ITFA sought to avoid as a matter of national policy.

South Dakota makes not legal but policy arguments in urging reversal of established case law. But because this lawsuit is a contrivance, the Court has been deprived of any rigorous fact finding to test the validity of South Dakota's policy claims. As a result, South Dakota's policy-based arguments have not been subjected to challenge and scrutiny in the lower courts. Yet many of these claims, including the State's assertions that its sales tax revenues are declining, are provably false. See Part III.C, *infra*.

Most consequentially, the absence of any meaningful factual record has deprived the Court of a reliable basis for ruling that the South Dakota law is facially consistent with the requirements of the Due Process and Commerce Clauses—the former concerned with fairness for the individual retailer, and the latter with the effects of State regulation on the national economy.[7]

In *Quill*, this Court confronted a corporation that spent heavily to direct thousands of catalogs into North Dakota, rather than passively receive orders from that State. Minimum contacts were thus established under Due Process. By contrast, an individual who merely maintains a website does not purposely direct his or her activity to any specific foreign State. The Internet does not allow one to avoid a particular

---

[7] *Quill*, 504 U.S. at 312.

jurisdiction. A website established to reach customers around the corner necessarily also reaches customers around the Nation. Passively receiving orders that arise merely from maintaining a website is very different from deliberately aiming "a deluge" of catalogs or sales representatives at a particular State.[8]

The South Dakota statute's extremely low minimum delivery thresholds will inescapably violate the minimum contacts requirements which neither this Court nor Congress can waive. See Part II, *infra*. This is especially so since a Court decision to overturn *Quill* would have immediate national application. The 40 State *amici* have clearly signaled they intend to follow South Dakota's lead—quickly subjecting an online retailer in a single State to *in personam* jurisdiction everywhere. This would impose wildly disproportionate burdens on a small Internet retailer with a single location, as compared to a non-Internet retailer with a single location, shredding the Due Process guarantee of fundamental fairness and driving out many current competitors to the established Internet giants. The resulting injury to the national economy also would violate the Commerce Clause. The South Dakota statute is thus doubly constitutionally infirm.

It is understandable that States seek to expand their revenues. It is equally understandable that Congress seeks to protect individuals from unfair tax and regulatory demands by foreign States. Balancing these competing interests is possible but requires nuance. Overruling *Quill* undoubtedly will create a host of new policy problems: *e.g.*, extraterritorial taxation and regulation of non-citizens who cannot vote

---

[8] *Id.* at 308.

and do not consume the State's services, disproportionate burdens on Internet commerce, and irreconcilable conflict among State and local compliance regimes. Nuanced legislation and a thorough exploration of the facts and the economics is needed to avoid these unintended consequences. As Justice Ginsburg has recently observed, "there is nothing nuanced" about what courts do by deciding a case one way or the other, while Congress "can write a statute that takes account of various interests."[9]

Accordingly, this Court should reject Petitioner's invitation to enter the policymaking arena—especially in a manner that would upset settled expectations, violate clear congressional policy, and countenance violations of both the Commerce Clause and Due Process.

ARGUMENT

I. SOUTH DAKOTA'S LAW VIOLATES THE COMMERCE CLAUSE BY VIRTUE OF THE INTERNET TAX FREEDOM ACT AND THE FEDERAL POLICY TOWARD INTERNET COMMERCE IT ESTABLISHED.

Congress has spoken directly and repeatedly to the tax issues in this case, and has done so largely in reliance on the core holding of *Quill*—that, consistent with the Commerce Clause, a State should not impose tax collection obligations on remote sellers with no physical nexus to the State. It did so first in 1998, when it enacted the Internet Tax Freedom Act ("ITFA"),

---

[9] Oral Argument Transcript, *United States* v. *Microsoft*, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-2_9pl4.pdf, at 6.

and again in 2001, 2004, 2007, 2014, and 2016, ultimately making the ITFA permanent in that year.

When the ITFA was signed into law by President Bill Clinton on October 21, 1998, it was a rare bipartisan accomplishment. It passed the U.S. House by unanimous consent in July 1998, H.R. 4105, 105th Cong. (1998), while the Senate companion bill, S. 442, 105th Cong. (2d Sess. 1998), passed the U.S. Senate by a vote of 96-2 in October 1998. At the conclusion of the 105th Congress, many observers viewed the ITFA as historic and one of Congress's most important and substantive accomplishments.[10]

The law, however, was never popular with State governments. Only four Governors endorsed it. The National League of Cities, the National Governors' Association, the U.S. Conference of Mayors, the National Association of Counties, and the National Conference of State Legislatures all worked against it, because all

---

[10] On March 13, 1997, Rep. Cox introduced H.R. 1054, titled the "Internet Tax Freedom Act," in the U.S. House, and Sen. Wyden introduced it in the Senate, where it was designated S. 442. Subsequently, Rep. Cox introduced two updated versions: H.R. 3849, in May 1998; and H.R. 4105, in June 1998. H.R. 4105 passed the U.S. House by unanimous consent in July 1998, see H.R. 4105 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/house-bill/4105/all-actions, while the Senate companion bill, S. 442, passed the U.S. Senate by a vote of 96-2 in October 1998, S.442 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/senate-bill/442/actions. The ITFA was then added to the omnibus appropriations bill for that year, and signed into law by President Clinton as Titles XI and XII of Pub. L. No. 105-277, on October 21, 1998. It is codified as a note to 47 U.S.C. § 151. The ITFA as originally enacted imposed a moratorium on discriminatory taxation of electronic commerce. The law was subsequently extended on multiple occasions by Congress, and in February 2016, it was made permanent. Pub. L. No. 114-125, § 992(a) (Feb. 24, 2016).

wanted to lay claim to their piece of the Internet. Cities had taxed and regulated cable TV as if it were a public utility, and they saw the Internet as no different. But in Congress and the White House, the uniquely interstate—indeed, global—characteristics of the Internet featured more prominently in policy making. Indeed, the White House pointed to "the Internet's special characteristics" as reason for its concern "about possible moves by state and local tax authorities to target electronic commerce."[11]

The policy arguments made by South Dakota in this case are the same arguments it and other States unsuccessfully made to Congress during the recurring debates over the ITFA. South Dakota and its sister States, along with counties, municipalities, and territorial governments, claim, now as then, that they will exert only a light touch when it comes to regulatory burden; that even though there are over 12,000 taxing jurisdictions with conflicting rules, the collective compliance burden will not abuse "traditional notions of fair play and substantial justice;"[12] and that it is their prerogative as States to protect in-state commerce from the unwanted disruption of Internet business models and out-of-state sellers.

These same arguments were made in 2016, when Congress made the ITFA permanent. Claiming the law would "substantially reduce revenues" for the States, its original opponents from 1998—including the National Governors Association, the National Association of

---

[11] "The Framework for Global Electronic Commerce," THE WHITE HOUSE, § I.1 (1998).

[12] *Int'l Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945).

Counties, the National League of Cities, and the U.S. Conference of Mayors—all opposed it anew.[13]

Congress and the White House, in 1998 and 2016 and all points in between, believed otherwise. The specter of multiple States and municipalities all simultaneously taxing and regulating commerce on the Internet was seen as the far greater concern. Congress believed the increase in GDP facilitated by Internet commerce would indirectly boost state revenues, offsetting claimed revenue losses. The fact that large in-state sellers would be challenged by small enterprises via the Internet was seen as a boon to competition and consumers alike.

Congress was particularly concerned with the impacts on small business. As stated in the Committee Report accompanying the ITFA in the Senate, the Internet "offers advantages such as providing small- and medium-sized companies the opportunity to compete with multinational conglomerates." But, the Report noted, there are thousands of state and local taxing jurisdictions in the United States, and "the potential costs of complying with the tax demands of these authorities could make use of the Internet uneconomical for such companies."[14]

Congress enacted the ITFA to achieve the benefits of Internet commerce through a national policy that does not burden small and micro enterprises on the

---

[13] H.R. Rep. No. 113-510, "Dissenting Views," at 16 (2014) (discussing H.R. 3086, the Permanent Internet Tax Freedom Act).

[14] S. Rep. No. 105-184, at 2-3 (1998) (discussing S. 442, the Internet Tax Freedom Act).

Internet by forcing them to comply with thousands of varying state and local tax regimes.

A. Congress Has Recognized the Unique Vulnerability of Internet Commerce to Tax Compliance Burdens from Multiple States.

"Most State and local commercial tax codes," the Senate Commerce Committee observed at the time of enactment of the ITFA, "were enacted prior to the development of the Internet and electronic commerce. Efforts to impose these codes without any adjustment to Internet communications, transactions or services . . . will lead to State and local taxes that are imposed in unpredictable and overly burdensome ways."[15]

The Internet's decentralized, packet-switched architecture has no precedent in U.S. or global commerce. While equally revolutionary when introduced, the telephone and telegraph are point-to-point communications. There is a point of origin and a terminus. A website, in contrast, has a unique point of origin (say, a small business's garage) that is immediately and uninterruptedly exposed to billions of Internet users in every U.S. jurisdiction and around the planet. This makes Internet commerce, unlike mail-order sales or telephone sales, uniquely vulnerable to tax and regulatory burdens in thousands of jurisdictions.

So too does the fact that the Internet is utterly indifferent to State borders. In its nearly instant transit, an email from one cubicle to another in the same office may be atomized and routed in pieces through servers in multiple States before reaching its destination a few feet away. A small business that

---

[15] *Id.* at 3.

maintains a website cannot choose whether to purposely avail itself of one or another jurisdiction.

These characteristics of the Internet, Congress recognized in the ITFA, would subject it to extravagant claims of nexus and a confusing patchwork of thousands of state and local taxing jurisdictions, unless federal policy remedied the situation. These fundamental characteristics of the Internet have not changed. Neither have the States' extravagant claims of nexus that Congress rejected.

B. State Sales Taxes Can Violate the ITFA's Ban on Burdensome Taxes.

The ITFA provides that "No State . . . may impose . . . discriminatory taxes on electronic commerce."[16] "Discriminatory" in the ITFA has a specialized meaning. A discriminatory tax is one that "is not generally imposed and legally collectible . . . on transactions involving similar property, goods, services, or information accomplished through other means."[17] The definition also includes any state tax that "imposes an obligation to collect or pay the tax on a different person . . . than in the case of transactions . . . accomplished through other means."[18]

Importantly, the ITFA's protection of Internet commerce goes beyond requiring neutrality between the tax regimes for Internet and non-Internet commerce. Apart from any comparison with other forms of commerce, the ITFA expressly prohibits any tax if "the sole ability to access a site on a remote seller's out-of-State computer server *is considered a factor* in determining

---

[16] ITFA § 1101(a).

[17] *Id.* § 1105(2)(A)(i).

[18] *Id.* § 1105(2)(A)(iii).

a remote seller's tax collection obligation."[19] Thus, Congress prohibited any State from *even considering* in its nexus determination the fact that consumers in the State can access the remote seller's out-of-state computer server.

The plain language of the ITFA encompasses sales and use taxes.[20] Indeed, sales and use taxes were a particular concern of the ITFA, as is evident from the fact that, in crafting the law, Congress stated its express reliance upon *Quill*'s physical presence rule for nexus.[21]

Congress openly worried that even *Quill*'s bright-line test might not be enough to protect small businesses from the burdens of having to comply with the laws, rules, filing requirements, and audits of so many jurisdictions. "These traditional notions of nexus," the Senate Committee Report states, referring to *Quill*, "are difficult to apply to the Internet because of the way that Internet transactions occur."[22]

In lieu of committee reports from the House Judiciary and Energy & Commerce Committees, the statement from Rep. Cox, the author of the bill, was published in the Congressional Record ("Statement of Intent").[23] No contrary statement of intent was ever made by any co-sponsor or supporter of the ITFA in either the Senate or the House. The ITFA, explains the Statement of Intent, is intended to provide "certainty" that the rules of *Quill*'s physical-presence test "will

---

[19] *Id.* § 1105(2)(B)(i) (emphasis added).

[20] *Id.* § 1105(2)(A).

[21] S. Rep. No. 105-184, at 2.

[22] *Ibid.*

[23] 144 Cong. Rec. E1288-03 (June 23, 1998).

continue to apply to electronic commerce just as they apply to mail-order commerce, unless and until a future Congress decides to alter the current nexus requirements."[24]

C. The ITFA Applies to the Taxes on Internet Transactions That Are the Subject of South Dakota's Law.

As noted, the ITFA prohibits any tax imposed differently on Internet commerce. The law specifically prohibits assigning the tax collection burden to a different person in Internet and non-Internet transactions. And it prohibits considering the fact that in-state consumers can access the remote seller's website as a factor for determining nexus. The South Dakota law violates each of these ITFA requirements.

The South Dakota law assigns the tax collection burden differently in retail transactions involving out-of-state sellers and South Dakota purchasers, depending on whether the transaction is made in person or remotely (that is, via the Internet, catalog, or phone).

When, for example, a resident of South Dakota buys furniture from a retailer in Montana—picking up the goods herself, and bringing them home—South Dakota law requires her to pay use tax. But South Dakota does not impose a use tax collection burden on the out-of-state seller.[25]

---

[24] *Ibid.*

[25] This is the flip side of South Dakota's merciful treatment of its in-state retailers, who are not required to collect tax on sales to non-residents if possession is taken outside of South Dakota. See South Dakota Department of Revenue, Sales and Use Tax Guide, 3 (July 2017). Nor does South Dakota enforce its use taxes against its own residents, over whom it unquestionably has

Unless, that is, the out-of-state seller is an Internet vendor.

In that case, the rule is different. If the furniture purchase is accomplished via the Internet (or via the telephone, or the mail), South Dakota's new law *does* require the Montana seller to collect and pay, even though Montana has no sales tax.

This differential treatment is what the ITFA prohibits. In both cases, there is a Montana seller and a South Dakota purchaser. South Dakota places the burden of tax compliance on the South Dakota purchaser if the transaction is accomplished in person. But it places an added burden of tax compliance on the Montana seller if the transaction is accomplished via the Internet.

In short, the way that South Dakota has contrived its "kill *Quill*" law[26] unavoidably burdens Internet remote sellers while sparing sellers of exactly the same property, goods, or services who don't accomplish their sales via the Internet. This violates Section 1105(2)(A)(i) of the ITFA.

Similarly, by placing the burden of tax compliance and payment on different persons when the Internet is involved (both the purchaser and seller in the case of Internet remote sales; the purchaser only in the case of non-Internet remote sales), South Dakota's law violates Section 1105(2)(A)(iii) of the ITFA.

---

jurisdiction. Pet. Br. at 50 (acknowledging that "most consumers do not pay their use taxes").

[26] For a description of the "Kill *Quill*" movement among the States, see, *e.g.*, Andrew Nehring, *Internet Sales Taxes: To Kill or Not to Kill Quill?*, WASH. EXAMINER (Apr. 7, 2017, 3:23 PM), https://www.washingtonexaminer.com/internet-sales-taxes-to-kill-or-not-to-kill-quill/article/2619704.

Moreover, the sole basis on which South Dakota justifies imposing tax-collection obligations on Internet sales is the fact that South Dakota residents access the remote seller's out-of-state computer servers from South Dakota. But any tax-collection obligation premised on such a justification violates the plain terms of Section 1105(2)(B)(i) of the ITFA, which invalidates a State assertion of nexus if maintenance of a website is even considered "a factor."

The fact that the South Dakota law violates a federal statute regulating interstate commerce distinguishes this case from the dormant Commerce Clause decision in *Quill*. As then-Judge Gorsuch noted, a State can, consistent with *Quill*, "constitutionally impose tax and regulatory burdens" on remote Internet sellers if those burdens are "more or less comparable" to in-State sales and use tax collection responsibilities. *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). But under the ITFA, the "more or less" test does not apply. The statute speaks canonically and allows no exceptions. Under Section 1105(2), a State may not impose the tax collection obligation on a different person or entity just because the arrangement is "comparable." Unless the arrangement is identical, it is prohibited.

The enactment of the ITFA was unquestionably a valid exercise of Congress's Article I power to regulate interstate commerce. Beyond the fact that the Supremacy Clause renders contrary State laws invalid,[27] the clear congressional judgment reflected in the law that taxes such as South Dakota's will unduly burden interstate commerce should inform the Court's own judgment on that subject. Unlike the dormant Commerce Clause

---

[27] *Edgar* v. *MITE Corp.*, 457 U.S. 624, 631 (1982).

judgment this Court made in *Quill*, in this case the Court may reach its Commerce Clause ruling in light of the fact that Congress has, in fact, plainly expressed itself in this area.

D. South Dakota's Preferred National Policy Is Directly at Odds with the ITFA's Policy Against Multiple and Discriminatory Taxation.

In addition to violating the letter of federal law, the South Dakota law is thoroughly inconsistent with the policy aims the Congress laid out in the ITFA. The ITFA recognizes that Internet commerce is inherently susceptible to burdensome regulation and taxation simultaneously by multiple jurisdictions in ways that offline commerce is not. In addition to banning entire categories of State taxes, it focused on the need for simplification and harmonization of State tax systems as they apply to online commerce.

The ITFA's purpose of simplifying tax compliance burdens on Internet retailers was made clear by the mandate given to the Advisory Commission on Electronic Commerce. The ITFA established the Commission to help develop "model State legislation" that would provide "uniform definitions of categories of property, goods, service, or information subject to or exempt from sales and use taxes." The purpose of such state legislation would be to ensure that "transactions using the Internet . . . would be treated in a tax and technologically neutral manner *relative to other forms of remote sales*."[28]

---

[28] Report to Congress of the Advisory Commission on Electronic Commerce, 70 (2000), https://govinfo.library.unt.edu/ecommerce/acec_report.pdf (emphasis added).

Over a one-year period, the 19-member Commission took live testimony from nearly 100 witnesses and experts, and hundreds more submitted written testimony. Its membership included governors, mayors, county commissioners, state lawmakers, and state tax administrators; technology experts; global trade experts; consumer and taxpayer advocates; and unique resources such as the president of the National Conference of Commissioners on Uniform State Laws. The Commission's report and recommendations fulfilled the statutory command to be "tax and technologically neutral and apply to all forms of remote commerce."[29]

The Commission recommended that State and local governments should, within three years, "simplify state and local sales and use taxation policies" in ten enumerated ways. The purpose of these simplifications is to achieve cost parity "between remote sellers and comparable single-jurisdiction vendors that do not offer remote sales."[30] The Report recognizes that Internet sellers are often small businesses located in a single jurisdiction. Thus, the point of comparison with single-jurisdiction vendors that do not offer remote sales is to avoid discriminatory burdens on one or the other.[31]

The Commission found that "substantial sales tax simplification is necessary" because "the current sales and use tax system is complex and burdensome." Without "nationwide consistency and certainty," sellers would face both "financial and logistical tax collection burdens." Foretelling the problems with alternatives

---

[29] ITFA § 1102(g)(2)(D).

[30] Report to Congress of the Advisory Commission on Electronic Commerce, at 5.

[31] *Id.* at 19-20.

to simplification, such as the recently enacted "report or collect" laws in several States, the Commission noted that a tax system dependent upon "determining the identity and location of the consumer" as well as the nature of items he or she purchased was at odds with "the need to protect consumer privacy rights."[32]

The Commission reported to Congress in 2000. Consistent with the ITFA itself—and the Commission's conclusion that "fundamental uniformity and simplification of the existing system are essential"—it recommended that States work with and through the National Conference of Commissioners on Uniform State Laws to draft "a uniform sales and use tax act."[33]

South Dakota's prescription is different. Instead of simplification and multistate harmonization, it seeks simply to expand its sovereign power beyond its borders by overturning *Quill*. This, however, would make it exceedingly difficult for Congress to incentivize States to simplify their tax systems along these lines. The burdens on small Internet businesses operating in interstate commerce would thus become permanent.

To date, South Dakota and its sister States have yet to effectively achieve any semblance of uniformity in their taxing regimes, preferring to maintain their own unique tax rules, definitions, rates, and regulations.[34]

---

[32] *Ibid.*

[33] See *ibid.* (recommending uniform tax base definitions, uniform and simple sourcing rules, one sales and use tax rate per state, uniform limitations on rate changes, uniform audit procedures, and uniform tax returns and remittance methods, among other things).

[34] South Dakota and less than half of the States joined the Streamlined Sales and Use Tax Agreement, which was supposed

This has left Internet sellers confronting essentially the same maze of differing state and local rules and competing definitions, deadlines, filing requirements, and audit demands that produced the ITFA in 1998 and led Congress to make the law permanent in 2016.

The national policy reflected in the ITFA is concerned with ensuring that state sales tax compliance would "not be more burdensome on a business that collects and remits taxes to several taxing jurisdictions than it is to a business that collects and remits taxes in a single taxing jurisdiction."[35] The ITFA and the Commission both addressed the overriding need "for nationwide consistency and certainty for sellers" alongside the "need to alleviate the financial and logistical tax collection burdens" on sellers. South Dakota's law would eliminate the certainty of *Quill*'s physical presence rule and expose sellers to vastly more complex and burdensome compliance requirements.[36]

In seeking to kill *Quill*, South Dakota does not recognize (or care about) these burdens. For nearly two decades it has resisted the clear congressional policy of simplification in return for extraterritorial reach. South Dakota focuses instead solely on the presumed competitive burden on its in-state businesses and its purported lost revenue. But these

---

to achieve uniformity or simplicity, but has not, even among its members.

[35] Report to Congress of the Advisory Commission on Electronic Commerce, at 2.

[36] *Id.* at 19-20; Sales Tax, Avalara Resource Center, https://www.avalara.com/learn/sales-tax (noting there are over 12,000 state and local sales tax jurisdictions).

arguments were expressly rejected in the ITFA and by the Commission.

"Undue burdens on interstate commerce," as this Court noted in *Quill*, may be avoided in appropriate situations "by the demarcation of a discrete realm of commercial activity that is free from interstate taxation."[37] If this was then true of the dormant Commerce Clause, it should be profoundly so when it is Congress, not the Court, that has made the demarcation in the exercise of its power to regulate interstate commerce. This is what Congress has in fact done in the ITFA.

E. The Solicitor General's Proposal to Reinterpret *Quill* to Discriminate Against Internet Commerce Violates the ITFA.

The Solicitor General proposes that the Court limit *Quill*'s nexus requirement to mail-order catalogs. This would permit South Dakota to impose unique tax-collection obligations on remote Internet sellers that don't apply to other remote sellers.[38] The ITFA, in § 1105(2)(A)(i)–(iii), flatly prohibits this.

Congress in the ITFA prohibited any taxing regime that treats Internet sales differently from sales of similar items "accomplished through other means." Not only does the law ban imposing a tax on Internet sellers while sparing other remote sellers; it also prohibits imposing the collection obligation on a different person in one case and not the other.[39] Both

---

[37] *Quill*, 504 U.S. at 314-15.

[38] U.S. Br. 24-26.

[39] ITFA § 1105(2)(A).

types of unlawful discrimination are inherent in the Solicitor General's approach.

The Solicitor General's proposal runs afoul of the ITFA in yet another way. His idea that remote Internet sellers are "virtually" present in every State where a consumer can access its website[40] violates the express prohibition against using as a factor for determining nexus the "sole ability [of persons within a State] to access a site on a remote seller's out-of-State computer server."[41] This provision of the law should foreclose any suggestion that the ability of in-state consumers to access a remote seller's website creates "a continuous presence" inside the State.[42]

II. SOUTH DAKOTA'S LAW VIOLATES THE DUE PROCESS CLAUSE.

The consideration of South Dakota's law and of *Quill* necessarily occasions evaluation of the law under the Due Process Clause. As *Quill* itself noted in parsing the two "analytically distinct" considerations, they are "closely related" in the constraints they impose on a State's power to tax and regulate beyond its borders.[43]

South Dakota's statute is radically different from the North Dakota law at issue in *Quill*. It is an extreme form of long-arm sales tax jurisdiction that asserts tax, regulatory, and (to enforce its audit and other requirements) *in personam* jurisdiction over even the smallest micro enterprises doing business online anywhere in the United States. The minimum

---

[40] U.S. Br. 24-26.

[41] ITFA § 1105(2)(B)(i).

[42] U.S. Br. 24.

[43] *Quill*, 504 U.S. at 305; see also *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008).

delivery threshold is so low that it is guaranteed to sweep in small sellers with nothing like the sufficient minimum contacts necessary to satisfy Due Process requirements.

An example will serve to illustrate.

A woman opens a small business out of her apartment in Idaho, selling iPhone cases principally over the Internet. They retail for $7. Her customers are mostly in the United States and Canada. In a typical week she fills orders primarily to New York, Florida, and Texas. She does this by going to the Post Office.

She rarely sells to customers in South Dakota—typically four iPhone cases in an entire week. Her net income is $1.49 per phone case. On those South Dakota sales, therefore, she earns $309 in a year.

Yet South Dakota's law would claim full tax and regulatory jurisdiction over the woman in this example. Despite her *de minimis* sales into South Dakota, she will be subject to the licensing, registration, audit, and fee-paying requirements of the South Dakota Department of Revenue.[44] She lacks the minimum contacts that *International Shoe* demands under "traditional notions of fair play."[45]

This Court has made clear that just as the Due Process Clause limits a State's ability to exercise *in personam* jurisdiction over a defendant in litigation, it also limits the ability of a state to tax a nonresident.[46] Due Process requires minimum contacts between

---

[44] S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016).

[45] 326 U.S. at 316.

[46] *Quill*, 504 U.S. at 307-08.

an out-of-state party and a State creating a "substantial connection" between them before that State can exercise jurisdiction.[47] Indeed, the "defendant *himself*" must establish a relationship with "the forum State," not merely with individuals within the State.[48]

An out-of-state seller may establish contact with an individual South Dakota purchaser online, but that does not show any relationship with the State itself.[49] When a product is generally available online, it is the *buyer's* conduct—"random," "fortuitous," and "attenuated"—that results in the shipment of the product from a seller who has made no special effort to single out that particular jurisdiction.[50] Were it otherwise, everyone who sells online and ships anywhere in the United States would have minimum contacts with every State under the Due Process Clause—a proposition this Court has rejected.[51]

To establish minimum contacts, an out-of-state seller must also "deliberate[ly] engage[] in significant activities within a State" or "create[] 'continuing obligations' between himself and residents of the [State]."[52]

This Court has clearly stated that where an out-of-state seller's connection to a State is limited to isolated

---

[47] *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014).

[48] *Id.* at 1121-22 (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985)).

[49] *Id.* at 1123.

[50] *Burger King*, 471 U.S. at 475.

[51] See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980).

[52] *Burger King*, 471 U.S. at 475-76.

occurrences of product sales,[53] or to a contract with a State resident, "sufficient minimum contacts" are not established.[54] South Dakota's law imposes tax collection obligations on out-of-state sellers regardless of whether they intentionally created a substantial relationship with that State.

Because the South Dakota law requires nothing more than 200 transactions delivering "tangible personal property [or] any product transferred electronically" into the State, it will unavoidably run afoul of the Due Process Clause. So too its alternative basis for asserting jurisdiction—the delivery of tangible and electronic products totaling only $100,000. Neither test requires intentional, significant contacts with South Dakota, and both will sweep in many sellers who lack such contacts.[55]

Consider these further examples:

If South Dakota residents download a single 99¢ song 200 times, the State will claim *in personam* jurisdiction over the faraway Internet seller.

If one person in South Dakota purchases a single expensive piece of art, the out-of-state seller immediately becomes subject to South Dakota's tax, regulatory, audit, and judicial powers.

If over the course of a year some 200 South Dakota residents receive gifts purchased online from the same Internet seller, then even if *none* of the purchasers lives in South Dakota, the online seller would become subject to South Dakota's tax-collection requirements.

---

[53] *Volkswagen*, 444 U.S. at 297.

[54] *Burger King*, 471 U.S. at 478.

[55] S.B. 106, 91st Legis. Assemb. § 1 (S.D. 2016).

In none of these examples would the seller have the minimum contacts this Court has in the past required before a State can claim jurisdiction over him or her.

The Due Process problems of the South Dakota statute are made worse when the inevitable similar extraterritorial demands of other States are taken into account. South Dakota approvingly reports that "many other States have [already enacted] provisions materially identical to South Dakota's,"[56] meaning that if this Court upholds the contested law in this case, even the smallest Internet sellers will quickly be subject to nationwide compliance burdens and the competing rules, filing requirements, and audit demands of over 12,000 taxing jurisdictions. Many States will have only attenuated contacts with the thousands of small and micro enterprises who will be subject to these burdens.

It is not simply that small businesses will have to file many forms, understand many conflicting laws and rules, and collect and remit taxes for jurisdictions with which they are entirely unfamiliar. Chapters 10-45 and 10-52 of the South Dakota Codified Laws also make clear a seller can be required to travel to South Dakota to appear before its auditors, its administrative tribunals, and its courts.

This is an exceptionally disproportionate burden for a small seller who lacks meaningful contacts with South Dakota beyond maintaining a storefront on the Internet and passively receiving orders.

South Dakota's law plainly reflects its desire to expand sales tax collection responsibilities to all retail businesses, even the very small and very remote. This

---

[56] Pet. at 8.

is the clear desire of most States, because they believe it will protect local businesses from unfair remote competition while increasing their tax revenue. It is precisely because this is the aim of many States that their collective ambitions threaten small Internet businesses with cumulatively crushing compliance burdens.

The violation of Due Process these small businesses face is all the more fundamentally unfair because these burdens are not borne by a similarly situated South Dakota seller who does not venture into interstate commerce.

Returning to the example of our small seller in Idaho, because she lives and works in that State, she is registered with the Idaho State Tax Commission, the Idaho Department of Labor, and the Idaho Industrial Commission. She has paid the Idaho State Tax Commission for a seller's permit, and regularly files Idaho sales tax returns. Compliance with Idaho's rules requires her, like all other businesses in Idaho, to be familiar with the State's varying tax rates and definitions of what is taxable, its audit and record-keeping requirements, and its filing requirement to file monthly sales tax reports.

As challenging as these regulatory burdens may be, they are the same for every similarly situated business in Idaho. The imposition of these burdens on her is fundamentally fair and thus consistent with Due Process.

But once she is required to comply not only with Idaho's rules, where she lives and works, but with the rules and burdens imposed by 46 different States, the equation changes. Forcing one small business, with one location, to bear this burden is fundamentally

unfair when a large in-state retailer has no such burden.

Unlike the in-state retailers whose South Dakota taxes are repaid in the form of police protection, fire protection, and all manner of public services, the Idaho seller receives nothing in return. Nor does the Idaho seller have any democratic voice to ensure the fair application of South Dakota's policies against her. Despite the command to pay taxes, she cannot vote.

The practical result of overturning *Quill*, then, will be to overburden small businesses who will immediately be subject to the distinct demands and filing requirements of thousands of taxing jurisdictions, even though they may not have substantial contacts with any of these States.

The reversal of *Quill* would not affect the large, nationwide online retailers such as Amazon, Walmart, and Apple. They already remit taxes everywhere based on their ubiquitous physical presence. Rather, this Court's decision would be acutely felt by smaller businesses. Not only would the increased burden on these sellers cause "practical problems" that Due Process protections are meant to curb,[57] but by imposing steep costs and driving some companies out of the market, it would, ironically, reduce the States' potential for increasing their tax revenues.

III. SOUTH DAKOTA'S PETITION IS NOT A LEGAL BUT A POLICY ARGUMENT WHICH LACKS EVIDENTIARY BASIS.

South Dakota seeks, by reversal of clearly established Supreme Court precedent, to win in the courts

---

[57] *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1780-81 (2017).

what it has been unable to win in Congress. If South Dakota succeeds, it will effectively neuter the national policy established by Congress in the ITFA. Once every website that fills orders nationally has to comply separately with the local tax laws, rules, regulations, and filing and audit requirements of 46 States, and once millions of individual sellers with a website find themselves liable to summons and the *in personam* jurisdiction of those States, it will be South Dakota's preferred national policy, not Congress's, that prevails.

A. This Action Provides No Factual Record to Support South Dakota's Alternative National Policy for Interstate Commerce.

It is not merely that South Dakota's legislative policy argument should be addressed to the Congress rather than this Court (though it should). Even were this Court a legislature, it would require an opportunity to weigh competing data on various sides of the policy argument. This case, because of the barren factual record produced by the state legislature's express-to-the-U.S. Supreme Court gimmick, has no meaningful findings of fact whatever.

Petitioner points to the "detailed findings" in the South Dakota law.[58] But there are none—save a few unsupported assertions. The law's Section 8 claims without proof that the status quo is "causing revenue losses and imminent harm."[59] As demonstrated below, this is untrue—South Dakota's sales tax revenue is increasing.

---

[58] Pet. at 6. Those findings, which were repeated in the State's complaint for declaratory judgment, were specifically denied in the Respondents' answer to the complaint. Resp. Br. at 24.

[59] S.B. 106 § 8(1).

The law's other relevant "finding" is that South Dakota's proposed tax compliance burdens are "neither unusually difficult nor burdensome for remote sellers."[60] Here, too, the record is barren. The fact is that mid-market Internet retailers would have to spend $80,000 to $290,000 in integration costs just to use the "free" sales tax software discussed by Petitioner. Each year thereafter, they would incur costs between $57,500 and $260,000 for maintenance, updates, audits, and service fees.[61] Beyond this, a retailer with a single place of business would face further compliance burdens in the form of monthly, quarterly, and annual filings in the thousands of jurisdictions in all 46 States with a sales tax that follow South Dakota's footsteps. This is not to mention the time and expense of traveling to South Dakota (and to its sister States with similar laws) in response to regulators' demands.

B. South Dakota's Policy Arguments Are Flawed and Unproven.

"Internet sales," reports the Supreme Court of South Dakota in this case, "have risen," while "state revenues have decreased."[62] The sole source for this questionable assertion is the "finding" to that effect in the South Dakota law.

Had there been actual fact-finding in this case, Petitioner and the state courts would have been confronted with the State's own data showing that

---

[60] *Id.* 106 § 8(6).

[61] Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUST, 3 (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

[62] *State* v. *Wayfair Inc.*, 901 N.W.2d 754, 756 (S.D. 2017).

sales and use tax revenue has not only grown every year for the past seven years, but it has grown at a substantially higher rate than the South Dakota economy.[63]

South Dakota Sales and Use Tax Revenue 2013-18
(in millions)

2013	2014	2015	2016	2017	2018
$787.7	$831.1	$836.5	$860.9	$974.7	$1,013.1*

The Governor's budget for 2018 projects that South Dakota's sales and use tax revenue will be *29% higher* than just five years prior.[64] The compound annual growth rate in sales and use tax revenue for the five years ending in 2016 is over 5%, compared to a compound annual growth in state GDP during that period of just 1%.[65]

---

[63] South Dakota Bureau of Finance & Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf; South Dakota Department of Revenue, Annual Reports, 13 (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/. These are State-level data only. Inclusion of localities' sales and use taxes would increase the amounts in the above table by approximately one-third.

* 2018 figure is the State's budget estimate.

[64] South Dakota Bureau of Finance & Management, General Fund Condition Statement (2017), *supra*. Effective July 1, 2016, the State increased its sales tax rate by 0.5%. The increase in collections for 2017 is significantly greater than would be expected from the rate increase alone. Likewise, the State's projected increase for 2018 is based on no increase in the sales tax rate compared to 2017.

[65] *South Dakota GDP*, DEP'T OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ (reporting data from Bureau of Economic Analysis, U.S. Department of Commerce).

And more generally, according to the Census Bureau, state and local governments collected a record high in general sales and gross receipts taxes in 2017.[66] That number has been steadily climbing since 2009 and totaled over $386 billion in 2017.[67] Just as in South Dakota, the total revenue for all state and local taxes has never been higher.

This is the "brutal" revenue "shortfall" described by Petitioner.[68]

There are many reasons for South Dakota's current economic woes, including recurrent droughts that have hurt agricultural production.[69] But State sales tax revenues are growing, not declining, contrary to the "findings" in the South Dakota law.[70] This is another reason that the lack of any factual record in this case makes it a poor vehicle for overturning *Quill*.

---

[66] Terence P. Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, CNSNEWS.COM (Mar. 22, 2018), https://www.cnsnews.com/news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hit-records-2017 (citing Census Bureau data).

[67] *Ibid.*

[68] Pet. at 14.

[69] South Dakota Bureau of Finance & Management, Economic and Revenue Update, 3 (Dec. 2017), https://bfm.sd.gov/econ/current.pdf.

[70] Even if tax revenues *were* falling, which they are not, South Dakota would have a difficult time establishing causation, given the various headwinds facing its regional economy.

C. Since *Quill* and *DMA II*, 'Changed Circumstances' Have Continued Changing, With Local Facilities Now Key to Retail e-Commerce

When Justice Kennedy wrote his concurrence in *Direct Marketing Ass'n* v. *Brohl* ("*DMA*"), he could speak of "the dramatic technological and social changes" driving the growth of e-commerce as distinct from brick-and-mortar retail.[71] When, the year following Justice Kennedy's opinion, then-Judge Gorsuch wrote his concurrence in *DMA II*, he could still speak intelligibly of remote Internet sellers and their "in-state brick-and-mortar rivals."[72]

That was then. No one speaks of "brick-and-mortar" any more. They now speak of "brick-and-click" as most stores have created an online presence. In 2018, not only larger retailers but even the smallest stores all sell via their own websites. Of those that do not, 92% report they plan to do so by the end of 2018.[73]

Competition in retail today no longer pits in-state brick-and-mortar stores against remote Internet sellers. The contest is between retail giants, who support the reversal of *Quill*, and small businesses.[74]

---

[71] 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

[72] *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

[73] *What Percentage of Small Businesses Have Websites?*, SMALLBUSINESS.COM (Mar. 18, 2017), https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-websites/.

[74] See Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – An Economic Analysis* (Mar. 15, 2018), at 12-13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948 (explaining the national retail industry will soon "be populated predominantly by (i) national

Those small businesses—in South Dakota and elsewhere—can only compete if they are not overwhelmed with a nationwide tax compliance burden simply by virtue of selling via the Internet.[75]

Since Amazon "sent shock waves" through the retail industry in August 2017 with its acquisition of Whole Foods, the pace of change in retail has quickened dramatically.[76] Today, Walmart, Apple, Target, and Macy's all compete head-to-head with Amazon in e-commerce. All have large online businesses as well as physical stores across the country, and all charge sales tax in every jurisdiction where it is required.[77] These five entities alone accounted for around two-thirds of all Internet retail sales in 2016.[78]

Even before adding Whole Foods' hundreds of stores across the country, Amazon maintained a substantial

---

chains of 'brick-and-click' retailers on the one hand, and (ii) small, nimble, remote IT-enabled retailers . . . on the other hand").

[75] *Id.* at 13-24 (explaining the "significant competitive advantages" national retail giants have over "small and remote" sellers, and how Internet taxes are "discriminatory tariff[s] on small retailers").

[76] Jennifer Kaplan & Matthew Boyle, *Amazon Cuts Whole Foods Prices as Much as 43% on First Day*, BLOOMBERG TECH. (Aug. 28, 2017), https://www.bloomberg.com/news/articles/2017-08-28/amazon-cuts-prices-at-whole-foods-as-much-as-50-on-first-day.

[77] Indeed, 17 of the largest 18 online retailers collect state and local sales taxes. See Richard Wolf, *Supreme Court will decide if online retailers must collect sales tax*, USA TODAY (Jan. 12, 2018), https://www.usatoday.com/story/news/politics/2018/01/12/supreme-court-decide-if-online-retailers-must-collect-sales-tax/1021423001.

[78] Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WOMEN'S WEAR DAILY (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796.

physical presence in all 46 U.S. States with a sales tax. By itself, Amazon accounts for over 40% of all online retail sales.[79] Like its major retail competitors, it now has warehouses, fulfillment centers, and stores across the country—allowing pick-up and returns of products purchased online.[80]

Amazon is only the most obvious example of the dominant trend in retail, which is putting pressure on established retailers from grocers to car dealers to combine e-commerce with local retail in every market.[81] It is thus unsurprising that the U.S. Government Accountability Office recently found that, as of last year, "80 percent of the potential revenue from requiring all Internet retailers to collect [sales tax] is already collectible."[82] The number is undoubtedly even higher now. Now, the lion's share of online retail has ubiquitous physical presence and their sales are already taxable.[83]

Just as "dramatic technological and social changes" intervened between *Quill* and *DMA*,[84] they have

---

[79] *Amazon Accounts for 43% of US Online Retail Sales*, BUS. INSIDER (Feb. 3, 2017), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2.

[80] Barbara Thau, *Five Signs That Stores (Not E-Commerce) Are The Future Of Retail*, FORBES (June 27, 2017), https://www.forbes.com/sites/barbarathau/2017/06/27/five-signs-that-stores-not-online-shopping-are-the-future-of-retail/#b1b1ddb4641c; Ryan Derousseau, *You Can Now Return Amazon Purchases at a Real Store*, TIME (Oct. 23, 2017).

[81] Brannon et al., *supra*, at 11-12.

[82] SALES TAXES: STATES COULD GAIN FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, GAO REPORT (Nov. 2017), at 9.

[83] Brannon et al., *supra*, at 31-32.

[84] *DMA*, 135 S. Ct. at 1135.

continued to reshape the retail industry in a way that has all but mooted the tax revenue issue, while bringing the question of the competitive viability of small Internet businesses versus Internet giants to the fore. The reversal of *Quill* will not affect the large, nationwide online retailers such as Amazon, Walmart, and Apple. But it will profoundly affect the small retailers who will suddenly face new, expensive, and disproportionate compliance burdens. As Congress foresaw when it enacted the ITFA, the lower costs of remote e-commerce are the only way for traditional small business to compete with these dominant, hybrid companies.[85]

IV. CONGRESS, NOT INDIVIDUAL STATES OR THE COURTS, IS BEST SUITED TO DEVISE A SOLUTION TO THESE COMPLEX MULTISTATE TAX POLICY ISSUES.

Congress, which is not limited to deciding cases, has more nuanced alternatives than this Court. It has been actively exploring a variety of ways to more elegantly solve these interdependent problems. For several years, beginning with the ITFA and the recommendations of the Commission authorized in that law, congressional policy has focused on requiring States to harmonize their sales tax regimes. Then, with a simplified sales tax regime for online commerce in place nationwide, Congress would authorize States to enforce collection beyond their borders. The States, as noted, have not done this, but Congress could require it as a condition of permitting extraterritorial tax enforcement.

---

[85] Report to Congress of the Advisory Commission on Electronic Commerce, at 11, 14; Brannon et al., *supra*, at 10-13.

Another approach, now under active consideration in the Congress, would force remote sellers to collect, but permit them to comply by following their own State's rates and rules. The taxes collected would be paid to the seller's State, which would then remit to the purchaser's State. Through an interstate compact authorized by Congress, the amounts due among States would be netted monthly, simplifying the distribution process. Under this system, the seller would be subject to audit only in those States where it is physically present, rather than in every one of 46 States.

Unlike the Court, Congress can actively monitor developments in the marketplace and in technology. It can craft legislation aimed at striking the right public policy balance in this rapidly evolving landscape. The Court has repeatedly declined "to pre-empt congressional action by judicially decreeing what accords with" good policy.[86] It is for Congress to decide the appropriate taxation policy for e-commerce. To a substantial extent, it already has done so in the ITFA, and more legislation is likely this year.

Because "Congress remains free to alter" the *Quill* framework—and is now considering legislation to do so—the demands of *stare decisis* have special force.[87] This Court should not reject its precedent based on South Dakota's policy preferences which Congress is free to accept or (as it has already done through eight re-enactments of the ITFA) reject.

Petitioner's recommended course of action will address one purported problem by creating many

---

[86] *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 195 (1978).

[87] *Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and in the judgment).

much larger ones. The wiser course is for this Court to recognize that the interests of *stare decisis* are strongest where, as here, Congress continues to exercise its Article I authority to develop appropriate national policy.[88]

CONCLUSION

The decision of the South Dakota Supreme Court should be affirmed.

Respectfully submitted,

CARL SZABO
Counsel of Record
GENERAL COUNSEL, NETCHOICE
1401 K St., N.W., Suite 502
Washington, DC 20005
(202) 420-7498
czsabo@netchoice.org

Counsel for Amici Curiae

April 4, 2018

---

[88] See *Coit Indep. Joint Venture* v. *Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 592 (1989) (Scalia, J., concurring) (noting Court should have deferred to the "legislative process" where "Congress is currently considering legislation").

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., ET AL.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS TED CRUZ, STEVE DAINES, AND MIKE LEE SUPPORTING RESPONDENTS

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

QUESTION PRESENTED

Should this Court defer to the federal legislative branch in determining national policy for interstate internet sales taxes, or should it overturn *Quill* v. *North Dakota*, leaving it to states to legislate in this area and thereby disrupt the ongoing federal legislative process?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTERESTS OF *AMICI* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Overturning *Quill* would thwart ongoing congressional efforts to find a workable solution to the remote sales tax issue 6

II. By adhering to *stare decisis* as endorsed in the *Quill* concurrence, this Court can allow Congress to replace that decision with a properly enacted federal solution. 12

III. In any event, *Quill* was correctly decided because the Constitution grants exclusive power to regulate interstate commerce to Congress 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Comptroller of the Treasury v. *Wynne*,
135 S. Ct. 1787 (2015) 14

H. P. Hood & Sons, Inc. v. *Du Mond*,
336 U.S. 525 (1949) 16

Kimble v. *Marvel Entertainment*,
135 S. Ct. 2401 (2015) 12, 13, 14

McCulloch v. *Maryland*,
17 U.S. 316 (1819) 15

Nat'l Bellas Hess v. *Dep't of Revenue*,
386 U.S. 753 (1967) 14, 16

Payne v. *Tennessee*,
501 U.S. 808 (1991) 12

Pearson v. *Callahan*,
555 U.S. 223 (2009) 12

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) ..... *passim*

S.C. State Highway Dep't. v. *Barnwell Bros., Inc.*,
303 U.S. 177 (1938) 16

Constitutional Provisions

U.S. Const. amend. X 16

U.S. Const. art. I. 8, 15

Bills and Statutes

Main Street Fairness Act,
S. 1452, 112th Cong. (2011-2012) 10

Marketplace and Internet Tax Fairness Act,
S. 2609, 113th Cong. (2013-2014) 10

Marketplace Fairness Act of 2017,
S. 976, 115th Cong. (2017-2018) 7, 10

No Regulation Without Representation Act,
H.R. 2887, 115th Cong. (2017-2018) 9

Remote Transactions Parity Act of 2017,
H.R. 2193, 115th Cong. (2017-2018) 7, 9

S.B. 106, 91st Sess. (S.D. 2016) 2

Sales Tax Fairness and Simplification Act,
S. 2152, 109th Cong. (2005-2006) 10

SDCL 10-64-1 2

SDCL 10-64-2 2

SDCL 10-64-3 3

Streamlined Sales and Use Tax,
S. 1736, 108th Cong. (2003-2004) 10

The Internet Tax Moratorium and Equity Act,
S. 512, 107th Cong. (2001-2002) 10

Other Authorities

Amazon Snips Prices on Other Sellers' Items Ahead of Holiday Onslaught, Wall Street Journal (Nov. 5, 2017), https://www.wsj.com/articles/amazon-snips-prices-on-other-sellers-items-ahead-of-holiday-onslaught-1509883201?mod= mktw. 11

Arthur Zaczkiewicz, Amazon, Wal-Mart Lead Top 25 Ecommerce Retail List, WWD (Mar. 7, 2016), http://wwd.com/businessnews/financial/amazon-walmart-top-ecommerce-retailers-10383750/ 8

Bryan Garner, et al., The Law of Judicial Precedent (2017) 12

Felix Frankfurter, The Commerce Clause under Marshall, Taney, and Waits (1937) 16

James Madison, Preface to the Debates in the Convention of 1787, *in* 3 The Records of the Federal Convention of 1787 (Max Farrand, ed. 1911) . 11, 15

Liran Einav et al., Sales Taxes and Internet Commerce, 104 Am. Econ. Rev. 1 (2014) 15

Press Release, NetChoice, Businesses United Behind Goodlatte Sales Tax Plan (Sept. 1, 2016), https://netchoice.org/ library/businesses-unite-behind-goodlatte-sales-tax-plan/. 8

Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf. 6, 8, 13

Tax Rates and Revenues, Sales and Use Taxes, DC Office of the Chief Financial Officer, https://cfo.dc.gov/page/tax-rates-and-revenues-sales-and-use-taxes..... 10

INTRODUCTION AND INTERESTS OF *AMICI*[1]

As the concurrence in *Quill Corp.* v. *North Dakota* noted, "Congress has the final say over regulation of interstate commerce, and it can change" the taxation rule challenged here "by simply saying so." 504 U.S. 298, 320 (1992) (Scalia, J., concurring in part and in the judgment). But, contrary to Petitioner, overturning *Quill* is not the next step in advancing this process. Rather, overturning *Quill* would upset ongoing negotiations in the Legislative Branch. If states could tax spending on interstate online purchases, they would immediately take advantage of this newfound power. This in turn would reduce incentives for a workable compromise and lead to states and cities engaging in the very sorts of protectionist activities the Commerce Clause sought to prevent.

Stare decisis, then, is at its zenith in this case. Not only would Respondents' reliance interests be compromised if *Quill* were overturned, but that would also seriously undermine the ability of *amici*—three United States Senators—to exercise their constitutional duties to regulate interstate commerce. While some *amici* support some legislative efforts, other *amici* support other approaches, and yet other *amici* support no federal legislation in this area whatsoever, the choice is for elected members of Congress to make.

---

[1] No one other than amici and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties filed blanket consents.

STATEMENT

It has been clear for many years that, to overturn *Quill*, Congress needed to act. All of the states knew this.

Rather than lobbying Congress, however, South Dakota in March 2016 enacted "An act to provide for the collection of sales taxes from certain remote sellers" (the "Act"). The Act requires any seller that "does not have a physical presence in the state" to collect and remit sales taxes if the seller satisfied either of two minimal conditions during the previous or current calendar year:

> (1) [its] gross revenue from the sales of tangible personal property, any products transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or
>
> (2) [it] sold tangible personal property, any product transferred electronically or services for delivery into South Dakota in two hundred or more separate transactions.

S.B. 106, 91st Sess. (S.D. 2016) SDCL 10-64-2. However, in devising these standards, the legislature found that: (a) existing constitutional doctrine "prevents states from requiring remote sellers to collect sales tax;" and (b) "a decision from the Supreme Court of the United States abrogating its existing doctrine" would be necessary for the Act to be enforced. *Id.* 10-64-1(7), (10).

Relying upon a right of action afforded only to the State itself, *id.* 10-64-3, the State filed suit in April 2016 against the respondents, retailers with no physical presence in South Dakota, and that the State conceded were acting lawfully in not collecting sales taxes. See *id.* 10-64-1(10); Complaint ¶ 24. The State sought a declaration that the Act is valid as applied to the respondents, although it acknowledged that the Act's collection requirements are currently unconstitutional. Complaint ¶¶ 1, 51.

For their part, each respondent has admitted that the respondent: (a) lacks a physical presence in South Dakota; (b) had gross revenue in 2015 from the sales of tangible personal property delivered into South Dakota in excess of $100,000 and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (c) is not registered to collect South Dakota sales taxes. See Addenda A & B.

When respondents moved for summary judgment, the State conceded that, because *Quill* is controlling, the lower court was required to grant summary judgment. In March 2017, the circuit court awarded judgment (Pet. App. B) and the State appealed. In its brief to the South Dakota Supreme Court, the State urged the Court to affirm summary judgment against the State, which it did in September 2017, on the basis of *Quill*. Pet. App. A.

SUMMARY OF ARGUMENT

I. Congress alone has the constitutional expertise and authority to address changes to the national economy of the last twenty-five years. During that period, Congress has undertaken substantial efforts to respond to these changes. Indeed, it is currently considering three bills that would respond to these changes.

By contrast, allowing States like South Dakota to tax sales from out-of-state vendors would hinder Congress' attempts to find a workable solution to the changing economy. Overturning *Quill* now would chill Congress' efforts to avoid the rival regulations that the Commerce Clause sought to prevent.

II. Principles of *stare decisis* weigh in favor of maintaining the "physical presence" requirement reaffirmed in *Quill*, which has been the law for over fifty years. When this Court decided *Quill*, it relied explicitly on Congress' silence on this question. It would thus be highly inappropriate for this Court to now take the same silence as a reason to overturn that long-settled precedent.

Reliance concerns also weigh in favor of a congressional solution to our changing economy. Under the *Quill* regime, businesses have developed in tax-advantaged states, thereby fostering growth and expansion not only in those states, but throughout the national economy.

III. In any event, *Quill* was a correct interpretation of the Commerce Clause. Drafted to prevent conflict

among the States, that Clause was a direct response to jealous and catastrophic regulations and taxes that created an internal trade war among the newly independent States. The States thus universally recognized that the power to regulate interstate commerce should necessarily belong to the federal government. To that end, in the Constitution, the Framers delegated that power to Congress, with almost no substantive debate.

South Dakota's statute mirrors the kinds of regulations to which the Framers were responding when they adopted the Commerce Clause. Because *Quill* recognized that reality, it was correctly decided, and therefore should be preserved for that reason as well.

ARGUMENT

I. Overturning *Quill* would thwart ongoing congressional efforts to find a workable solution to the remote sales tax issue.

Under the Commerce Clause, Congress not only has the constitutional authority over taxation of interstate sales using the internet, it has also undertaken substantial effort to find a workable solution to that issue. This is evident in the bills currently under consideration in Congress, additional attempts by the House Judiciary Committee to come up with a compromise, former bills that attempted to find a solution, and a variety of Congressional hearings regarding the issue.

1. For example, the House Judiciary Committee has written multiple versions of a bill that it hopes will serve as a "compromise solution."[2] After holding hearings and meeting with experts in 2014, the committee has come up with fresh ideas for addressing the issue. *Id.* By the end of 2017, its chairman, Representative Goodlatte, was optimistic that "the problem [was] becoming progressively less difficult to solve." *Id.*

Three bills currently pending before Congress demonstrate the variety of views on this topic. First,

---

[2] Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf.

the Senate is considering addressing this issue through the Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017-2018). That bill would allow the twenty-four states—including South Dakota—that have joined the Streamlined Sales and Use Tax Agreement (adopted in 2002) to mandate the collection of sales and use taxes when making a remote sale, provided the state meets certain simplification requirements. Remote sales would include any sales into a state in which a seller does not already have to pay sales and use taxes without the bill. There would be exceptions for small sellers, that is, those with gross U.S. remote sales below $1 million. To provide an adjustment period, states would not be allowed to enforce the law immediately.

The House has its own version of the bill, the Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017-2018). The bill includes roughly the same scheme as the Marketplace Fairness Act. The most significant difference is that the exceptions are more detailed. A remote seller can be exempt from the mandate to collect sales and use taxes if the seller's gross annual receipts are less than $10 million in the first year, $5 million in the second year, or $1 million in the third year. Additionally, there is an exception for "utiliz[ing] an electronic marketplace for the purpose of making products or services available for sale to the public." *Id.*

Indeed, other bills have been proposed, and gone through repetitive drafts in efforts to find common

ground.[3] Over 100 online retailers wrote to Congress in support of one 2016 draft.[4]

The approach taken in the Committee's drafts has been to simplify compliance burdens by ensuring that, in collecting tax, remote sellers are responsible only to their home states and states within which they have a physical presence or have voluntarily registered as "dealers."[5] Remote sellers without a physical presence in the buyer's state, who have not voluntarily registered there, would collect the tax and remit it to the remote seller's home-state taxing authorities. Those authorities would then forward it to the customer's state using a proven clearinghouse method similar to that used for fuel taxes.[6]

It would be difficult to imagine this Court or a state legislature reaching the same sort of compromise. This Court, of course, lacks the power to enact an internet sales tax. See U.S. Const. art. I. And no state legislature has an incentive to compromise with citizens of other states; after all, they serve the interests

---

[3] See Goodlatte Statement at 1–3.

[4] Press Release, NetChoice, Businesses United Behind Goodlatte Sales Tax Plan (Sept. 1, 2016), https://netchoice.org/ library/businesses-unite-behind-goodlatte-sales-tax-plan/.

[5] See Arthur Zaczkiewicz, Amazon, Wal-Mart Lead Top 25 Ecommerce Retail List, WWD (Mar. 7, 2016), http://wwd.com/businessnews/financial/amazon-walmart-top-ecommerce-retailers-10383750/.

[6] Goodlatte Statement at 2.

of their constituents. Only Congress can work out a uniform compromise.

True, the House has not yet passed a version of the Remote Transactions Parity Act. However, this only demonstrates that the House has not come yet to an agreement, not that it is numb to the issue. The Constitution intentionally structured the legislative branch so that it would not move too quickly, and the House is merely meeting that expectation.

2. An alternative plan has been the No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018). This House bill would go in a different direction by prohibiting states from taxing a person's interstate retail activity if the person is not physically present in the state when the tax is enacted. However, a person is "physically present" for purposes of the bill if any of several conditions is met. For example, one is "physically present" if she maintains a domicile in the state; owns or maintains certain property in the state; has any employees in the state that perform certain tasks; or has three or more employees in a state.[7]

3. Congress has also made other attempts to address internet-sales taxes. A bill from the 107th Congress called for states and local governments to develop a uniform system for a sales-and-use tax on

---

[7] See No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018), https://www.congress.gov/bill/115th-congress/house-bill/ 2887.

remote sales. The Internet Tax Moratorium and Equity Act, S. 512, 107th Cong. (2001-2002). Additionally, several precursors to the Marketplace Fairness Act of 2017 have been introduced in prior Congresses. Those include the Streamlined Sales and Use Tax, S. 1736, 108th Cong. (2003-2004); the Sales Tax Fairness and Simplification Act, S. 2152, 109th Cong. (2005-2006); the Main Street Fairness Act, S. 1452, 112th Cong. (2011-2012); and the Marketplace and Internet Tax Fairness Act,S. 2609, 113th Cong. (2013-2014).

In short, this is not an issue that Congress is ignoring, just now considering, or considering half-heartedly. This is an issue that Congress has looked at consistently but on which it simply has not yet come to agreement.

4. Overturning *Quill* would undo much of Congress' work to find a workable national compromise under the Commerce Clause. At the same time, it would empower all fifty states to impose taxes on those who are least likely to resist. For example, the District of Columbia imposes a 14.8 percent tax on hotel guests—almost all of whom cannot vote for the D.C. City Council.[8] Likewise, states would feel free to

---

[8] Tax Rates and Revenues, Sales and Use Taxes, DC Office of the Chief Financial Officer, https://cfo.dc.gov/page/tax-rates-and-revenues-sales-and-use-taxes.

tax out-of-state businesses like Respondents who already face aggressive pricing driven by Amazon and Wal-Mart.[9]

If *Quill* were overturned, then, many of the key players in the current negotiations would focus on state rather than federal legislation to protect their interests. Whatever faction prevailed in the state legislatures would then have less incentive to continue working for a national solution. This patchwork of state laws would create—in the words of Madison—"rival, conflicting and angry regulations" and related market uncertainty. See James Madison, Preface to the Debates in the Convention of 1787, *in* 3 The Records of the Federal Convention of 1787, 547–58 (Max Farrand, ed. 1911). The burden of this uncertainty would fall on small retailers, unable to afford the army of lawyers that larger companies employ.

---

[9] See, *e.g.*, Amazon Snips Prices on Other Sellers' Items Ahead of Holiday Onslaught, Wall Street Journal (Nov. 5, 2017), https://www.wsj.com/articles/amazon-snips-prices-on-other-sellers-items-ahead-of-holiday-onslaught-1509883201?mod=mktw (noting aggressive price cuts). Both Amazon and Wal-Mart already voluntarily pay sales taxes for online sales, making *Quill's* impact limited.

II. By adhering to *stare decisis* as endorsed in the *Quill* concurrence, this Court can allow Congress to replace that decision with a properly enacted federal solution.

Principles of *stare decisis* weigh heavily in favor of leaving *Quill* in place. Indeed, in their concurrence in that case, Justices Scalia, Thomas, and Kennedy identified two factors that weighed heavily in favor of applying *stare decisis* there: First, the doctrine has "special force" where, as there, "Congress remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (internal punctuation and citations omitted); see also *Kimble* v. *Marvel Entertainment*, 135 S. Ct. 2401, 2409 (2015) (same). Second, "the demands of the doctrine are 'at their acme ... where reliance interests are involved'"—as everyone agreed they were there. *Quill*, 504 U.S. at 320 (Scalia, J., concurrence) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)); *accord id.* at 317 (majority's reliance on reliance interests). Indeed, this Court recently noted that reliance interests are relevant if there is "a reasonable possibility that parties have structured their business transactions in light of [Court precedent]." *Kimble*, 135 S. Ct. at 2410. The Court has also often noted that *stare decisis* is important when the decision has long been in place and where overruling the decision would lead to more "judge-made rule[s]." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009); see also Bryan Garner, et al., The Law of Judicial Precedent 370 (2017). All four of these factors are present here.

First, there is no doubt that Congress is free to overturn *Quill*. Not only did the *Quill* concurrence make this point, but the Solicitor General admits it on page 32 of his brief. Indeed, Congress in 2014 considered overturning *Quill* by statute. Goodlatte Statement at 1. But this bill was rejected for two reasons:

- Companies in one state could be taxed by another state. Much like the original American colonists, Respondents and other businessmen would be subjected to taxation without representation. *Id.*
- Companies would face extensive costs if they had to manage the taxes of 49 states and 6,000 municipalities. *Id.*

The fact that Congress has considered overturning *Quill* and rejected that path for policy reasons only reinforces the "special force" that must be given to *stare decisis*.

Second, contrary to Petitioner, reliance issues are still acutely present—and indeed stronger than the reliance interests relied on in *Kimble*. Knowing *Quill* is the law, Respondents and others have set up shop in one or two states, rather than fifty. This business model has fostered growth and expansion of the online internet business. Such growth would be at risk if corporations were suddenly required to follow new state laws and regulations that make it advantageous to have a physical presence in more states.

Third, the rule reaffirmed in *Quill* has been on the books for more than 50 years. See *Nat'l Bellas Hess* v. *Dep't of Revenue*, 386 U.S. 753 (1967). That is far longer than other cases in which this court has invoked the length of a precedent as a reason for reaffirming it.

Last, overturning *Quill* would likely lead to the creation of more judge-made law. If *Quill* were overturned, some states would likely tax internet sales more heavily than brick-and-mortar sales. This would surely lead to more cases about the scope of the dormant Commerce Clause doctrine. See, *e.g.*, *Comptroller of the Treasury* v. *Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting).

It is better to leave *Quill* on the books—whether or not it is overruled by Congress—than to open the door for a new line of cases in this constitutionally questionable area. Cf., e.g., *Kimble*, 135 S. Ct. at 2409 ("Respecting stare decisis means sticking to some wrong decisions"). Indeed, some of Petitioners' own *amici* already anticipate that, if *Quill* is abrogated, courts will have to draw new lines in this area. *E.g.* Amicus Brief of Four U.S. Senators at 12–19.

For all these reasons, settled principles of *stare decisis* demand that *Quill* be left on the books—and that Congress be allowed to play its proper role in regulating interstate commerce.

III. In any event, *Quill* was correctly decided because the Constitution grants exclusive power to regulate interstate commerce to Congress.

In any event, *Quill* was correctly decided because Congress alone has the constitutionally delegated power and institutional expertise to resolve the issue of whether an online merchant can be taxed by a state where the merchant has no physical presence. Because the "power to tax involves the power to destroy," *McCulloch* v. *Maryland*, 17 U.S. 316, 431 (1819), allowing states to levy sales taxes on out-of-state retailers would naturally affect—and impede—interstate commerce.[10]

Yet Article I, section 8 of the Constitution explicitly delegates the power to "regulate Commerce ... among the several States" to Congress. This was not accidental. It was a deliberate response to a clear problem under the Articles of Confederation. Prior to this delegation to the federal government, States "taxed & irritated the adjoining States" in a manner that "proved abortive," and "engendered rival, conflicting and angry regulations." Madison, *supra*, at 547–48. As "commercial warfare between states began," it became

---

[10] Liran Einav et al., Sales Taxes and Internet Commerce, 104 Am. Econ. Rev. 1, 24 (2014) ("[A] one percentage point increase in a state's sales tax leads to an increase of just under 2 percent in online purchasing from other states, and a 3-4 percent decrease in online purchasing from home-state sellers.").

abundantly clear that something needed to be done. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533 (1949). The clear need for action also had a clear solution—the power to regulate interstate commerce had to be given exclusively to the federal legislature. "No other federal power was so universally assumed to be necessary, [and] no other state power was so readily relinquished." *Id.* at 534.

Thus, as this Court recognized in *Bellas Hess*, "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Bellas Hess*, 386 U.S. at 760. The Tenth Amendment reserves to the states *only* those "powers not delegated to the United States by the Constitution[.]" U.S. Const. amend. X.

Accordingly, as this Court has long recognized, the Commerce Clause preempts state legislation that burdens interstate commerce even in the absence of congressional action. See *Quill*, 504 U.S. at 309 (The Commerce Clause "'by its own force' prohibits certain state actions that interfere with interstate commerce.") (quoting *S.C. State Highway Dep't.* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938)). Thus, even "without national legislation," the Commerce Clause "puts it into the power of the Court to place limits on state authority." Felix Frankfurter, The Commerce Clause under Marshall, Taney, and Waits 18 (1937).

Even absent congressional action, the Commerce Clause imposes those limits of its own force.

CONCLUSION

This is the prototypical case calling for application of *stare decisis*. *Amici* and other Senators and Representatives should be allowed to exercise the power the Constitution gives them to solve this important issue.

Respectfully Submitted,

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

April 2018

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* eBAY INC., *ET AL.*, IN SUPPORT OF RESPONDENTS

ANDREW J. PINCUS
Counsel of Record
LEAH S. ROBINSON
AMY F. NOGID
KAREN W. LIN
SAMANTHA C. BOOTH
JED W. GLICKSTEIN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. Elimination Of The Physical-Presence Requirement Would Impose Extraordinary Burdens On Interstate Commerce, Disturb Settled Reliance Interests, And Damage The National Economy. 4

A. Requiring Small Sellers To Comply With Every Jurisdiction's Sales-Tax Collection Obligation Would Impose A Substantial Practical Barrier To Participating In Interstate Commerce. 6

1. Determining the sales tax due in myriad jurisdictions is a complex and labor-intensive task. 6

2. Inexpensive software does not solve the complexity problem. 8

3. Audits and litigation would add to compliance costs. 12

4. The exception for small sellers in South Dakota's law should not affect the Court's analysis. 15

TABLE OF CONTENTS—continued

Page

B. Abandonment Of The Physical-Presence Requirement Would Impede The Operations Of Small Businesses And Damage The National Economy.....16

1. Most online businesses are small, operate on tight margins, and cannot absorb substantial new tax-collection compliance costs.....17

2. The circumstances of *amici*, which are typical of small businesses that sell online, demonstrate the crucial role of the physical-presence rule.....18

3. Eliminating the physical-presence rule would stunt economic growth and diminish opportunities for previously marginalized groups.....21

4. Elimination of the physical-presence rule would place small online businesses at a significant competitive disadvantage.....23

II. Due Process Limits The Tax-Collection Burdens That May Be Imposed On Out-of-State Sellers.....28

A. Due Process Limits State Power To Tax And Regulate.....28

TABLE OF CONTENTS—continued

Page

B. Many Small And Medium-Sized Online Businesses Do Not Have Purposeful Contacts With States Where Purchasers Of Their Products Reside.....31

CONCLUSION.....35

TABLE OF AUTHORITIES

Page(s)

CASES

American Oil Co. v. *Neill*,
380 U.S. 451 (1965) 32

Boschetto v. *Hansing*,
539 F.3d 1011 (9th Cir. 2008) 31

Bristol-Myers Squibb Co. v. *Superior Ct. of Cal., San Fran. Cty.*,
137 S. Ct. 1773 (2017) 29

Burger King Corp. v. *Rudzewicz*,
471 U.S. 462 (1985) 30, 34

Edgar v. *Mite Corp.*,
457 U.S. 624 (1982) 29

Exxon Corp. v. *Department of Revenue of Wis.*,
447 U.S. 207 (1980) 32

Frate v. *Dunkin' Brands, Inc.*, No. BER-L-1271-16, 2016 N.J. Super. Unpub. LEXIS 1499 (N.J. Super. Ct. Law Div. June 28, 2016) 14

Helicopteros Nacionales de Colom., S.A. v. *Hall*, 466 U.S. 408 (1984) 30

International Shoe Co. v. *Washington*,
326 U.S. 310 (1945) 29, 30

TABLE OF AUTHORITIES—continued

Page(s)

J. McIntyre Mach., Ltd. v. *Nicastro*,
564 U.S. 873 (2011) 34, 35

Kawa v. *Wakefern Food Corp. Shoprite Supermarkets, Inc.*,
24 N.J. Tax 444 (N.J. Super. Ct. App. Div. 2009) 14

McLeod v. *J.E. Dilworth Co.*,
322 U.S. 327 (1944) 32

MeadWestvaco Corp. v. *Illinois Dep't of Revenue*, 553 U.S. 16 (2008) 29

Miller Bros. Co. v. *Maryland*,
347 U.S. 340 (1954) 29, 33

Moorman Mfg. Co. v. *Bair*,
437 U.S. 267 (1978) 29

North Dakota v. *Quill Corp.*,
470 N.W.2d 203 (N.D. 1991) 34

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) ..... *passim*

Shaffer v. *Heitner*,
433 U.S. 186 (1977) 30

Shrader v. *Biddinger*,
633 F.3d 1235 (10th Cir. 2011) 31

TABLE OF AUTHORITIES—continued

Page(s)

Toys "R" Us, Inc. v. *Step Two, S.A.*,
318 F.3d 446 (3d Cir. 2003) 32

Trintec Indus., Inc. v. *Pedre Promotional Prods., Inc.*,
395 F.3d 1275 (Fed. Cir. 2005) 31

Walden v. *Fiore*,
134 S. Ct. 1115 (2014) ..... *passim*

STATUTES

Ill. Admin. Code tit. 86, § 130.310(a) 8

Ill. Admin. Code tit. 86, § 130.310(d)(7) 8

Minn. Stat. § 297A.62.1 7

Minn. Stat. § 297A.67.8(b) 7

MISCELLANEOUS

2017 NSBA Small Business Regulations Survey, Nat'l Small Bus. Ass'n (Jan. 18, 2017), goo.gl/KPKzPX 18

Amy Haimerl, *The Fastest-Growing Group of Entrepreneurs in America*, Fortune, June 29, 2015, goo.gl/C5AQkx 22

TABLE OF AUTHORITIES—continued

Page(s)

Andreas Lendle et. al., *There Goes Gravity: How eBay Reduces Trade Costs*, Policy Research Working Paper No. 6253, World Bank (Oct. 2012), perma.cc/D9SC-N54N 25

Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WWD, Apr. 7, 2017, goo.gl/keJdfR 24

Debra Cassens Weiss, *Chicago Lawyer Has Filed More Than 900 Qui Tam Actions Against Internet Retailers*, ABA Journal, Oct. 21, 2016, perma.cc/8AYH-LBTJ 14

Eric Schulzke, *The Era of Sales-Tax-Free Online Shopping Is Nearly Over. Here's How It Ended.*, Deseret News, June 7, 2017, goo.gl/9M3hHm 25

Examining the Impact of Technology on Small Business, U.S. Chamber of Commerce, Morning Consult & Facebook (Jan. 18, 2018), perma.cc/5FT5-33BT 22, 26

Grocery and Convenience Stores: Taxable and Nontaxable Sales, Tex. Comptroller of Pub. Accounts (Nov. 2012), goo.gl/TAibMW 7

TABLE OF AUTHORITIES—continued

Page(s)

New Jersey Sales Tax Guide, N.J. Div. of Taxation (July 2017), perma.cc/FKL4-MBH4 8

The New Map of Economic Growth & Recovery, Econ. Innovation Grp. (May 2016), perma.cc/8NRQ-RV3Y 23

Retail Sales Tax Compliance Costs: A National Estimate, PricewaterhouseCoopers (Apr. 7, 2006), perma.cc/6DCP-LH48 15

Sales and Use Tax Exemption for Clothing Under the Streamlined Sales and Use Tax Law, N.J. Div. of Taxation (revised 9/1/06), perma.cc/XX8S-4PU8 9

Stefany Zaroban, *Earnings Preview: Amazon Accounts for 43% of All US Online Sales in 2016*, Digital Commerce 360, Feb. 1, 2017, perma.cc/8PQJ-SFZ7 25

INTEREST OF *AMICI CURIAE*

Amici include eBay, Inc., and independent small businesses in all 50 States that operate on eBay's Marketplace platform. They submit this brief because, as businesses that make or facilitate online sales, they have considerable practical experience bearing on the discriminatory burden that online sellers would face if forced to collect tax on sales to purchasers in jurisdictions across the country. As *amici*'s experience demonstrates, abandoning the physical-presence requirement recognized by this Court's precedent as a necessary predicate for the imposition of such a tax-collection obligation would place crushing burdens on small online businesses, causing many to curtail operations and damaging the national economy. Accordingly, *amici*'s perspective and experience may assist the Court in resolving this case.

Because numerous *amici* have joined this brief, detailed descriptions appear in the Appendix.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

South Dakota and its *amici* make an extraordinary request. They urge the Court to overrule one of its decisions—*Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), which held that a State may impose sales-tax collection obligations only on sellers with

---

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket consents to the filing of *amicus* briefs in this case.

an in-state physical presence—with no regard for the usual considerations of *stare decisis*. They make this request even though Congress could have, but thus far has chosen not to, set aside the *Quill* physical-presence requirement. And they would discard the requirement even though *Quill itself re*affirmed it: the Court there refused to overrule precedent requiring physical presence, finding that the requirement both is necessary to avoid undue burdens on interstate commerce and has engendered significant reliance interests.

In taking a second bite at this apple, 25 years after the Court in *Quill* refused to overrule its physical-presence precedent, South Dakota maintains that changes in the economy have rendered the *Quill* rule obsolete. But that is not so: The considerations that underlie *Quill* apply with undiminished force today. Absent the physical-presence requirement, hundreds of thousands (and possibly millions) of independent small businesses that make online sales—and that were created, and have flourished, in reliance on *Quill*—would be subjected to difficult, and sometimes insuperable, compliance burdens. Overruling *Quill* therefore would cause substantial damage to one of the most important and vibrant segments of the national economy. It also would create many new questions about application of the judicially created rule urged by South Dakota, leading to unnerving uncertainty for businesses that operate online and, inevitably, to extensive litigation.

The Court should not take such a destructive step. As the Court noted in *Quill* itself, modification of the physical-presence requirement, if any modification is indeed appropriate, should be made by Congress, the only body that is equipped to assess the

real-world effects of discarding the requirement and to calibrate any substitute rule in a manner that considers and appropriately balances all of the competing interests.

A. South Dakota's central contention is that satisfying tax collection obligations in the many thousands of U.S. jurisdictions that impose a sales tax would be cheap and simple. But that is false. The free software that South Dakota and its *amici* tout for this purpose has significant flaws and is untested at the scale envisioned, meaning that, if *Quill* is overruled, online sellers would have to (1) themselves master the tax laws of these myriad jurisdictions or (2) purchase expensive tax assistance. And online sellers *still* would be subject to numerous additional compliance burdens, including audits in States across the country, *qui tam* litigation if they under-collect tax, and consumer fraud suits if they over-collect. If anything, these burdens have grown since the time of the *Quill* decision.

B. Imposition of these burdens would have destructive effects on the innumerable independent small sellers now operating online. These businesses, which have few employees and typically lack back-office operations, do not have the resources needed to satisfy varying nationwide tax-collection obligations and the associated administrative and litigation burdens. The real-world experiences of *amici* here, which are detailed below, demonstrate that many small independent online sellers would respond to abandonment of the physical-presence rule by limiting their operations; some would go out of business. And that would have profoundly destructive effects on the national economy: Small online companies provide unique business opportunities for women,

minorities, and people with disabilities, while fostering growth and employment in areas of the country that otherwise have suffered from economic stagnation.

C. If the Court nevertheless overrules *Quill*'s Commerce Clause holding, it should make clear that the Due Process Clause continues to set significant limits on the authority of States to impose sales-tax collection obligations on independent small online sellers. Due process principles preclude States from setting regulatory or tax requirements on out-of-state entities that lack "minimum contacts" with the jurisdiction. In the circumstances here, such contacts exist only when the regulated entity *itself* purposefully creates contacts with the forum. That standard is not satisfied simply because the seller made its products available over Internet commerce marketplaces to potential buyers everywhere in the world—the only contact that independent small online sellers typically have with remote States.

ARGUMENT

I. Elimination Of The Physical-Presence Requirement Would Impose Extraordinary Burdens On Interstate Commerce, Disturb Settled Reliance Interests, And Damage The National Economy.

In *Quill*, the Court relied in substantial part on the importance of "limit[ing] the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." 504 U.S. at 313. In particular, the Court pointed to the burden of complying with tax-collection obligations "imposed by [what was then] the Nation's 6,000-plus taxing jurisdictions," which could "entangle [an out-of-state

seller] in a virtual web of complicated obligations." *Id.* at 313 n.6 (citation omitted). The Court added that the physical-presence requirement "has engendered substantial reliance and has become part of the basic framework of a sizable industry." *Id.* at 317. The concurring Justices reiterated the importance of businesses' reliance on the physical-presence rule, recognizing that "we ought not visit economic hardship upon those who took us at our word." *Id.* at 320-21 (Scalia, J., concurring in part and concurring in the judgment).

In urging the Court to overrule *Quill*, the principal contention of South Dakota and the United States is that these considerations no longer apply. South Dakota assures the Court that the compliance difficulties discussed in *Quill* are now "cheap and easy to solve" (Pet'r Br. 44), while the United States blithely declares, with no real explanation, that the burdens are "manageable." U.S. Br. 22.

But those contentions are demonstrably false. Elimination of the *Quill* physical-presence requirement would impose enormous, and sometimes insurmountable, burdens on independent small businesses that rely on Internet sales—burdens that are, in significant respects, considerably *greater* than those that concerned the Court in *Quill*. And that effect, in turn, would disrupt and damage both a major industry that developed in reliance on the *Quill* rule and the broader national economy.

A. Requiring Small Sellers To Comply With Every Jurisdiction's Sales-Tax Collection Obligation Would Impose A Substantial Practical Barrier To Participating In Interstate Commerce.

To begin with, South Dakota declares that calculating and collecting the sales tax due in every jurisdiction across the Nation "is a trivial matter" (Pet'r Br. 45), an assertion that it repeats throughout its brief with metronomic regularity. *Id.* at 2, 13, 45-47. But that simply is not so. The number of taxing jurisdictions has grown substantially since the decision in *Quill*; the Government Accountability Office recently reported that between 10,000 and 12,000 jurisdictions now collect sales tax, "each with potentially different tax rates, different rules governing tax-exempt goods and services, [and] different product categories." U.S. Gov't Accountability Off., GAO-18-114, *Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* 3 (2017) (GAO Report), perma.cc/JS9Q-67X4. For several reasons, subjecting small independent online businesses to tax-collection obligations in each of these jurisdictions would "unduly burden interstate commerce." *Quill*, 504 U.S. at 313.

1. *Determining the sales tax due in myriad jurisdictions is a complex and labor-intensive task.*

At the outset, determining the correct amount of sales tax due in myriad jurisdictions certainly is not as simple as "typing a shipping address into a search bar." Pet'r Br. 45. See Resp'ts Br. 30-32.

First, it often is not apparent whether the item being sold is even taxable. Slight product differences can engender significant taxability differences. For a flavor of the complexity, consider these representative examples:

- When shipping to Minnesota, a standard blanket is subject to sales tax at the State rate of 6.5% (plus any local rates); but a *baby receiving blanket* would be exempt from tax. Compare Minn. Stat. § 297A.62.1, with Minn. Stat. § 297-A.67.8(b).
- When shipping to Texas, deodorant is subject to sales tax at the State rate of 6.25% (plus any local rates); but deodorant *with antiperspirant* would be exempt. *Grocery and Convenience Stores: Taxable and Non-taxable Sales*, Tex. Comptroller of Pub. Accounts (Nov. 2012), goo.gl/TAibMW.

A vendor must know to look for these sorts of distinctions, and must check them in every jurisdiction into which it makes a sale. And, as discussed below, miscalculations in either direction, resulting in over- or under-collection of taxes, can have significant adverse legal consequences for the vendor.

Second, the vendor must determine the applicable tax rate. Rates vary by location, and can vary within five-digit zip codes—and even within city blocks. To offer just one example, consider Bonner Springs, Kansas, a suburb of Kansas City. If a seller uses Bonner Springs' five-digit zip code 66012, it will charge 7.5% state and local sales tax. But if the seller uses the nine-digit zip code 66012-1402 (still Bonner Springs), the rate will increase to 9.25%. If the

product instead is shipped a few houses down the street to where the nine-digit zip code is 66012-7086, the rate will again be 7.5%.

Rates also may vary by sales price,[2] by the customer's intended use of the product,[3] or by more obscure distinctions; for example, when shipping to Illinois, a *Snickers* bar would be "candy" taxed at the State rate of 6.25% (plus any local rate); but a *Twix* bar would be taxed at the reduced rate for "food" of 1% (plus any local rate). Compare Ill. Admin. Code tit. 86, § 130.310(a), with Ill. Admin. Code tit. 86, § 130.310(d)(7) (defining "candy" and excluding items containing flour).

These state tax rates and rules change with regularity. For example, looking at just one State, between the filing date of South Dakota's brief on February 26, 2018, and the date this brief is filed, at least 44 of the 1,785 taxing localities in California changed their sales tax rates, requiring vendors to update the rates they previously used.

2. Inexpensive software does not solve the complexity problem.

South Dakota and its *amici* do not contend that small online businesses realistically are capable of themselves making these determinations necessary

---

[2] For example, if a vendor sells a dress to a buyer in Connecticut for less than $1000 the sales-tax rate is 6.25%, but if the sale price is more than $1,000 the rate jumps to 7%.

[3] For example, when shipping to New Jersey, yarn intended for art projects would be subject to the State rate of 6.25%, but yarn that the purchaser intends to knit into clothing would be exempt from tax. *New Jersey Sales Tax Guide*, N.J. Div. of Taxation, 22-23 (July 2017), perma.cc/FKL4-MBH4.

to collect sales tax in thousands of jurisdictions across the country, or that requiring them to make those calculations as a condition of doing business online would be permissible under the Commerce Clause. Instead, they suggest that "free" or inexpensive software solves this compliance problem by providing a simple tool for determining tax rates, inviting readers to "try it" for themselves. Pet'r Br. 45. So we tried it—and discovered that South Dakota's free software is no solution at all, making errors and containing omissions that would serve as a trap for unwary or unsophisticated vendors.

The free version of TaxCloud.net cited by South Dakota does not bring many of the distinctions listed above to a vendor's attention. To offer just one of many possible examples, although TaxCloud.net correctly computed the New Jersey sales tax rate for "clothing" as 0%, it incorrectly computed the rate for "scarves" as 6.25% (TaxCloud.net category "Clothing: scarves"). The correct rate for scarves sold into New Jersey is 0%. *Notice: Sales and Use Tax Exemption for Clothing Under the Streamlined Sales and Use Tax Law*, N.J. Div. of Taxation, 1 (revised 9/1/06), perma.cc/XX8S-4PU8. A vendor using the TaxCloud.net software touted by South Dakota in its brief therefore would have over-collected New Jersey sales tax on its sale of scarves—an error, as we explain below (*infra*, pp. 13-14), that would subject the seller to suit by overcharged purchasers.[4] See GAO Report at 17 (noting similar examples).

---

[4] Errors of this sort affect many vendors: on March 8, 2018, there were 542,911 active eBay.com listings for "scarf" or "scarves."

And there are other problems with reliance on free software as an answer to the constitutional concerns that underlie the *Quill* rule. Software cannot determine *how* to categorize each of the myriad products offered for sale online. See *Ibid.* This is a significant real-world issue: On eBay alone, the more than one *billion* items for sale fall into more than *17,000* categories and subcategories, while in 2016 the typical eBay seller that made annual sales of between $10,000 and $500,000 had customers in 314 different taxing jurisdictions.[5]

Thus, free software is not a complete answer to the "virtual welter of complicated obligations" that concerned the Court in *Quill*. 504 U.S. at 313 n.6. In fact, South Dakota's *amicus* NASCP concedes this point, warning users that, "[i]f you are aware * * * of an item-specific tax or exemption in a jurisdiction you do business in, and don't see that item singled out in the drop-down menu, you can contact the software provider, who will verify the information and modify the software accordingly[.]" Br. 17 n.20.

---

[5] South Dakota's *amicus* National Association of Certified Service Providers (NACSP) points to a website with category label codes (or "TICs") to address this problem. Br. 15-18. But even leaving aside the difficulty posed by products that do not fall neatly into conventional categories (*e.g.*, is a Twix bar candy or food?), the software makes many head-scratching distinctions. For example, the general category for "clothing" (TIC 20010) lists 35 items, including "bathing suits," even though there is a separate TIC for "swimsuits" (TIC 92012); and "scarves," even though there is a separate TIC for "scarves" (TIC 92013). Yet the sales tax treatment varies by TIC code. For example, TaxCloud.net indicates that a vendor should charge New Jersey sales tax on a scarf if using TIC 92013 (Scarves) but should not charge New Jersey sales tax if using the general TIC for clothing (20010).

This is a delicate way of acknowledging that vendors cannot safely rely on free software to solve their compliance problems, and that they must familiarize themselves with "item-specific tax[es] or exemption[s]" in the jurisdictions where they sell.

Absent the *Quill* rule, then, a small business could be assured of tax compliance only if it researches for itself the taxability of every product that it sells. Such research would involve locating, accessing, and understanding the sales-tax provisions in every State and local taxing jurisdiction where its products are purchased. It hardly needs extensive proof that this would be an impossibly massive undertaking.

Moreover, the software invoked by South Dakota has never been used on anything remotely like the massive scale that would follow abandonment of the *Quill* rule. To date, of course, businesses have been required to collect sales tax only where they have physical locations, meaning that small businesses have been able to focus their tax collection efforts on a very limited number of jurisdictions with which they have familiarity. It is not at all clear that free software is capable of accommodating millions of small businesses that suddenly would be required to collect tax for the first time in thousands of separate jurisdictions. South Dakota therefore is urging the Court to take an enormous gamble in overturning a long-settled constitutional rule—a request predicated on the untested assumption that legal and compliance issues, which have been expensive and challenging for even the largest businesses to address, would suddenly become cheap and simple for small retailers to resolve.

Nor is more expensive (and, presumably, less error-prone) software a satisfactory alternative, even if it is assumed that such software really is up to the task. South Dakota and its *amici* do not suggest that such sophisticated software is within the financial reach of small businesses; notably, they do not mention such software's costs. On the available evidence, that cost is substantial, running to as much as $200,000 annually—not counting "start-up costs and additional administrative costs," "labor intensive" "mapping" of product categories, and "additional costs to better integrate sales tax software with existing business information systems * * * or regularly reconcile receipts and records manually to prepare sales tax returns for all states where [the business] makes sales." See GAO Report at 19-20. Although it is a truism that interstate commerce must pay its own way, a rule that effectively requires small businesses to pay hundreds of thousands of dollars annually in compliance costs as the practical condition of selling products across the Nation surely would impose an undue burden on interstate sales. This, too, is not debatable: South Dakota's *amicus* Multistate Tax Commission concedes that for small sellers, even with the assistance of available software, the cost of tax collection and remittance "alone may be prohibitive." Br. 9.

3. Audits and litigation would add to compliance costs.

The substantial cost of determining the tax due is not the only compliance burden that would confront small businesses if the physical-presence rule is repudiated. See GAO Report at 19 (software "licensing fees are only one of multiple costs required to collect sales taxes in multiple states").

a. One source of compliance expense—stemming from audits—is especially notable. Audits are expensive and distracting, demanding numerous financial documents, including sales ledgers and receipts, bank records, inventory and purchase records, and income tax returns. If the auditor believes sales tax should have been collected on a particular transaction, the burden will be on the vendor to demonstrate that the auditor is incorrect. See GAO Report at 19-22.

For small businesses, the prospect of undergoing such audits in dozens of States across the country is daunting. The average small business owner who is audited expends many thousands of dollars to resolve the inquiry (whether or not that inquiry was meritorious)—a potentially prohibitive cost for even a successful small enterprise.[6]

b. Absent the physical-presence requirement, small businesses also would face the risk of two types of lawsuits in jurisdictions across the country: *qui tam* actions and consumer class-action challenges.

Small sellers are likely to make occasional errors in the calculation of the tax due, either because they use defective software or due to the complexity of the tax-collection process. And in light of that complexity, sellers could easily be *accused* of making such er-

---

[6] The experience of *amicus* 411Marine is typical; an audit in its home State required expenditure of $8000 in administrative costs. See page 20, *infra*; see also Br. United Network Equipment Dealers Ass'n 9 (citing evidence that small companies pay $5,000 in audit fees per $1 million in revenue). Audits in distant States, requiring travel and retention of out-of-state accounting assistance or counsel, would be significantly more expensive.

rors even if they did not. These errors (or accusations) could have significant, and very expensive, legal consequences.

If a vendor collects too *little* in tax, it could be subject to *qui tam* litigation seeking recovery of the amount underpaid. At least ten States permit such suits, and they are brought with some frequency. See, *e.g.*, Debra Cassens Weiss, *Chicago Lawyer Has Filed More Than 900 Qui Tam Actions Against Internet Retailers*, ABA Journal, Oct. 21, 2016, perma.cc/8AYH-LBTJ. But if the vendor collects too *much* in tax, it could be subjected to consumer class action suits seeking damages for overcharging. These sorts of suits, too, are frequent. See, *e.g.*, *Frate* v. *Dunkin' Brands, Inc.*, No. BER-L-1271-16, 2016 N.J. Super. Unpub. LEXIS 1499 (N.J. Super. Ct. Law Div. June 28, 2016); *Kawa* v. *Wakefern Food Corp. Shoprite Supermarkets, Inc.*, 24 N.J. Tax 444 (N.J. Super. Ct. App. Div. 2009).

Many consumer fraud and false claims/*qui tam* provisions carry the potential of treble damages and the payment of the relator's attorneys' fees, in addition to any tax deficiency found to exist. And compounding the threat to vendors, even though the standard statute of limitations period for the assertion of tax against a sales-tax filer is three or four years, the statute of limitations in a *qui tam* suit often exceeds that period (New York's is 10 years).

Against this background, it is undeniable that the burden on small businesses associated with a universal sales-tax collection obligation would be enormous. Even under current law, a study conducted by PricewaterhouseCoopers LLP determined that, for sellers with annual sales under $1,000,000, the cost of complying with sales-tax collection obligations

is 16.84% of state and local sales tax collected. *Retail Sales Tax Compliance Costs: A National Estimate*, PricewaterhouseCoopers, 12 (Apr. 7, 2006), perma.cc/6DCP-LH48. Inevitably, this burden would grow exponentially if *Quill* were overruled.

4. The exception for small sellers in South Dakota's law should not affect the Court's analysis.

Finally, these dangers are not vitiated by the inclusion in South Dakota's law of an exception that purports to protect small sellers. That law, enacted for the express purpose of challenging *Quill*, is a stalking horse; if *Quill* is overruled, many States undoubtedly will impose sales-tax collection requirements to the limits of their constitutional authority. See Resp'ts Br. 50-52. As it is, 23 States that encompass 70% of the U.S. population have refused to adopt the Streamlined Sales and Use Tax Agreement (SSUTA), another much-touted voluntary state effort to simplify sales tax collection. Compare Pet'r Br. 13-14, with Resp'ts Br. 17-19. And the request by South Dakota's *amicus* Multistate Tax Commission that States be allowed to seek sales tax retroactively if *Quill* is overruled suggests the aggressive tack that state tax collectors can be expected to take. MTC Br. 18-19. See Resp'ts Br. 62-65.

Moreover, compliance with state-by-state and locality-by-locality small-business exemptions, if they indeed are created, would itself place substantial burdens on small businesses, with sellers having to wade through a patchwork of varying exemption rules. For any business whose sales approach small-business exemption thresholds, tracking whether the business qualifies for an exemption in each jurisdiction where it sells could be more burdensome than

simply collecting taxes. And the mere *existence* of a tax on remote sellers (even if a seller qualifies for an exemption) would carry hidden costs by creating the risk of audits and tax penalties.

South Dakota's emphasis on the limits in its law—and the suggestion by *amici* like the Tax Foundation that these limits are crucial to the law's constitutionality (see Br. 10-18)—thus serve principally to demonstrate that any action in this area should be taken by Congress, which is the only body able to adopt uniform nationwide protections for small sellers.

B. Abandonment Of The Physical-Presence Requirement Would Impede The Operations Of Small Businesses And Damage The National Economy.

If the physical-presence requirement is abandoned, the tax-collection burdens described above would fall disproportionately on small and "micro-businesses" (the latter generally defined as having fewer than five employees)—a particularly valuable, but vulnerable, segment of the economy. The high cost and practical difficulty of compliance would force many of these businesses to restrict their operations, or cease operating altogether, and would discourage other aspiring entrepreneurs from starting new businesses in the first place. That outcome would have destructive consequences for the national economy. The Court's recognition in *Quill* that the physical-presence requirement "ha[d] engendered substantial reliance and has become part of the basic framework of a sizable industry" (504 U.S. at 317) applies with even greater force today, as removal of *Quill*'s "basic framework" would injure a vastly larg-

er number of people, and affect a much larger industry, than it would have in 1991.

1. Most online businesses are small, operate on tight margins, and cannot absorb substantial new tax-collection compliance costs.

The overwhelming majority of businesses that sell online are very small, even vis-à-vis other sectors of the small-business community. In 2014, for example, eBay alone provided a platform for hundreds of thousands of commercial sellers with annual sales that exceeded $10,000 but were less than $1 million. Additional business owners rely on other platforms (like Etsy) and on social media sites (like Facebook and Instagram) or non-marketplace platforms (like Symphony Commerce, Squarespace, Magento, CommerceHub, Drupal Commerce, and Shopify) to launch and run their small and micro-businesses. So it is certain that there are many hundreds of thousands, and more likely millions, of small businesses operating today in the United States that sell their products and services online.

These small businesses simply are not equipped to handle the burden of tax compliance and enforcement in more than 10,000 jurisdictions across the Nation. Such businesses typically have minimal, or no, back-office staffs. Because they operate on very small margins, they lack the option of outsourcing tax compliance burdens. In fact, 40% of all small business owners cite themselves as the primary person tasked with regulatory compliance for their company, and reported spending at least five hours every month on that task. Only 21% had designated legal counsel or human resources staff to keep them abreast of regulations that might affect their busi-

ness. *2017 NSBA Small Business Regulations Survey* Nat'l Small Bus. Ass'n, 6-7 (Jan. 18, 2017), perma.cc/YBF8-3BVH.

Given the limited resources and tight margins of small online businesses, the imposition of sales-tax compliance burdens in many thousands of jurisdictions certainly would deter growth and encourage sellers to avoid markets where tax compliance expenses and audit exposure risk would outweigh the marginal opportunity for increased profit; would put some sellers out of business altogether; and would discourage the creation of new businesses. Although the United States declares that online sellers maintain a "virtual presence" everywhere (Br. 27), overruling *Quill* would impose *real* burdens on these sellers that, given the States' current ability to collect the bulk of tax due on remote sales (see GAO Report at 8), would be "'clearly excessive.'" U.S. Br. 23.

2. The circumstances of amici, *which are typical of small businesses that sell online, demonstrate the crucial role of the physical-presence rule.*

This concern is not theoretical: it is borne out by the real-world experiences of *amici* here. The following examples are typical of small independent businesses that use the eBay platform. Four of these five businesses have sold to customers in all 50 States (the fifth has customers in all States but Alaska and Hawaii), and absent the *Quill* rule therefore would be required to comply with tax-collection obligations all across the Nation.

Colleen Rast would never have started Great Sky Gifts—which sells apparel, collectibles, and lo-

cally made gifts and food on eBay and other online platforms—in 2001 had she been required to figure out how to collect and remit taxes for every U.S. state and local jurisdiction. The physical-presence rule allowed her to instead focus her time and resources on creating and growing her business. She now employs three full-time and two part-time individuals and rents a 6,000-square-foot warehouse in her hometown of Kalispell, Montana. That growth, in turn, has benefited other local businesses in her community, permitting her to purchase, and sell online, products from those businesses. She also has mentored other local businesses on how to expand by selling online.

This growth, however, would not cover the burden of collecting taxes, and of potentially being audited, in all jurisdictions into which Mrs. Rast sells goods. Recently, as a result of state rules requiring her to collect and remit taxes for her products that are sold on Amazon.com and pass through Amazon warehouses, she has begun collecting tax on sales in 13 States, and she has been audited in Arizona. The complexity and expense of these burdens leads her to believe that, if she is subject to sales-tax collection obligations in all States and local jurisdictions where she sells her products, she would close her business—to the detriment of her current employees, the local businesses whose products she purchases and sells, and the other local businesses she mentors.

Chris Bright started 411Marine with his family to reduce landfill waste by dismantling old vessels and recycling their parts. Expanding their business to sell parts on eBay allowed them to survive the economic downturn in 2007; had they been required to collect and remit sales tax nationwide at that

time, they would have had to close their business. That remains a concern. 411Marine's annual net revenues are approximately $60,000, barely enough to cover the $8,000 (plus innumerable hours and stress) it has cost to respond to an audit in Mr. Bright's home State of South Carolina. It is certainly not enough to cover the cost of audits in other States and the $50,000 it would cost to hire an additional employee to ensure compliance with tax rules in jurisdictions across the Nation. These prospective costs, and the added worry that would come with them, make Mr. Bright fear that, if the physical-presence rule is repudiated, he will have to close 411Marine—resulting in five employees losing their jobs and more waste filling local landfills.

Laurie Wong also cannot afford the $10,000 her accountant estimates an audit would cost—much less multiples of that if she were subject to audits in all the States in which she sells goods. Nor can she afford the tripling of her accounting budget that would result if she were required to collect and remit taxes in multiple jurisdictions. Instead, she would have to curtail many of the programs that her not-for-profit business, Reflections of Trinity, provides to help members of her Georgia community—programs including a food pantry that provides nearly 600 boxes of food a week to those in need; a senior bridge program, which delivers food to seniors in three communities; and dental outreach and services for seniors. These programs were made possible by Mrs. Wong expanding from selling donated goods out of a brick-and-mortar store to selling on eBay. The online sales have helped Reflections of Trinity's revenue grow from approximately $100,000 annually to approximately $500,000, while its paid staff has grown from two to ten. But the added costs of figuring the

tax due from sales in innumerable jurisdictions would directly reduce the funds available for the essential services Reflections of Trinity provides to its community.

The experiences of Mrs. Rast, Mr. Bright, and Mrs. Wong are echoed by those of **Angie Nelson**—who fears that elimination of the physical-presence rule would force her to scrap her plans for expanding her electronics recycling and resale business, eliminate the eBay storefront that generates 80% of her sales, and dismiss her eleven employees; of **Tony Brocato**—who worries that his family-owned tire and appliance store would have to stop selling on eBay, dismiss the four local workers it hired in response to its online growth, and reduce its donations to local charities; and of thousands of other small business owners in communities across America.

3. Eliminating the physical-presence rule would stunt economic growth and diminish opportunities for previously marginalized groups.

The social and economic harms that would follow from abandonment of the physical-presence rule—in lost innovation, income, job stability and creation, and expanded opportunity for marginalized communities—would far outweigh whatever limited increase in tax revenue States might obtain from those small businesses that do survive.

The Internet makes it possible for anyone, anywhere, to operate a national or international business—and as the experiences of *amici* here demonstrate, innumerable small businesses are doing just that. This unprecedented opportunity has permitted women and minorities to create small businesses at

higher rates than ever before. As the histories of online sellers like Colleen Rast, Laurie Wong, and Angie Nelson suggest, the schedule and geographic flexibility provided by eBay and other Internet platforms is opening doors to success outside of traditional employment paths that many women have found appealing. It surely is no coincidence that the emergence of Internet businesses corresponded with exponential growth in the number of businesses owned by African-American women (historically one of the most marginalized groups), which has increased by 322% since 1997. Amy Haimerl, *The Fastest-Growing Group of Entrepreneurs in America*, Fortune, June 29, 2015, goo.gl/C5AQkx.

Similarly, a collaborative study by Facebook, the U.S. Chamber of Commerce Technology Engagement Center, and Morning Consult found that African-American, Hispanic, and veteran business owners were 36%, 40%, and 34% more likely, respectively, to build their businesses on Facebook, as compared to other business owners. *Examining the Impact of Technology on Small Business*, U.S. Chamber of Commerce, Morning Consult & Facebook, 8 (Jan. 18, 2018), perma.cc/5FT5-33BT (*"Examining the Impact"*). The same groups were 25%, 31%, and 25% more likely than other business owners to have used Facebook to conduct business with entities in other cities, counties, or States. *Ibid.* This data confirms that the Internet is creating non-traditional pathways to employment and success for members of the workforce that face special challenges.

And more generally, e-commerce has fostered growth and employment across the country. Because online sales permit entrepreneurs in even the most remote locations to operate a national business,

growth in e-commerce micro-businesses is far more geographically diverse than that in the rest of the economy. According to a 2016 study by the Economic Innovation Group (EIG), more than *half* of the net business growth since the Great Recession has occurred in just 20 large metropolitan counties, located in just seven States. *The New Map of Economic Growth & Recovery*, Econ. Innovation Grp., 9 (May 2016), perma.cc/8NRQ-RV3Y. Moreover, 59% of counties (home to almost one-third of the U.S. population) experienced a *reduction* in total businesses from 2010 to 2014. *Id.* at 7. On eBay, however, the top 50% of net business growth was distributed among almost four times as many counties (75), and nearly 75% of counties experienced net small business growth on eBay. *Platform-Enabled Small Businesses and the Geography of Recovery*, eBay, 12-13 (Jan. 2017), perma.cc/22YL-UKGX. Further, more than 10% of that small business growth came from counties with fewer than 100,000 people. *Id.* at 4.

Overall, small and micro-businesses operating online have expanded economic opportunities for previously marginalized groups. They also have fostered revitalization of smaller communities that otherwise have been left out of the post-recession recovery. By greatly burdening the businesses whose growth has fostered these developments, abandonment of the physical-presence rule would undermine both of these boons to the national economy.

4. Elimination of the physical-presence rule would place small online businesses at a significant competitive disadvantage.

In nevertheless contending that *Quill* has had harmful economic effects, South Dakota and its *amici* insist that the physical-presence rule gives online

businesses an unfair competitive advantage over their brick-and-mortar counterparts. Pet'r Br. 10-11. But whether or not this contention would have been accurate a generation ago, it is not today: the competitive effects highlighted by South Dakota have been overtaken by more recent changes in the marketplace.

Although South Dakota and its *amici* treat e-commerce and brick-and-mortar businesses as mutually exclusive, that is not the competitive reality today. The top players in today's e-commerce marketplace all have *both* an online *and* a physical presence in virtually every State.[7] As the GAO Report observed (at 9): "Many of the largest Internet sellers are established retail chains or consumer brands with a physical presence, such as retail stores, in all, or nearly all, of the 45 states (plus the District of Columbia) that have a statewide sales tax." A quick perusal of the "top 50" online retailers confirms that observation. Topping the list are chains like Wal-Mart, Target, Apple, Macy's, and Nordstrom, which collect and remit sales tax nationwide.[8] And although Amazon was once the *bête-noir* of brick-and-mortar retailers, it now has its own nationwide network of increasingly local facilities across the country, including a growing range of logistics centers as well as interconnected brick-and-mortar retail operations—causing it, as of 2017, to collect sales tax in *all* jurisdictions. This evolution has "sharply altered the political and economic dynamics" of the e-commerce

---

[7] Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WWD, Apr. 7, 2017, goo.gl/keJdfR.

[8] *Ibid.*

market and the pool of sellers that benefit from the *Quill* rule.[9]

Consequently, the most constitutionally significant marketplace change since the decision in *Quill* has not been the rise of large online retailers that escape sales-tax collection obligations. Instead, it is that e-commerce has made it possible for *very small* businesses to have a *universal* geographic reach. Indeed, a 2012 World Bank research paper found that Internet platforms like eBay reduce the "friction of distance" (the transaction costs that preclude otherwise mutually beneficial transactions between remote buyers and sellers), with the "distance effect [being] 65 percent smaller online than offline." Andreas Lendle et. al., *There Goes Gravity: How eBay Reduces Trade Costs*, Policy Research Working Paper No. 6253, World Bank, 3 (Oct. 2012), perma.cc/D9SC-N54N. That reality is obvious: Prior to the development of e-commerce (that is, when *Quill* was decided), small independent sellers such as *amici* here could not have found customers and sold their products across the Nation and around the world—the sales that make operation of their businesses feasible.

Yet if South Dakota prevails, these small Internet businesses will be subject to multi-state tax burdens that are exponentially greater than those im-

---

[9] Eric Schulzke, *The Era of Sales-Tax-Free Online Shopping Is Nearly Over. Here's How It Ended.*, Deseret News, June 7, 2017, goo.gl/9M3hHm. See also Stefany Zaroban, *Earnings Preview: Amazon Accounts for 43% of All US Online Sales in 2016*, Digital Commerce 360, Feb. 1, 2017, perma.cc/8PQJ-SFZ7 (estimating that Amazon's 2016 sales accounted for between 33 and 43 percent of all U.S. online retail); Resp'ts Br. 46-49.

posed on their *equivalently sized* brick-and-mortar counterparts. Consider two start-up retailers, one brick-and-mortar and one Internet-based. The brick-and-mortar business selects its physical site (and tax jurisdiction), and must learn only one set of tax collection rules, file one set of returns, and submit to one set of audits. In contrast, an e-commerce business *starts out* on a national (or even global) scale, and thus would wade into a morass of conflicting tax regulations from virtually its first sale—and that burden would grow rapidly as buyers from additional remote locations select the seller's wares. The net effect of overturning *Quill*, then, would be to impose a disproportionate burden *on small remote sellers*, giving equivalently situated in-state brick-and-mortar vendors a competitive windfall.

And that is not all. The dichotomy between online and brick-and-mortar retailers is breaking down for all sizes of business, with as many as 75% of *small* businesses in the United States using at least one major digital platform for sales. *Examining the Impact* at 3. Those brick-and-mortar (or, more accurately, "brick-and-click") local businesses are now getting the advantage of the *Quill* rule when they make online sales into other jurisdictions, just like businesses that operate only on the Internet. But overruling *Quill* would subject these brick-and-click businesses' online sales to the same burdens that are outlined above, with the almost certain result that these businesses also would sometimes choose to limit the scope of their operations. The result would be to suppress nationwide commerce and economic activity.

* * * * *

The premises on which South Dakota rests its argument are false. If *Quill* is overruled, tax compliance will not be painless; for small online sellers, complying with tax-collection obligations in remote jurisdictions would be daunting, prohibitively expensive, and sometimes impossible. Rejecting the physical-presence rule would not restore competitive balance; instead, it would place small online sellers at a profound competitive disadvantage. And although South Dakota posits that *Quill* had unintended practical consequences, that decision simply *affirmed* existing law and *preserved* reliance interests; it is the dramatic change urged by South Dakota that would have devastating—and, so far as this Court is concerned, literally incalculable—effects on innumerable businesses that developed and operate in reliance on the *Quill* rule.

At bottom, South Dakota's case turns on factual assertions about the ease of compliance and competitive realities that are hotly contested—we submit that they are wrong—and that an appellate court simply is not equipped to assess. If this Court nevertheless accepts the State's argument and overrules *Quill*, but proves incorrect in its factual assumptions, its decision will cause devastating injury to hundreds of thousands of small businesses and the untold millions of people who own and work for them. The Court should not take such a blind leap of faith. It should reaffirm *Quill*, leaving South Dakota free to present its empirical arguments to the proper audience: Congress.

II. Due Process Limits The Tax-Collection Burdens That May Be Imposed On Out-of-State Sellers.

For the reasons addressed above, the Court should not disturb the Commerce Clause holding of *Quill*. But if the Court disagrees with that submission, its decision also should take account of the *other* relevant constitutional limit on the States' power to tax and regulate: The Due Process Clause precludes the imposition of obligations on out-of-state entities that have not purposefully availed themselves of the opportunity to do business in the regulating State. Under this long-standing constitutional principle, an out-of-state seller does not subject itself to a State's sales-tax collection obligations simply by making its wares available on the Internet.

The existence of this due process limit, and the complexity of the due process litigation that inevitably would follow repudiation of the *Quill* Commerce Clause rule, *itself* counsels against overruling *Quill*. If the Court does reject *Quill*'s Commerce Clause holding, however, it should make clear that due process continues to bar the imposition of tax-collection obligations on sellers that lack a sufficiently substantial connection with the taxing State.[10]

A. Due Process Limits State Power To Tax And Regulate.

1. Due process limitations, although "closely related" to Commerce Clause considerations, impose

---

[10] The United States and others of South Dakota's *amici* recognize that due process is an independent constraint on state power to tax. See U.S. Br. 13 n.1; Law Professors & Economists Br. 10 n.6.

"analytically distinct" constraints on a State's power to tax and regulate. *Quill*, 504 U.S. at 305 (quotation omitted). See also, *e.g.*, *MeadWestvaco Corp.* v. *Illinois Dep't of Revenue*, 553 U.S. 16, 24 (2008). As the Court explained in *Quill*: "Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him." 504 U.S. at 312.

These due process fairness concerns shape the limits on a State's ability to exercise its authority over persons or entities outside its borders. Perhaps the most familiar of these due process restrictions are those on the scope of a State's adjudicative authority over nonresidents, where it is settled that a state court may exercise personal jurisdiction only over nonresidents who have sufficient "minimum contacts" with the court's State. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-17 (1945); see, *e.g.*, *Bristol-Myers Squibb Co.* v. *Superior Ct. of Cal., San Fran. Cty.*, 137 S. Ct. 1773, 1779 (2017).

And of particular relevance here, very similar limits govern both "a State's power to enact substantive legislation" (*Edgar* v. *Mite Corp.*, 457 U.S. 624, 643 (1982) (quotation omitted)) and its authority to tax, where the Due Process Clause demands "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill*, 504 U.S. at 306 (quoting *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345 (1954)). See also *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 272-273 (1978). This is not surprising, as the Court's seminal decision stating the due process limits on

state adjudicative jurisdiction, *International Shoe*, also addressed—and used a similar standard to define—state authority to tax. See *Shaffer* v. *Heitner*, 433 U.S. 186, 203 (1977); *International Shoe*, 326 U.S. at 321.

2. In assessing whether minimum contacts that are sufficient to support exercise of a State's regulatory or adjudicatory authority exist, courts are guided by two fundamental considerations.

First, "the relationship must arise out of contacts that the 'defendant *himself* creates with the forum State." *Walden* v. *Fiore*, 134 S. Ct. 1115, 1122 (2014). This means that the "unilateral activity of another party * * * is not an appropriate consideration when determining whether a defendant has sufficient contacts with the forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colom., S.A.* v. *Hall*, 466 U.S. 408, 417 (1984).

Second, the "minimum contacts" inquiry focuses on "the defendant's contacts with *the forum State itself*, not the defendant's contacts with persons who reside there." *Walden*, 134 S. Ct. at 1122 (emphasis added). This requirement demands that the defendant "'deliberately' * * * engage[] in significant activities *within* a State" or "creat[e] '*continuing* obligations' between himself and residents of the forum." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475-476 (1985) (emphasis added) (quotations omitted).

Under these principles, "an individual's contract with an out-of-state party *alone*" cannot "automatically establish sufficient minimum contacts" for the exercise of jurisdiction. *Burger King*, 471 U.S. at 478. Rather, due process requires some act by which the regulated party "purposefully 'reach[es] out beyond'

their State," as by "entering in a contractual relationship that 'envision[s] continuing and wide-reaching contacts' in the forum state." *Walden*, 134 S. Ct. at 1122 (quoting *Burger King*, 471 U.S. at 473, 480).

B. Many Small And Medium-Sized Online Businesses Do Not Have Purposeful Contacts With States Where Purchasers Of Their Products Reside.

1. In many cases, these due process constraints will prohibit States from imposing tax-collection obligations on out-of-state businesses that operate online. Most small and medium-sized online businesses—*amici* here, for example—do nothing to purposefully target *particular* States, and thus lack the minimum contacts with those States that are required to support the assertion of state authority.

Of course, a business makes a deliberate decision to offer its goods or services online, where they will be available to customers everywhere in the world. And "in a sense, the internet operates 'in' every state regardless of where the user is physically located" *Shrader* v. *Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011). A website, however, "is not *directed at* customers in [a particular State], but instead is available to all customers throughout the country who have access to the Internet." *Trintec Indus., Inc.* v. *Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1281 (Fed. Cir. 2005) (emphasis added). So far as the online seller is concerned, that the buyer lives in one jurisdiction as opposed to another is largely irrelevant; the only connection is that the remote jurisdiction "is where the purchaser happen[s] to reside," a contact that is insufficient to establish jurisdiction. *Boschetto* v. *Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008). And

this conclusion is even stronger when the business's contact with buyers in other States is mediated primarily or entirely through a website operated by *another* entity like eBay, Etsy, or Amazon.

Accordingly, "the mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world." *Toys "R" Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003). It is not enough to satisfy due process requirements that the business hopes—or knows—that establishing an online presence will result in sales to persons who live in States other than its own: In selling goods or services, an online business ordinarily does not "avail[] itself of the 'substantial privilege of carrying on business' within [the buyer's] State." *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U.S. 207, 220 (1980). Cf. *Walden*, 134 S. Ct. at 1124. In fact, the *seller* does nothing in, or to target, the buyer's State at all. See *American Oil Co.* v. *Neill*, 380 U.S. 451, 457 (1965) (Idaho's tax on sales in Utah held invalid "despite the fact that the vendor knew that the goods were destined for use in that State").

2. It is no answer that *purchasers* of the online seller's product live in and benefit from services provided by the taxing State. The purchaser is subject to use tax where he or she lives and uses that product, but that does not justify imposing a burden on the *seller*: "[a] sales tax and a use tax * * * are * * * taxes on different transactions and for different opportunities afforded by a State." *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330-331 (1944). And an online business has *no* connection, let alone a substantial one, with the relationship between the buyer and the

buyer's State that supports imposition of a tax-collection obligation.

The Court already has reached that conclusion, in circumstances that, although lower-tech, were in principle quite similar to those here. In *Miller Brothers*, Maryland attempted to collect a use tax from a Delaware vendor that sold items to Maryland residents, noting that the vendor's "advertising with Delaware papers and radio stations, though not especially directed to Maryland inhabitants, reached, and was known to reach, their notice." 347 U.S. at 342. The Court rejected that argument. It held that such "incidental effects of general advertising" were not sufficient to show the business's "invasion or exploitation of the consumer market *in Maryland*." 347 U.S. at 347 (emphasis added). Nor was it sufficient that the business "delivered some purchases to common carriers consigned to Maryland addresses," and even delivered products to Maryland in "its own vehicles." *Id.* at 342. As the Court held, "the burden of collecting or paying" the purchaser's tax "cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here." *Id.* at 357. The parallel to an online seller, whose website also "reach[es]" buyers in the taxing State and whose products are delivered to purchasers there, is apparent.[11]

---

[11] The rejection of the petitioner's due process challenge in *Quill* is wholly consistent with this view. Compared to the individual *amici* here, Quill was a juggernaut, doing more than $200 million a year in national sales, more than $1 million of which were in North Dakota. 504 U.S. at 302. To obtain these significant North Dakota revenues, Quill targeted North Dakota with massive quantities of catalogues and flyers (*id.* at 304), each year mailing over 230,000 pieces of mail (collectively weighing

In short, when the seller's only connection to the taxing State rests on the fortuity that one of the State's citizens has purchased something from the seller's website and thereby incurred a tax obligation, the seller does not "'deliberately' * * * engage[] in significant activities within a State" or "creat[e] 'continuing obligations'" necessary to establish minimum contacts for taxing purposes. *Burger King*, 471 U.S. at 475-476 (quotations omitted). In these circumstances, a State no more may conscript an out-of-state defendant into collecting a tax the State imposes on its own citizens than it may hale an out-of-state defendant into court based on the State's contacts with the plaintiff. *See Walden*, 134 S. Ct. at 1122.

3. To be sure, application of due process principles to Internet commerce may pose difficult questions in particular circumstances. Cf. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 890 (2011) (Breyer, J., concurring). That is all the more reason for the Court not to jump into the briar patch by overruling *Quill* and uprooting 50 years of Commerce Clause jurisprudence.

---

24 tons) to North Dakota customers. *North Dakota* v. *Quill Corp.*, 470 N.W.2d 203, 205 (N.D. 1991). Quill also licensed custom software to buyers that, the state supreme court found, gave Quill a property interest in property located in the State. *Id.* at 216.

Based on these extensive and intentional contacts, the Court found "no question that Quill ha[d] purposefully directed its activities at North Dakota residents" and "that the magnitude of those contacts [was] more than sufficient for due process purposes." 504 U.S. at 308. In contrast, a business that does not target a State, instead selling products via generally accessible third-party platforms like eBay, has not "purposefully directed its activities" at the buyer's State.

But whatever the precise contours of the Due Process Clause's restraints on state authority, those limits are real and have a substantial scope. And just as "[i]t may be fundamentally unfair to require a small Egyptian shirt maker * * * or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States" (*Nicastro*, 564 U.S. at 892 (Breyer, J. concurring)), so too would it be fundamentally unfair to subject each of the myriad e-businesses operating today, selling products over the Internet and through online platforms, to the massive burden of assessing and collecting taxes in thousands of jurisdictions throughout the United States—jurisdictions in which the business has no substantial operations and with which it lacks traditional minimum contacts.

For these reasons, if the Court overrules *Quill* it should make clear that the Due Process Clause's guarantee of the "fundamental fairness of governmental activity" (*Quill*, 504 U.S. at 312) limits State power to impose tax-collection obligations on online businesses.

CONCLUSION

The decision of the South Dakota Supreme Court should be affirmed.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
LEAH S. ROBINSON
AMY F. NOGID
KAREN W. LIN
SAMANTHA C. BOOTH
JED W. GLICKSTEIN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

APRIL 2018

APPENDIX

DESCRIPTIONS OF THE *AMICI CURIAE*

eBay Inc., is a global e-commerce company that operates through its Marketplace, StubHub, and Classifieds platforms. It connects millions of buyers and sellers around the world. Its platforms enable sellers to organize and offer their inventory for sale, and buyers to find and purchase it. Founded in 1995 in San Jose, California, eBay is one of the world's largest and most vibrant marketplaces for discovering great value and unique selection. As of December 31, 2017, eBay's Marketplace and StubHub platforms had over one billion live listings around the globe.

Frederickson's, located in Sheffield, Alabama, sells luxury appliances.

Blonde Giraffe Fashions, located in Sitka, Alaska, sells fashions.

Revivelt, located in Mesa, Arizona, sells refurbished computer parts and electronics.

Knife Art, located in Little Rock, Arkansas, sells quality cutlery.

eWaste Direct, Inc., located in Livermore, California, is a recycling store for outdated computer equipment.

The Pros Closet, located in Boulder Colorado, sells bicycles, parts, and accessories.

Omni Comics & Cards, located in Wethersfield, Connecticut, sells collectibles.

Sound of Tri State, located in Claymont, Delaware, sells electronics.

Textile Magic, located in Washington, D.C., sells a variety of textiles.

QuikDrop, located in Stuart, Florida, sells collectibles and is a consignment drop-off store.

Reflections of Trinity, located in Powder Springs, Georgia, is a charity business that sells clothes to provide for a community resource center.

Andres Harnisch Brokerage Inc., located in Honolulu, Hawaii, is a dealer in antiques, jewelry, and collectibles.

Garden Devotions, located in Post Falls, Idaho, sells religious statuary and home and garden decor.

BubbleFast, LLC, located in Gurnee, Illinois, sells eco-friendly supplies.

Speed Outfitters, located in Elkhart, Indiana, sells motorcycle parts and gear.

Geothermal Products, located in Ankeny, Iowa, is a green business that sells geothermal installations.

Outdoor Power Deals, located in Basehor, Kansas, sells outdoor equipment and parts.

Loucon LLC, located in Murray, Kentucky, sells sporting goods.

Jen Picked, located in West Monroe, Louisiana, sells fashion.

Enjoyment for Everyone, located in Westbrook Maine, sells clothing.

Green Living LLC, located in Silver Spring, Maryland, sells vitamins.

Golf Etail, located in Springfield, Massachusetts, sells gold equipment.

Suit Depot, located in Oak Park, Michigan, sells men's suits and blazers.

Relay Networks, located in Deephaven, Minnesota, sells indoor and outdoor networking solutions.

Adam Pollock LLC, located in Madison, Mississippi, sells jewelry, diamonds, and watches.

College-Therapy-Fund, located in Dardenne Prairie, Missouri, sells antiques and vintage jewelry.

Great Sky Gifts, located in Kalispell, Montana, sells apparel, collectibles, and locally made gifts and food.

Gongs Unlimited, located in Lincoln, Nebraska, sells gongs.

Motorcycle Works, located in Carson City, Nevada, sells motorcycle parts.

Coast to Coast, located in Newport, New Hampshire, sells Chinese antiques.

Seamless Development, located in Cherry Hill, Nerw Jersey, sells custom e-commerce software.

Native Treasures of New Mexico, located in Peralta, New Mexico, sells Native American jewelry and art.

NYC Fitness Family and Finds, located in New York City, New York, sells brand-name clothing and household items.

Better Deals 123, located in Wake Forest, North Carolina, sells smart phone accessories.

Outdoor Bunker, located in Fargo, North Dakota, sells hunting, camping, and survival gear.

The Music Farm, located in Canton, Ohio, sells guitars and electronics.

Dashkin, located in Broken Arrow, Oklahoma, sells car parts.

541 Motorsports, located in Grants Pass, Oregon, sells car parts.

Zig's Truck and Auto Accessories, located in Pittston, Pennsylvania, sells truck and auto parts.

Divas Rack 13, located in North Providence, Rhode Island, sells clothing.

ABC Motors & Marine, located in Hardeeville, South Carolina, sells parts, engines, and accessories for boats.

RC Hunting Store, located in Aberdeen, South Dakota, sells hunting gear.

Mac Nash, located in Hendersonville, Tennessee, sells collectible toys.

G-Brats Guitars, located in Midlothian, Texas, sells guitars.

MDG Sales, located in South Jordan, Utah, sells electronics, DVDs, and movies.

Al's Snowmobile Parts Warehouse. located in Newport, Vermont, sells used snowmobile, ATV, and UTV parts.

C2 Management, located in Berryville, Virginia, sells recycled electronics.

Tuff Rooster, located in Nine Mile Falls, Washington, sells descaling tablets and solutions, as well as brand name clothing.

Sarge & Reds, located in Harpers Ferry, West Virginia, sells playing cards.

DRL Communications, located in Mukwonago, Wisconsin, sells radio equipment.

Mid Mod, located in Cheyenne, Wyoming, sells modern furniture.

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC. ET AL.,

Respondents.

On Writ of Certiorari
to the Supreme Court of South Dakota

BRIEF FOR ETSY, INC. AS AMICUS CURIAE SUPPORTING RESPONDENTS

WILLIAM M. JAY
ANDREW KIM
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001

JILL SIMEONE
ETSY, INC.
117 Adams Street
Brooklyn, NY 11201

KEVIN P. MARTIN
Counsel of Record
SAMUEL J. GAMER
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
kmartin@goodwinlaw.com
(617) 570-1000

April 4, 2018

TABLE OF CONTENTS

Page

I. Microbusinesses Will Suffer The Greatest Adverse Effects Of Abandoning The *Quill* Rule. 5

II. Quill's Fundamental Premise Remains Sound In The Era Of Online Commerce. 11

III. Quill's Fate Should Not Turn On The Specifics Of South Dakota's Law. 23

IV. Stare Decisis Requires Maintaining Quill's Bright-Line Rule. 26

TABLE OF AUTHORITIES

Page(s)

Cases

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 27

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 23

Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.,
386 U.S. 753 (1967) 12, 13, 26

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Reeves, Inc. v. Stake,
447 U.S. 429 (1980) 11

Statutes and Regulations

Cal. Rev. & Tax Code § 6359.3 17

Conn. Agencies Regs. § 12-426-30 ..... 9, 10

Conn. Gen. Stat. § 12-412(23) 16

Fla. Stat. § 212.08(7) 16

Ind. Code § 6-2.5-2.1 25

Mass. Gen. Laws ch. 64H, § 6 ..... 16, 18

N.D. Cent. Code § 57-39.2-02.2 25

N.Y. Tax Law § 1115(s) 22

Ohio Rev. Code § 5739.02(A)(9)(a) 18

72 Pa. Stat. § 7204(32) 16

72 Pa. Stat. § 7213.1(a) 25

S.D. Codified Laws § 10-59-24.1 17

Va. Code § 58.1-609.1 17

Wash. Admin. Code § 458-20-102 18

Wash. Admin. Code § 458-20-244 ..... 15, 16

Wash. Rev. Code § 82.08.053 ..... 15, 25

Wash. Rev. Code § 82.08.0293 15

Wash. Rev. Code § 82.13.010(3) 15

Wash. Rev. Code § 82.13.020 15

Wyo. Stat. § 39-15-501 25

Other Authorities

Bradley Ashby & Harley Duncan, *The Role of Online Marketplaces in the Collection of Transaction Taxes*, 26 J. Multistate Tax'n 8 (June 2016) 7

Joseph Bishop-Henchman, Tax Found., *Testimony Before Maryland Legislature on the Streamlined Sales Tax Project*, (Feb. 18, 2009), https://taxfoundation.org/testimony-maryland-legislature-streamlined-sales-tax-project/ 20

Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis*, Mar. 15, 2018, https://papers.ssrn.com/sol3/.cfm?abstract_id=3140948 7

Clutch, *Small Business Websites in 2017: Survey* (Mar. 14, 2017), https://clutch.co/web-designers/resources/small-business-2017-website-survey 6

Conn. Dep't of Rev. Servs., *Annual One-Week Sales and Use Tax Exclusion for Clothing and Footwear Costing Less Than $100*, http://www.ct.gov/drs/cwp/view.asp?A=1510&Q=569278 9

DazzleMeGlitter, *Pink Unicorn Fluff*, https://www.etsy.com/listing/590607555/pink-unicorn-fluff-pink-iridescent (last visited Apr. 3, 2018) 8

DimitrasWorkshop,
Leather Sandals "Cockatoo",
https://www.etsy.com/listing/503572596/
leather-sandals-handcrefted-sandals
(last visited Apr. 3, 2018).....8

Jennifer Dunn, *Sales Tax By State:
Is Candy Taxable?*, TaxJar
(Feb. 13, 2017),
https://blog.taxjar.com/sales-tax-state-
candy-taxable/ 15

Etsy, *Adding Sales Tax to Listings*,
https://www.etsy.com/help/article/331
(last visited Apr. 3, 2018).....19

Etsy, *Crafting the Future of Work: The Big
Impact of Microbusinesses* (2017),
available at
https://extfiles.etsy.com/advocacy/Etsy_
US_2017_SellerCensus.pdf.....8, 9, 21

Cara Griffith, *Streamlining Versus
"Amazon" Laws: The Remote Seller
Dilemma*, 55 St. Tax Notes 351 (2010) 10

H.R. 684, 113th Cong. (2013).....28

Brian Headd, U.S. Small Bus. Admin.,
Office of Advocacy, *The Role of
Microbusinesses in the Economy*
(Feb. 2015),
https://www.sba.gov/sites/default/files/Mi
crobusinesses_in_the_Economy.pdf 4

Idaho House of Representatives, H.B. 578.....25

indigojoneseats, *Heart Shaped Hot Chocolate Sticks with Homemade Marshmallows*, https://www.etsy.com/listing/219218916/heart-shaped-hot-chocolate-sticks-with (last visited Apr. 3, 2018) 16

indigojoneseats, *Pecan Pie Bars*, https://www.etsy.com/listing/239527518/pecan-pie-bars (last visited Apr. 3, 2018) 16

Internet Tax Issues: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 106th Cong. (2000) 28

Liz Malm et al., *Sales and Use Tax Compliance Legislation was a Big State Tax Trend This Year*, Multistate Insider, July 11, 2017, https://www.multistate.us/blog/sales-and-use-tax-compliance-legislation-july2017 (last visited Apr. 3, 2018) 25

Nancy Marshall-Genzer, *The Consequences of an Online Sales Tax*, Marketplace (Apr. 22, 2013, 12:24 PM), https://www.marketplace.org/2013/04/22/consequences-online-sales-tax 10

Miasclosetshop, *Midnight in the Meadow Dog Collar*, https://www.etsy.com/listing/589385504/midnight-in-the-meadow-dog-collar-dark (last visited Apr. 3, 2018) 22

RocailStudio, *Modern Baby Blanket in Pastel Mint Green*, https://www.etsy.com/listing/80806164/modern-baby-blanket-in-pastel-mint-green (last visited Apr. 3, 2018) 8

S. 698, 114th Cong. (2015) 28

S. 976, 115th Cong. (2017) 28

Peter G. Stathopoulos, *State Taxation of Remote Sellers: Has the Physical Presence Nexus Test Been Rendered Obsolete?* 23 J. Multistate Tax'n 22 (Aug. 2013) 20

Streamlined Sales Tax Governing Board, Inc., *Taxability Matrix*, http://www.streamlinedsalestax.org/otm/ (last visited Apr. 3, 2018) 20

TaxJar, Sales Tax API, https://developers.taxjar.com/api/reference/#introduction (last visited Apr. 3, 2018) 17

Tex. Comptroller of Pub. Accounts, Publication No. 94-124, *Manufacturing Exemptions* (Apr. 2003), *available at* https://comptroller.texas.gov/taxes/publications/94-124.php 18

U.S. Gov't Accountability Office,
Sales Taxes: States Could Gain Revenue From Expanded Authority, But Businesses Are Likely to Experience Compliance Costs (Nov. 2017) ..... *passim*

Vauxvintage, *Vintage 60s Black & Brown Striped Midi Dress*,
https://www.etsy.com/listing/548119771/vintage-60s-black-brown-striped-midi
(last visited Apr. 3, 2018) 8

INTEREST OF THE AMICUS CURIAE

Etsy, Inc. provides a leading online marketplace used by "microbusinesses"—businesses in which the sole employee is also the owner, or that have just a handful, if any, more employees—to sell handmade, craft, and vintage products over the internet. Etsy does not "sell" any products or hold inventory. Its business is providing an online platform for microbusinesses to sell their goods. A typical Etsy seller is a female entrepreneur working out of her home to supplement her household's income. In 2017, 1.9 million such microentrepreneurs used Etsy to earn a total of $3.25 billion, including from sales across state and country lines.

Etsy is concerned that if the Court's long-standing precedent in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), were to be overturned, or if *Quill* were to be construed to not reach online sales, the impact on the small businesses selling on Etsy would be devastating. The typical single-person business selling craft products on Etsy to earn supplemental income lacks the substantial resources necessary to ensure compliance with the sales tax laws of potentially thousands of jurisdictions. Indeed, these sellers already identify existing administrative burdens from running a small business—*e.g.*, local business licensing requirements and their own State's tax collection and reporting obligations—as one of their most significant barriers to growth. Survey data suggest that a significant percentage of Etsy sellers would stop selling into the interstate market if forced to learn and comply with the sales tax regimes of additional jurisdictions. That is precisely the fragmentation of the interstate market

that the dormant Commerce Clause, and the holding of *Quill*, were intended to avoid.[1]

SUMMARY OF ARGUMENT

The largest online retailers, including Amazon, already are collecting sales tax in every jurisdiction into which they sell; these retailers tend to have either storefronts or fulfillment centers throughout the country and thus *Quill* does not excuse them from sales tax collection obligations. The effect of *Quill's* abrogation would be felt most by smaller businesses, including the microbusinesses selling on Etsy, for which the administrative burdens of running a business already pose a barrier to growth. Many microbusinesses would stop selling into the interstate market altogether if they were required to calculate and collect sales taxes in States in which they lack a physical presence. *Infra* at 11.

South Dakota asserts that *Quill's* bright-line rule no longer is necessary to protect small businesses from crippling compliance obligations because modern software makes it simple to accurately calculate sales taxes nationwide. In an era accustomed to technological leaps and marvels this may sound plausible, but it is a chimera. No piece of software code can accurately account for how thousands of tax codes (with inconsistent rules, jurisdiction to jurisdiction, that frequently change) apply to tens of thousands of products, includ-

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

ing the many unique creative products sold through Etsy. *Infra* at 13-19.

South Dakota also argues that the dormant Commerce Clause should not prevent enforcement of its particular law requiring out-of-state businesses to collect sales taxes, emphasizing that it carves out businesses that do not sell much into South Dakota. But that is not truly accurate. While many out-of-state microbusinesses will not sell $100,000 of goods into a particular foreign State, it is reasonably likely that many would engage in more than 200 transactions—particularly for affordable, low-cost craft goods. And South Dakota has proposed no limiting principle that would prevent it or another State from introducing stingier exemptions in the future. Abandoning *Quill's* bright-line rule on the basis that South Dakota's particular exemptions are reasonable will lead to endless litigation over variants on the exemption theme. *Infra* at 26.

This Court should do what it did in *Quill*—leave the bright-line physical-presence rule intact and allow *Congress* to decide whether, and how, to allow States to require out-of-state businesses to collect sales taxes. Since *Quill*, Congress has taken steps to craft a solution for interjurisdictional sales taxation that balances the concerns of all stakeholders—States and small out-of-state businesses alike. There is no reason for this Court to preempt Congress and abandon *Quill* now, upending the reliance interests of millions of small businesses. *Infra* at 27-29.

ARGUMENT

There are more than 10,000 taxing jurisdictions in the United States. Forty-five States, the District of Co-

lumbia, and thousands of counties, cities, towns, and other political subdivisions each have the power to tax the sale of goods and services. These jurisdictions can set their own sales tax rates, their own definitions of the sales tax base, and their own classifications for goods and services that govern the rate paid or exemption from tax. These jurisdictions also may exempt (or not) various categories of purchasers from paying sales tax at all, may make application of the sales tax hinge on the use to which a product will be put, and may declare unplanned sales tax "holidays" to spur business. Mastering the sales tax laws of even a single jurisdiction can be difficult, particularly for the millions of sole proprietorships and other very small businesses—"microbusinesses"—that use marketplace websites such as Etsy to reach their customers.[2] For microbusinesses to master the sales tax laws of *all* jurisdictions from which a customer might place an order over the internet, in order to ensure compliance with the sales tax collection requirements of all those jurisdictions, would be impossible.

This Court had such compliance concerns in mind when it decided *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). *Quill* reaffirmed a bright-line rule under which a seller only is responsible for collecting sales taxes in jurisdictions in which it has a physical presence. The rule was deemed necessary because a business cannot realistically be expected to manage the "virtual welter of complicated obligations" that nation-

---

[2] According to the Small Business Administration, a microbusiness is a business with one to nine employees. Brian Headd, U.S. Small Bus. Admin., Office of Advocacy, *The Role of Microbusinesses in the Economy* (Feb. 2015), https://www.sba.gov/sites/default/files/Microbusinesses_in_the_Economy.pdf.

wide sales tax exposure would impose. *Id.* at 303, 313 & n.6 (quoting *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753, 759-60 (1967)). While South Dakota urges that *Quill* has been obviated by changes in technology and the marketplace, each of its arguments is factually flawed. The Court should reaffirm *Quill* to avoid placing insurmountable compliance barriers in front of businesses, particularly microbusinesses, seeking to participate in the interstate economy.

I. Microbusinesses Will Suffer The Greatest Adverse Effects Of Abandoning The *Quill* Rule.

To read South Dakota's brief, one would think that this case pits exclusively small, local in-state retailers on the one side, against exclusively large, online giants such as Amazon on the other. *E.g.*, Pet. Br. 1 (asserting that some companies "do *billions* in business in a forum" without collecting sales taxes and that "*Quill*-shielded companies make up a large and expanding slice of retail"). South Dakota paints an entirely inaccurate picture. Online giants already are collecting and remitting sales taxes nationwide, so overruling *Quill* will not affect them; the burden of overruling *Quill* would fall instead on the small online businesses that South Dakota's brief entirely ignores. Many of those small businesses sell through Etsy, and Etsy survey data suggest that if *Quill* were overturned, the burden of interjurisdictional sales tax compliance would discourage small businesses from selling into the interstate market at all.

1. The larger online retailers include not only companies that largely eschew brick-and-mortar storefronts such as Amazon, but also "big box" companies that also have significant online presences, such as

Walmart or Target. And even Amazon has physical locations—fulfillment centers to facilitate same-day or next-day delivery—in many States. These companies *already* are collecting sales taxes in every State to which they sell online because, for the most part, they have a physical presence in every State and thus are not shielded from sales-tax collection obligations by *Quill*. Indeed, the GAO estimates that States already collect about "75 to 80 percent of the taxes that would be owed if all remote sellers were required to collect tax on all remote sales." U.S. Gov't Accountability Office, *Sales Taxes: States Could Gain Revenue From Expanded Authority, But Businesses Are Likely to Experience Compliance Costs* 8 (Nov. 2017) ("GAO Report"). The numbers are even higher for internet sales—the top 100 online retailers collect taxes on 87% to 96% of sales made. *Id.* at 41.

The fight over *Quill* is thus not principally about the larger online retailers. Instead, it principally concerns millions of far smaller businesses that lack the resources with which to address interjurisdictional sales tax collection obligations.

2. Small businesses, no less than companies such as Amazon, have recognized that an online presence is a modern business necessity and are adapting accordingly. As of 2017, 71% of small businesses in the United States had their own website, and 92% of small businesses planned to have a website by the end of 2018. Clutch, *Small Business Websites in 2017: Survey* (Mar. 14, 2017), https://clutch.co/web-designers/resources/small-business-2017-website-survey. Many of these companies operate local storefronts in their hometowns and use the internet to reach incrementally more customers in other cities or States. "Virtually all

retail conducted in the United States today is internet-enabled in some form or fashion"—"brick-and-mortar" has become "brick-and-click." Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis*, Mar. 15, 2018, at 7, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948. Other small businesses operate purely online.

For many of the smallest businesses, particularly microbusinesses, the prospect of reaching substantial volumes of customers through their own independent websites is both daunting and unrealistic. For such microbusinesses, online marketplaces such as that operated by Etsy perform a crucial role.

An online marketplace is "a technology platform that facilitates the sale of goods or services between a third-party seller and a customer." Bradley Ashby & Harley Duncan, *The Role of Online Marketplaces in the Collection of Transaction Taxes*, 26 J. Multistate Tax'n 8, 8 (June 2016). A transaction starts with sellers posting their products on the online marketplace's listings. A customer can then browse the marketplace, find a product, place an order with the seller, and transmit payment and shipping information through the marketplace. A seller receives the information and ships the purchased good to the buyer; the marketplace, in turn, remits payment to the seller, charging a small fee or portion of the sale for using the marketplace service.

Etsy is a global online marketplace that specializes in the sale of unique and creative goods, ranging from handcrafted pieces to vintage treasures. Its nearly two million active sellers use the online platform to market a tremendous variety of products. Some of the most popular items on Etsy include handcrafted home décor,

jewelry, accessories, and clothing, many of which are unique and can be purchased only from an Etsy seller. The type of goods available on Etsy can range from everyday items (such as handcrafted sandals and baby blankets) to intricate novelties (such as unicorn fluff and vintage 1960s midi dresses).[3]

Etsy sellers are not online giants. Etsy's most recent survey of those selling in its marketplace shows that 77% are businesses operated by a sole proprietor.[4] Eighty-seven percent of Etsy sellers are run by women entrepreneurs, and 97% of these businesses are based out of the sellers' homes.[5] Only 32% of Etsy sellers also have a traditional full-time job, and for nearly half of all Etsy sellers, their online businesses provide an important source of supplemental income, allowing them to "pay for necessary household expenses, including utility bills and rent."[6] In 2017, Etsy's 1.9 million businesses generated a total of $3.25 billion in gross merchandise sales.

---

[3] *See, e.g.*, DimitrasWorkshop, *Leather Sandals "Cockatoo"*, https://www.etsy.com/listing/503572596/leather-sandals-handcrefted-sandals (last visited Apr. 3, 2018); RocailStudio, *Modern Baby Blanket in Pastel Mint Green*,https://www.etsy.com/listing/80806164/modern-baby-blanket-in-pastel-mint-green (last visited Apr. 3, 2018); DazzleMeGlitter, *Pink Unicorn Fluff*, https://www.etsy.com/listing/590607555/pink-unicorn-fluff-pink-iridescent (last visited Apr. 3, 2018); Vauxvintage, *Vintage 60s Black & Brown Striped Midi Dress*, https://www.etsy.com/listing/548119771/vintage-60s-black-brown-striped-midi (last visited Apr. 3, 2018).

[4] Etsy, *Crafting the Future of Work: The Big Impact of Microbusinesses* 5 (2017) ("Etsy Census"), *available at* https://extfiles.etsy.com/advocacy/Etsy_US_2017_SellerCensus.pdf.

[5] *Id.* at 4-5.

[6] *Id.* at 7.

3. Microbusinesses engaged in interstate retail sales, including those selling on Etsy and other online marketplaces, have relied on *Quill*'s bright-line rule as an essential safeguard for their business. Although the means by which businesses pitch their wares has changed over the years with the digital revolution, their reliance on *Quill* has not.

As microbusinesses, Etsy sellers lack the administrative and logistical resources available to larger entities. Indeed, Etsy sellers rank administrative burdens as one of their biggest challenges. On average, for every hour that an Etsy seller spends making or designing her products, she spends an additional hour dealing with various administrative tasks, such as business licensing, accounting, inventory management, or shipping.[7]

The administrative burden of addressing interjurisdictional sales tax compliance obligations would be devastating to the typical Etsy seller. Sales tax compliance requires more than just the automated collection or remittance of taxes. For a seller, the most arduous part of the process is often placing an item in the correct tax categories for each jurisdiction in which the product may be taxed. Those jurisdictions, in turn, may not use the same classifications—one State, for instance, may distinguish between shoes "primarily designed for athletic activity" and shoes that are not,[8]

---

[7] *Id.* at 11.

[8] Connecticut, for example, distinguishes between the two for purposes of a sales tax holiday. *See* Conn. Agencies Regs. § 12-426-30 ("'Articles of footwear' do not include footwear primarily designed for athletic activity or protective use . . . ."); *see also* Conn. Dep't of Rev. Servs., *Annual One-Week Sales and Use Tax Exclusion for Clothing and Footwear Costing Less Than $100*,

while another State may treat both types of shoes as the same. *See infra* at 15-18 (outlining the obstacles that sellers face with interjurisdictional product classification).

Even with *Quill* in place, "[d]etermining how to handle tax-exempt sales, sales tax holidays, and product taxability coding can be a daunting task, particularly for small and midsize businesses. It has been estimated that sales tax exemptions account for 60 percent of the cost of compliance for small businesses." Cara Griffith, *Streamlining Versus "Amazon" Laws: The Remote Seller Dilemma*, 55 St. Tax Notes 351, 354 (2010). Layering sales tax compliance obligations for thousands of jurisdictions on top of existing tax compliance burdens could make an online business impossible for one person to manage. *See, e.g.*, Nancy Marshall-Genzer, *The Consequences of an Online Sales Tax*, Marketplace (Apr. 22, 2013, 12:24 PM), https://www.marketplace.org/2013/04/22/business/consequences-online-sales-tax (quoting a small business owner noting that "if he had to charge taxes for all 50 States, he'd have to hire someone just to handle taxes," and that "'this could be crushing'"). Indeed, while South Dakota portrays itself in this case as the champion of small businesses, it is the smallest businesses that would be hurt the most should *Quill* be overturned. GAO Report 15 ("[B]usinesses with limited experience in multistate tax collection and those that lack software systems designed to facilitate multistate tax collection would incur the highest costs. . . . [L]arger retailers that already collect in many states

---

http://www.ct.gov/drs/cwp/view.asp?A=1510&Q=569278 (describing sales-tax-holiday exemption for "articles of clothing and footwear, as described in [§ 12-426-30]").

would already have the systems in place for collection under expanded authority.").

4. If *Quill* were overturned, Etsy survey information indicates that sellers might well avoid doing business with customers living in States that impose tax collection mandates on remote retailers. Etsy recently asked a sample group of sellers how they would respond to laws requiring the collection and remission of taxes on sales outside the sellers' home jurisdictions. Twenty-three percent of Etsy sellers surveyed stated that they would stop selling to places in which they would incur such an obligation; five percent of sellers said they would close their businesses altogether. South Dakota's tax on online sales by remote retailers thus will engender the very marketplace fragmentation against which the dormant Commerce Clause was intended to guard. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980) ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.").

II. Quill's Fundamental Premise Remains Sound In The Era Of Online Commerce.

For the reasons given above, the Court should expect any impact from the abrogation of *Quill* to fall most heavily on smaller businesses, including microbusinesses selling through online marketplaces including Etsy, many of which may stop making interstate sales altogether. South Dakota argues that this drastic impact on the nation's most vulnerable entrepreneurs is justified because *Quill's* rationale for its bright-line rule has eroded with technological and legal changes. That proposition is entirely incorrect.

1. In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Court held that a State may not impose a tax "upon a seller whose only connection with the customers in the State is by common carrier or the United States mail." *Id.* at 758. The Court arrived at this holding for two reasons—one rooted in due process, the other in the dormant Commerce Clause. First, the Court determined that to hold otherwise would allow "local jurisdictions with no legitimate claim to [] a fair share of the cost of the local government" to impose "a virtual welter of complicated obligations." *Id.* at 759. Those obligations included addressing "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements." *Id.* Second, the Court reasoned that "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements," for "Congress alone has the power of regulation and control." *Id.*

A quarter century later, this Court was asked to revisit *Bellas Hess*, which produced the decision in *Quill*. The North Dakota Supreme Court had held that *Bellas Hess* was no longer necessary given economic, technological, and legal developments. On the economic front, the state supreme court observed that the mail order business had experienced "remarkable growth" since the days of *Bellas Hess*, and that "advances in computer technology greatly eased the burden of compliance with a 'welter of complicated obligations' imposed by state and local taxing authorities." 504 U.S. at 303. The state supreme court also noted that the legal landscape had changed, explaining that this Court's minimum-contacts and dormant Commerce Clause jurisprudence gave it reason to believe *Bellas Hess* was no longer good law.

This Court disagreed. It noted that the bright-line rule still "further[ed] the ends of the dormant Commerce Clause" by setting forth "the demarcation of a discrete realm of commercial activity that is free from interstate taxation" and by creating a "safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or by United States mail.'" *Id.* at 315 (citation omitted). Whether the *Quill* Court would have adopted the bright-line rule of *Bellas Hess* in the first instance did not matter—*stare decisis* controlled. *Id.* at 311, 317. Because "a sizable industry" had developed a "substantial reliance" on the rule, the "interest in stability and orderly development of the law" underpinning *stare decisis* required that the bright-line rule remain in place. *Id.* at 317.

2. South Dakota makes the same argument that its neighbor to the north made in *Quill*: technology has evolved to the point where the bright-line physical presence rule is no longer necessary. *Compare* Pet. Br. 9-13, *with Quill*, 504 U.S. at 303, 313 & n.6 (noting argument that "advances in computer technology" greatly eased the burden of compliance with a "'welter of complicated obligations"). But despite the digital revolution, tax compliance is hardly "easy." Pet. Br. 13. While tax compliance software is doubtless better than it was at the time of *Quill*, the patchwork quilt of varying sales tax laws in thousands of jurisdictions remains. Modern tax compliance software does not have enough functionality to obviate the administrative burden that was the deciding concern for this Court in *Bellas Hess* and *Quill*. Indeed, the burden is multifaceted—it requires the mapping of thousands of tax codes (with their respective exceptions, exemptions, and holidays), the mapping of millions of unique products to those thousands of tax codes, and the overlay-

ing of matrices of exemptions tied to the status of sellers and buyers. Given this complexity, it is doubtful that a software fix *ever* can be developed.

South Dakota claims that tax collection is so seamlessly automated that "[r]ate calculation" at the point of sale is "now as easy as typing a shipping address into a search bar." Pet. Br. 45; *see also* Br. of Nat'l Ass'n of Certified Serv. Providers ("CSP Br.") 6-7 ("Simply put: no retailer needs to manually calculate or file sales tax, or to keep track of the peculiarities in any jurisdiction's tax laws."). That argument simplistically assumes that any given jurisdiction only has one tax rate that applies equally to all products for all purchasers for all purposes. The real world is far more complicated.

To begin, it is not the case that all jurisdictions have only a single tax rate that applies to all products equally. Classifying a product for just *one* jurisdiction can be a difficult and complicated process. It requires knowledge not only of the applicable statutes and regulations, but also interpretive guidance from courts and administrative agencies addressing similar fact patterns. A State can have hundreds of different product classifications, and that multiplicity is enough, standing alone, to make the first step of sales tax collection confusing even in that one State. The task of classification becomes impossible for a microbusiness when an Etsy seller must grapple with the sales tax laws of 44 other States and over 10,000 local jurisdictions. Tax collection software provides little help with classification; software providers caution that sellers alone are

responsible for ensuring accurate product classification and urge cautionary over-collection.[9]

Etsy's recent efforts to collect sales tax in the State of Washington illustrate the difficulties of classification. In July 2017, Washington enacted a law that requires remote sellers (*i.e.*, online sellers with no physical presence in Washington) and marketplace facilitators such as Etsy to collect and remit sales taxes, unless they instead provide written notice to consumers that the consumers owe sales taxes *and* then submit an annual report to each consumer detailing their purchases. Wash. Rev. Code §§ 82.08.053, 82.13.020. As a "marketplace facilitator" that handles more than $10,000 of gross sales in Washington for all Etsy sellers, Etsy made the choice to collect taxes for sales made in the State, regardless of whether an individual Etsy seller's sales in Washington exceed $10,000. *Id.* §§ 82.08.053(1)(a)(i), 82.08.053(2)(b), 82.13 010(3).

Etsy began complying with the law when it went into effect on January 1, 2018, and encountered classification problems at the outset. The sale of craft food items, for example, posed an immediate issue. Washington law exempts the sale of "food and food ingredients" from sales tax requirements. Wash. Rev. Code § 82.08.0293. Candy is an exempted food item and is defined as "a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces." Wash. Admin. Code

---

[9] *See, e.g.*, Jennifer Dunn, *Sales Tax By State: Is Candy Taxable?*, TaxJar (Feb. 13, 2017), https://blog.taxjar.com/sales-tax-state-candy-taxable/ ("If you're unsure about how certain candy taxability sales tax rules apply to you, be sure to consult your state's department of revenue or a sales tax expert!").

§ 458-20-244(3)(e)(i). But any sweet preparation that includes flour is not considered "candy" under Washington law, nor is any sweet preparation that requires refrigeration. *Id.* § 458-20-244(3)(e)(ii). So a marshmallow pop would be considered "candy" and exempt from Washington's remote retail sales tax,[10] but a pecan pie bar from the same seller likely would not be, as the latter contains flour.[11] As Etsy is not the producer or seller of the goods on its platform, it has no way of making product classifications with certainty. Etsy can only classify an item with the information given by an Etsy seller in her listing, which could be incomplete or insufficient to make a determination of tax category from jurisdiction to jurisdiction. The end result of this uncertainty is that Etsy sellers may err on the side of collecting sales tax (collecting the higher of two tax rates if she is not certain which applies), which could lead to over-collection.

Washington is not the only State with complicated classification rules, and those rules do not overlap neatly across States. Some States, for example, will exempt sales of the American flag and their respective state flags from sales tax obligations.[12] But Massachusetts allows an exemption only for American flags,[13]

---

[10] *See, e.g.*, indigojoneseats, *Heart Shaped Hot Chocolate Sticks with Homemade Marshmallows*, https://www.etsy.com/listing/219218916/heart-shaped-hot-chocolate-sticks-with (last visited Apr. 3, 2018).

[11] *See, e.g.*, indigojoneseats, *Pecan Pie Bars*, https://www.etsy.com/listing/239527518/pecan-pie-bars (last visited Apr. 3, 2018).

[12] *See, e.g.*, Conn. Gen. Stat. § 12-412(23); Fla. Stat. § 212.08(7); 72 Pa. Stat. § 7204(32).

[13] Mass. Gen. Laws ch. 64H, § 6(w).

California allows an exemption only for flags sold by nonprofit veterans groups,[14] and Virginia allows an exemption only for flags sold by government agencies.[15] Classifying a product as a "flag" for tax compliance purposes will not capture these nuanced differences in exemption laws. Neither Etsy nor any tax compliance software can make meticulous classification decisions for a microbusiness;[16] it will be nearly impossible to capture every classification, every exemption, and every judicial or administrative interpretation of every exemption in every taxing jurisdiction across the country. The permutations would be difficult to quantify and manage for any business, never mind a microbusiness. And treating products with a broad brush, as tax compliance software does now, is no answer to this problem, as it raises the risk of over-collection. Over-collection is understandably no problem for South Dakota, but it is unfair to consumers and merchants alike. Indeed, over-collection potentially exposes cautious merchants to the prospect of litigation. State laws like South Dakota's already give consumers who may have been inadvertently overcharged the option of pursuing a lawsuit to recover an overcharge. *E.g.*, S.D. Codified Laws § 10-59-24.1.

Classifying products and determining the exemptions associated with certain classifications are not the only challenges that modern technology cannot over-

---

[14] Cal. Rev. & Tax Code § 6359.3.

[15] Va. Code § 58.1-609.1.

[16] TaxJar, for example, has only 17 broad exemption categories based on a product's classification. TaxJar, Sales Tax API, https://developers.taxjar.com/api/reference/#introduction (last visited Apr. 3, 2018). One of those categories is a catchall "other exempt" classification.

come. Many States exempt transactions from sales tax obligations based on the status of the *buyer*. In certain States, for example, 501(c)(3) nonprofit organizations are exempted from paying sales taxes.[17] A buyer's eligibility for an exemption also may turn on factors other than the buyer's identity. Any buyer may be exempt from sales tax if the purchased item will be used to manufacture another item,[18] the item will be resold,[19] or the item will be used in certain types of construction.[20] But neither Etsy nor any third-party tax compliance software is capable of collecting this information automatically; rather, a microbusiness must handle such exemptions on a case-by-case basis. While that administrative burden may be (barely) manageable for a microbusiness's home State, it would become impossible if a microbusiness had to account for every state and local taxing jurisdiction's particular rules.

There are other reasons why the purported technological wizardry of tax compliance software does not obviate the need for *Quill's* bright-line exemption. For

---

[17] *E.g.*, Ohio Rev. Code § 5739.02(A)(9)(a).

[18] *E.g.*, Tex. Comptroller of Pub. Accounts, Publication No. 94-124, *Manufacturing Exemptions* (Apr. 2003), *available at* https://comptroller.texas.gov/taxes/publications/94-124.php ("State sales and use tax exemptions are available to taxpayers who manufacture, fabricate or process tangible personal property for sale.").

[19] *E.g.*, Wash. Admin. Code § 458-20-102.

[20] *E.g.*, Mass. Gen. Laws ch. 64H, § 6(f) (exempting "building materials and supplies to be used in the construction, reconstruction, alteration, remodeling or repair" of, *inter alia*, buildings owned by governmental agencies or nonprofit entities and buildings located in a Marine Industrial Park "exclusively used for agricultural production or seafood processing").

example, even the identification of the taxing jurisdiction can prove to be a challenge. Many tax programs use ZIP codes to set tax rates;[21] a seller types in a ZIP code (or a range of ZIP codes) and manually sets a tax rate for those ZIP codes, under the assumption that those ZIP codes are part of the same local taxing jurisdiction. (For some platforms, the ZIP code is automatically keyed to a local taxing jurisdiction's rate.) But neighboring jurisdictions often share ZIP codes; one part of the ZIP code area may be in a taxing jurisdiction, while another may not. Consider the 57717 ZIP code. Most of the ZIP code covers the area around Belle Fourche, South Dakota. But the ZIP code actually covers three different States (Montana, South Dakota, Wyoming), and six different counties. While South Dakota and Wyoming have sales taxes, Montana does not. The software may be incapable of detecting multiple local rates for one area and may instead default to the rate for South Dakota, the predominant jurisdiction.

3. South Dakota asserts that the Streamlined Sales and Use Tax Agreement ("Streamlined Agreement") has reduced interjurisdictional differences in sales tax laws and that it "substantially simplif[ies] . . . sales-tax compliance systems and processes." Pet. Br. 13; Streamlined Sales Tax Governing Board Br. 1. But the Streamlined Agreement suffers from several flaws that prevent it from eliminating the need for *Quill*.

---

[21] *See, e.g.*, Etsy, *Adding Sales Tax to Listings*, https://www.etsy.com/help/article/331 (last visited Apr. 3, 2018) ("If you do need to charge tax, sellers located in the United States can use the sales tax tool to specify a tax rate for each US state (by state, zip code, or range of zip codes).").

To begin, despite its name, the Streamlined Agreement is not truly "streamlined." While the Agreement's signatories have attempted to harmonize several sales tax provisions, "there still is a significant lack of uniformity among even SSUTA member States relating to the application of sales/use taxes in many areas." Peter G. Stathopoulos, *State Taxation of Remote Sellers: Has the Physical Presence Nexus Test Been Rendered Obsolete?* 23 J. Multistate Tax'n 22, 47 (Aug. 2013). Because the Agreement requires only "substantial compliance," member States can deviate from provisions they simply do not like. *See id.* (describing Georgia's decision to "decouple[] . . . from the SSUTA resale exemption certificate provisions"); Joseph Bishop-Henchman, Tax Found., *Testimony Before Maryland Legislature on the Streamlined Sales Tax Project*, (Feb. 18, 2009), https://taxfoundation.org/testimony-maryland-legislature-streamlined-sales-tax-project/ (explaining that, while the Agreement had a requirement for a uniform clothing tax rate, the Streamlined Sales Tax Project abided by Minnesota's decision to charge a separate tax for fur sales).

Even assuming a microbusiness can familiarize itself with the Streamlined Agreement's provisions, there is no guarantee that it will be compliant with the laws of the Agreement's signatories; indeed, at a minimum, that business must navigate through a complicated "taxability matrix" for each member State with several hundred rows of comparative data to determine whether a particular signatory's law is harmonized with the Streamlined Agreement.[22]

---

[22] *See* Streamlined Sales Tax Governing Board, Inc., *Taxability Matrix*, http://www.streamlinedsalestax.org/otm/ (last visited Apr. 3, 2018).

Moreover, the Streamlined Agreement lacks buy-in from most of the country. While 24 States are signatories to the Agreement, the five most populated States—California, Texas, Florida, New York, and Pennsylvania—are not. An agreement that is meant to provide a cross-border solution cannot be effective if it does not address two-thirds of the American population.

4. South Dakota may suggest that the burden of tax collection simply can be transferred from microbusiness sellers to the marketplace operators used by those sellers, such as Etsy. Some States already have taken partial steps in that direction; as discussed above, Washington puts marketplace operators to the choice of either collecting sales taxes for their sellers or providing onerous annual reports of purchases to marketplace customers. *Supra* at 15.

Shifting the sales tax collection burden from sellers to marketplace operators is neither feasible nor fair. As an initial matter, shifting the collection burden to marketplace operators would hardly address the problem for all microbusinesses, as not all microbusinesses sell through a third-party online marketplace. Moreover, to the extent States such as South Dakota base a seller's sales tax collection and reporting obligations on whether the seller's sales volume into a State exceeds a particular threshold, marketplace operators cannot reliably enforce those thresholds because microbusinesses often sell their goods on multiple platforms. "The majority (58%) of Etsy sellers [in the United States] promote or sell their goods in other venues." Etsy Census at 8. Etsy has no way of tapping into information about a particular seller's sales through other channels. And even if it did, the burden of reviewing outside sales activity for 1.9 million sellers—Etsy's seller

base as of December 31, 2017—would be overwhelming even for an established marketplace operator.

Finally, and most importantly, there is no practicable way for even a single business to ensure that it is accurately classifying its products in accordance with the laws of thousands of jurisdictions (and to account for the jurisdictions' varying exemptions for certain purchasers and for certain uses). Doing so often requires detailed knowledge of a product's characteristics—for example, whether a food product contains flour, or if a customer purchases a dog collar meant for a guide dog.[23] *Supra* at 15-18. Requiring a marketplace operator to master such information for millions of sellers, selling tens of millions of products, in order to ensure each seller's compliance with thousands of jurisdictions' tax codes, is entirely unrealistic.

5. All told, the imposition of sales taxes on remote retail transactions will only drive small businesses away from the interstate market. The decision to leave the market would be understandable given that a seller would be subjected to significant financial and regulatory obligations, bearing potential civil and criminal liability for non-compliance, over which it has zero input or influence. A craft jeweler in New York will have no effective way of protesting a South Dakota legislator's proposal to take the current law a step further by lowering the collection threshold from $100,000 to $50 and 200 transactions to a single transaction.

---

[23] *See, e.g.*, Miasclosetshop, *Midnight in the Meadow Dog Collar*, https://www.etsy.com/listing/589385504/midnight-in-the-meadow-dog-collar-dark (last visited Apr. 3, 2018); *see also* N.Y. Tax Law § 1115(s) (exempting "the sale of any good or service necessary for the . . . maintenance of a guide dog" from sales tax requirements).

And the burden goes beyond mere collection. Once exposed to a State's taxation requirements, a seller must not only report and remit taxes, it must also respond to information requests, remain vigilant about continued compliance with the ever-changing requirements of state and local law, and defend itself from regulatory and judicial scrutiny in the form of audits and enforcement actions. But a microbusiness subjected to such scrutiny is unlikely to have the resources necessary to mount a defense over an audit or a dispute and therefore is much more likely to bow immediately to governmental pressure. *See* GAO Report 23 (smaller remote retail businesses are likely to "pay or comply without thoroughly examining the strength of their legal position"). A foreign legislature unaccountable to those adversely affected by its laws should not be able to place such drastic impositions on those who lack "powerful safeguards against legislative abuse." *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).

III. Quill's Fate Should Not Turn On The Specifics Of South Dakota's Law.

In part, South Dakota seeks to turn the question of *Quill's* fate into a referendum on the State's specific law, urging that its law should be permitted to survive dormant Commerce Clause review because it offers "ample safe harbors" for businesses making only marginal sales into the State. Pet Br. 23. The Court should not heed the State's siren-song call to abandon *Quill*'s bright-line rule in favor of case-by-case review.

1. To begin, South Dakota's insistence that its safe harbor provisions ensure that out-of-state businesses with only minor sales volume in the State will not be saddled with onerous sales tax collection obligations

blinks reality. The South Dakota law is triggered *either* by $100,000 of gross receipts *or* 200 transactions in the State in a year. Pet. Br. 23. While few microbusinesses will cross the dollar-value threshold and sell $100,000 of goods in South Dakota, 200 sales is a realistic possibility. On Etsy, several popular items (such as accessories and craft supplies) are sold for less than a dollar. A seller could thus do far less than $100,000 of business in South Dakota while still triggering a collection obligation.

The thresholds also are misleading because any seller that merely *might* exceed the threshold will feel compelled to collect sales taxes. A seller must collect sales taxes if it crosses the threshold of 200 transactions or $100,000 of gross receipts either in the previous year or in the *current* year. Pet. App. 19a. It is unclear how a seller is expected to ensure compliance with an obligation triggered by sales volume in the *current*-year. Practically speaking, a business that expects to sell more than a *de minimis* number of goods in South Dakota would need to collect sales taxes prophylactically beginning with sale one because of the *possibility* that later sales might trigger the collection requirement. A business that fails to collect the tax from early purchasers, and then later exceeds the threshold, presumably itself will be on the hook for remitting the amounts owed or be in violation of the law.

Finally, South Dakota has identified no principle that would make a 200-sale threshold constitutional there, but unconstitutional in a far larger State such as California or Texas. Transaction-based thresholds for sales tax obligations therefore may not offer much protection to microbusinesses at all, should they be adopted in other States.

2. States have expressed no reluctance in exercising their taxation power over those outside their borders. A number of States have enacted laws like South Dakota's, imposing taxes on out-of-state retailers despite the fact that *Quill* currently is in force.[24] Some of those laws have been in effect for some time; if this Court overturns *Quill*, there is every reason to think that States with such laws will seek to enforce them all the way back to the date they were enacted. And other States are eager to join the fray. In 2017 alone, legislators in 31 States proposed 80 bills concerning the collection of sales tax for interjurisdictional sales; many of these proposed laws specifically targeted marketplace sellers.[25]

It is not difficult to foresee States testing the boundaries of the dormant Commerce Clause in a *Quill*-less world. South Dakota's threshold requirements—200 transactions or $100,000—are enough to impose an onerous burden on many microbusinesses offering remote retail, but they are by no means the floor. Other States, such as Idaho, Pennsylvania, and Washington, already have lower monetary thresholds ($10,000), and there is no reason to be confident that States will stop there.[26] South Dakota has proposed no

---

[24] *See, e.g.*, Ind. Code § 6-2.5-2.1; N.D. Cent. Code § 57-39.2-02.2; Wyo. Stat. § 39-15-501.

[25] Liz Malm et al., *Sales and Use Tax Compliance Legislation was a Big State Tax Trend This Year*, Multistate Insider, July 11, 2017, https://www.multistate.us/blog/sales-and-use-tax-compliance-legislation-july2017 (last visited Apr. 3, 2018).

[26] 72 Pa. Stat. § 7213.1(a); Wash. Rev. Code § 82.08.053(2)(a). On March 22, 2018, Idaho enacted into law H.B. 578, which imposes the $10,000 floor. The text of H.B. 578 can be found at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2018/legislation/H0578.pdf.

principled basis to distinguish, for purpose of the dormant Commerce Clause, between its own threshold requirements and lower ones—there is no reason why a threshold of $100,000 would be constitutional, whereas a threshold of $10,000 or $1,000 would not be. Overturning *Quill* on the basis that South Dakota's thresholds are reasonable will thus touch off an avalanche of litigation over the constitutionality of ever lower thresholds. That is precisely the type of line-drawing that should be left to Congress, not the judiciary.

IV. Stare Decisis Requires Maintaining Quill's Bright-Line Rule.

Quill's bottom-line rule has stood for over half a century, with its *stare decisis* effect reaffirmed more than two decades ago. There is no doubt that microbusinesses have relied on *Quill*'s bright-line rule. While sales tax compliance software has evolved since 1992, that compliance software still does not provide an adequate solution to the immense burden of administering sales taxes for 45 States, the District of Columbia, and over 10,000 local jurisdictions. Despite the appearance of progress through technological revolution, little has changed since *Quill*—*Quill* continues to "engender[] substantial reliance" and is "part of the basic framework of a sizable industry," 504 U.S. at 317; uprooting *Quill* would impose a "welter of complicated obligations," *Bellas Hess*, 386 U.S. at 759-60.

Overturning *Quill* would cause substantial disruption to the online marketplace, and the harm would be felt most acutely by those who are least able to afford it: small businesses and microbusinesses who rely on marketplaces like Etsy. *See* GAO Report 22 (costs of satisfying multiple sales tax obligations will be at its

highest for "businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions").

That harm only will be amplified if States choose to enforce their existing sales tax laws retroactively. While South Dakota has chosen to tax remote retailers prospectively, nothing prevents another State from looking back, citing sales tax regimes already in place whose enforcement is limited by *Quill*. In fact, 41 States, two U.S. Territories, and the District of Columbia have hinted to this Court that sales taxes will be assessed retroactively in *Quill*'s absence. Br. of Colorado et al. 19. The amici States argue that retroactive application will be tempered by "regulations or other administrative guidance," *id.*, but such an assurance provides little comfort to microbusinesses, especially in light of the fact that several of the State amici have already begun taxing businesses retroactively, Respondents' Br. 63-64. Although it is feasible in theory for a business to fight retroactive collection, in practice microbusinesses do not have the resources to engage in such a fight. *See* GAO Report 23. The Court should therefore reaffirm *Quill* for the same reasons cited in that decision: "[t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis* . . . counsels adherence to settled precedent." 504 U.S. at 317.

Moreover, *stare decisis* applies with "enhanced force" when those unhappy with a ruling of this Court "can take their objections across the street," so that "Congress can correct any mistakes it sees." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Indeed, the Court indicated in *Quill* that the bright-line rule should remain intact until Congress had an oppor-

tunity to address interjurisdictional sales taxation. It recognized that Congress was best positioned to determine the "thorny questions" that might arise if the bright-line rule were upended, and that Congress alone had the power to "protect interstate commerce from intolerable or even undesirable burdens." *Quill*, 504 U.S. at 318 & n.10.

Congress has studied this issue closely since *Quill*. There is little doubt that the adverse impact of interjurisdictional taxation on smaller businesses has been at the forefront of Congress's deliberations. *E.g.*, *Internet Tax Issues: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 15 (2000) (testimony of Erick Gustafson, Director, Citizens for a Sound Economy) (testifying that "if taxes were applied to on-line sales," growth for small businesses in the "new technology sector would be slowed by 24 percent"). In the last five years alone, members of Congress have proposed at least five bills that address remote retail sales over the internet. These bills attempt to balance issues concerning the benefit to state coffers, the burden imposed on remote retailers, and the feasibility of an interjurisdictional sales taxation scheme in different ways.[27] Although the bills are not perfect, they represent Congress's continued deliberation of this issue.

This Court should not preempt Congress's careful contemplation. As *Quill* recognized, this Court's consideration of a single sales tax regime is no substitute

---

[27] For example, the Marketplace Fairness Act, introduced three times over the last five years, would exempt any seller whose gross annual receipts do not exceed $1 million. H.R. 684, 113th Cong. (2013); S. 698, 114th Cong. (2015); S. 976, 115th Cong. (2017).

for Congress's expertise and exercise of judgment. 504 U.S. at 318 ("[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."). If South Dakota's remote retail tax scheme is allowed to stand, it only will invite other legislatures to pass more onerous legislation to test the limits of the dormant Commerce Clause, which will in turn only spur more litigation about the exact contours of what the Clause allows. In the meantime, microbusinesses such as those selling on Etsy will be needlessly discouraged from participating in the interstate economy.

CONCLUSION

The judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted.

WILLIAM M. JAY
ANDREW KIM
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001

JILL SIMEONE
ETSY, INC.
117 Adams Street
Brooklyn, NY 11201

KEVIN P. MARTIN
Counsel of Record
SAMUEL J. GAMER
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
kmartin@goodwinlaw.com
(617) 570-1000

April 4, 2018

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF FLIPPER LLC, AN AMAZON THIRD PARTY MERCHANT WITH PRODUCT SOLD IN ALL 50 STATES AND OVER 20 COUNTRIES, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MELANIE L. OXHORN
Counsel of Record
MELANIE L. OXHORN, P.C.
450 East 63rd St. #6C
New York, NY 10065
(917) 414-1987
moxhorn@gmail.com

DANIEL PITKOW
FLIPPER LLC
67-1185 Mamalahoa Hwy, #D104
Kamuela, HI 96743
(310) 266-6933

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. AMAZON'S THIRD-PARTY MERCHANT PROGRAM MUST BE CONSIDERED IN EVALUATING SOUTH DAKOTA'S STATUTE	5
A. Amazon Controls All Aspects Of Transactions On Its Marketplace	6
B. Under Existing Laws In Every State, Amazon Should Be The Sole Party Responsible For Collecting Any Sales Tax Due On Sales Of Products Supplied By Third-Party Merchants	9
II. SOUTH DAKOTA'S STATUTE IS UNWORKABLE AND DISCRIMINATORY IN ITS APPROACH TO SMALL BUSINESSES WHOSE PRODUCTS ARE SOLD ONLINE BY AMAZON	12
A. South Dakota's Law Violates The Due Process Rights Of Amazon's Third-Party Merchants	12
B. South Dakota's Law Substantially And Unduly Burdens Interstate Commerce Of Small Online Businesses	13

TABLE OF CONTENTS – Continued

Page

C. South Dakota Uses Its Law To Impermissibly Discriminate In Favor Of Amazon And Against Third-Party Merchants 16

CONCLUSION..... 21

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) 12

J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) 12

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 2, 5, 12, 21

OTHER AUTHORITIES

Amazon Fulfillment Center Locations, https://www1.avalara.com/trustfile/en/resources/amazon-warehouse-locations.html 15

Amazon Marketplace: It's Bigger Than It Looks, Entrepreneur (Oct. 24, 2017), https://www.entrepreneur.com/article/303532 5

Amazon Sellers Brood as States Come Calling for Taxes (Nov. 11, 2017), https://www.nytimes.com/2017/11/15/technology/amazon-sales-tax.html 17, 20

Amazon Statistics: Need To Know Numbers about Amazon (Jan. 24, 2018), https://www.nchannel.com/blog/amazon-statistics/ 5

Amazon to add second headquarters with up to 50,000 jobs in grab for talent (Sept. 7, 2017), https://www.usatoday.com/story/money/2017/09/07/amazon-plans-second-headquarters-dubbed-hq-2/640861001/ 18

TABLE OF AUTHORITIES – Continued

Page

Amazon to Collect Tax in Pennsylvania: What do eCommerce businesses need to know? (May 9, 2018), https://taxify.co/2018/03/09/amazon-collect-tax-pennsylvania-ecommerce-businesses-need-know/ 15

Amazon to start collecting state sales taxes everywhere (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html 18

Amazon's (not so secret) war on taxes (May 23, 2013), http://fortune.com/2013/05/23/amazons-not-so-secret-war-on-taxes/ 17

Customers, Squarespace, https://www.squarespace.com/customers 14

Here's How Much Amazon Prime Members Spend Per Year, Fortune (Oct. 18, 2017), http://fortune.com/2017/10/18/amazon-prime-customer-spending/ 7

Is Amazon Too Big to Tax (Mar. 1, 2018), https://newrepublic.com/article/147249/amazon-big-tax 18

One Cent Items, Amazon, https://www.amazon.com/slp/1-cent-items/gb3sywbtdwrz8da 13

Secret recording suggests HMRC told to go easy on Amazon (Jan. 24, 2018), https://economia.icaew.com/en/news/january-2018/secret-recording-suggests-hmrc-told-to-go-easy-on-amazon 18

Small business is providing big power behind Amazon (Dec. 26, 2017), https://www.cnbc.com/2017/12/26/small-business-is-providing-big-power-behind-amazon.html 5

TABLE OF AUTHORITIES – Continued

Page

South Carolina DOR Goes After Amazon Services For Unreported Sales/Use Tax On Third-Party Transactions, https://www.brannlaw.com/eyes-on-ecom-law/south-carolina-dor-goes-amazon-services-unreported-salesuse-tax-third-party-transactions/ 9

States offer sales tax amnesty program for marketplace sellers (Aug. 16, 2017), https://www.digitalcommerce360.com/2017/08/16/sales-tax-amnesty-program-marketplace-sellers/ 19

States vs. Marketplace vs. Third-Party Sellers – The Amazon Sales Tax Challenge, https://www.bna.com/states-vs-marketplace-n73014464175/ 19

Tax incentives get Amazon to build fulfillment center in Katy (Mar. 29, 2017), https://www.houstonchronicle.com/business/retail/article/Tax-incentives-get-Amazon-to-build-fulfillment-11037679.php 18

Third-party seller share of Amazon platform 2007-2017, https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/. 5

TrustFile Pricing, Avalara, http://www1.avalara.com/trustfile/en/pricing.html 15

Wix.com Surpasses 100 Million Registered Users Milestone (Feb. 15, 2017), https://investors.wix.com/investor-relations/press-releases/press-release-details/2017/Wixcom-Surpasses-100-Million-Registered-Users-Milestone/default.aspx 14

INTEREST OF AMICUS CURIAE[1]

Flipper LLC, founded in 2008, is a sole member limited liability company with pass through status. Flipper manufactures and sells Flipper Remote, a high-cost specialty product custom designed for people suffering from Alzheimer's Disease, blindness, brain cancer and any number of other physical and mental challenges.

Flipper's main distribution channel is on the internet, with Amazon.com comprising the majority of Flipper's total sales. Through Amazon's distribution channels, Flipper's product is sold in all 50 states and over 20 countries. But for such internet commerce, Flipper Remote and other specialty products would not exist because big-box retailers do not carry niche items.

Flipper's connection with any state is tenuous at best since it has only one location (the physical location of its owner) and can be operated remotely from any place in the world with an internet connection. Yet, it and other small online businesses like it that rely on Amazon's marketplace to distribute their products are being unfairly and substantially burdened under laws like those in South Dakota and other states. These states accord Amazon special treatment by ignoring its

---

[1] Petitioner and Respondents have consented to the filing of this brief in blanket consents that have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

own role as the retailer in sales of third-party merchandise and seeking to impose tax collection and notice requirements on remote online merchants even though those merchants have no control over where Amazon stores or sells their products.

While South Dakota supposedly provides a "safe harbor" for small online retailers, Flipper is not protected under that law because small businesses like it are unable to predict how many units they will sell in a given jurisdiction and cannot collect sales tax from buyers retroactively if they meet the sales threshold at the end of the year. And because the tax collection software currently available does not work on Flipper's platform or on many other platforms, these businesses cannot implement a cohesive tax collection solution, and instead must collect everywhere using multiple administrative systems, substantially increasing cost for millions of small businesses.

As a consequence, Flipper and other small businesses that provide products sold by Amazon online have a strong interest in ensuring that any rule adopted by this Court is uniform and does not give rise to a patchwork of discriminatory and unworkable state laws.

SUMMARY OF ARGUMENT

Quill's holding that sales tax for interstate commerce requires a bright line rule because of its peculiarities is truer today than it was in 1992 because

internet commerce is vastly more complicated than the mail order business. Amazon, which did not exist in 1992, now represents more than 40 percent of all internet sales. More than 50 percent of the items sold by Amazon online come from third-party merchants, with small businesses accounting for half of those items. Any change in the applicable standard that does not address Amazon and other marketplace platforms will lead to massive unintended consequences and litigation that will be detrimental to millions of entrepreneurs and consumers.

South Dakota's statute is unworkable and overly simplistic when applied to small third-party merchants. Because they act only as suppliers rather than retailers of merchandise sold to Amazon's customers on its marketplace and Amazon fully controls all aspects of any sale transactions, those businesses cannot be said to have purposefully directed their conduct at the state of South Dakota merely on the basis of Amazon's storage or shipment of merchandise there.

In addition, even if South Dakota could regulate them as a matter of due process, its statute unduly burdens interstate commerce by these and other small businesses. First, they have no way of predicting how many sales will be made in any given jurisdiction and cannot collect sales tax from buyers retroactively if sales there exceed the "safe harbor" threshold at the end of the year. Second, because there is no comprehensive tax software solution that works on all of their platforms, these businesses would need to rely in part upon Amazon's costly tax collection service in

conjunction with other administrative systems to meet their obligations under the statute.

Finally, South Dakota and other states use these laws to discriminate against interstate commerce by third-party merchants in favor of Amazon. Any other large or small retailer in Amazon's position would have been required to register to collect taxes under these circumstances. But while the cost of tax collection for Amazon would be negligible in comparison with the aggregate and substantial cost imposed on small online businesses, Amazon has used its considerable economic power to dictate the circumstances under which it will collect sales taxes.

As a result, South Dakota and other states have discriminated in favor of Amazon and against third-party merchants, threatening these businesses with back-tax liability and penalties if they do not agree to collect taxes, while at the same time forgiving Amazon for its own back taxes. The states' unfair and coercive action confirms that a national sales tax solution, not a patchwork of ill-conceived state laws, is required to address transactions involving marketplace platforms.

ARGUMENT

I. AMAZON'S THIRD-PARTY MERCHANT PROGRAM MUST BE CONSIDERED IN EVALUATING SOUTH DAKOTA'S STATUTE

Amazon did not exist in 1992 when *Quill* was decided. Amazon accounts for an estimated 44 percent of all online sales and third-party merchants generate 51 percent of Amazon's total sales.[2] It is estimated that Amazon has five million third-party merchants.[3] In 2016, Amazon delivered two billion items for third-party merchants.[4] More than half of the items sold by Amazon online come from small businesses.[5] But Amazon is conspicuously missing from the debate in this proceeding. As a result, the Court does not have the record before it needed to get a full understanding of how South Dakota's statute and other state laws that target remote online sales will affect a significant part of the internet retail market and burden interstate commerce.

---

[2] *Third-party seller share of Amazon platform 2007-2017*, https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/.

[3] *Amazon Marketplace: It's Bigger Than It Looks*, Entrepreneur (Oct. 24, 2017), https://www.entrepreneur.com/article/303532.

[4] *Amazon Statistics: Need To Know Numbers about Amazon* (Jan. 24, 2018), https://www.nchannel.com/blog/amazon-statistics/.

[5] *Small business is providing big power behind Amazon* (Dec. 26, 2017), https://www.cnbc.com/2017/12/26/small-business-is-providing-big-power-behind-amazon.html.

A. Amazon Controls All Aspects Of Transactions On Its Marketplace

Amazon has two main selling programs: (1) where it is the "vendor"; and (2) where another business is a "third-party merchant" that uses Amazon's platform. Third-party merchants then choose whether to use Amazon's shipping service, called Fulfillment by Amazon ("FBA"), or ship items themselves. Since millions of customers subscribe to Amazon's Prime Shipping Program, there is a benefit to using Amazon for shipping services via FBA.

Amazon maintains full control over the content of all product listings, including product description, technical details, intellectual property enforcement and the content of customer and seller reviews. Amazon does this to maintain high quality and consistent listings for customer satisfaction. Their goal is to have only one product listing for each specific product.

Each merchant that sells the product is then identified under the main listing. Amazon discloses this information in small print so that customers frequently have no idea whether Amazon or a third-party merchant is the seller of record. If Amazon is designated as the seller, the listing says "Ships and Sold by Amazon.com." If a third-party merchant is designated as the seller and uses FBA, the listing says "Sold by [merchant's name] and Fulfilled by Amazon." And if a third-party merchant is the seller and the shipper, the listing says "Ships and Sold by [merchant's name]."

Since many merchants sell the same product and are listed under the main product listing, Amazon has an algorithm that assigns the "Buy Box." The Buy Box is highly valuable because it controls which merchant is credited with the sale. Very few consumers see who the merchant is or have any relationship with them – Amazon retains full control over this based on their algorithmic factors. The main factors are price, seller performance rating, whether the merchant uses FBA, and whether it is the manufacturer.

FBA is more complicated in practice than it appears to be. Since an estimated 90 million customers subscribe to Prime Shipping,[6] it makes sense for merchants to use FBA. When a merchant sends inventory to Amazon for FBA, Amazon determines the destination "sorting" warehouse for further processing and passes along bulk shipping rates from a preferred common carrier, usually United Parcel Service. At the sorting warehouse, Amazon then determines which "fulfillment warehouse" to send the inventory based on its sales predictions. Amazon strategically places the inventory across the country in fulfillment warehouses to reduce the shipping cost to customers and provide same-day delivery. Amazon has full control over where it sends the inventory; the individual merchant has no control or knowledge of where Amazon places the inventory. Amazon merchants only find out about a sale

---

[6] *Here's How Much Amazon Prime Members Spend Per Year*, Fortune (Oct. 18, 2017), http://fortune.com/2017/10/18/amazon-prime-customer-spending/.

after it occurs, and even then, only if they download specified reports.

There is a quirk of using FBA. Since each product needs to be identified, it requires either the Universal Product Code ("UPC") label or an Amazon FBA label with a unique identifier. Amazon provides a labelling service for an extra cost, or else merchants can use the product's UPC label. If merchants decide to use the UPC, Amazon categorizes this inventory as "commingled." Commingled inventory can be attributed to any merchant that uses the UPC label for identification purposes.

For example: Merchant A sends goods to a sorting warehouse in Pennsylvania and Amazon disperses this to five warehouses in the eastern U.S. Merchant B sends the same product using the UPC label to a fulfillment warehouse located in Colorado. If Amazon's Buy Box algorithm attributes a sale to Merchant A for a customer located in South Dakota, Amazon may pick and ship from Merchant B's inventory located in Colorado because it is the closest. Merchant A then gets credited for the sale to a customer located in South Dakota even though it had no physical control over the product that was sourced from Colorado, and no physical product was ever stored in South Dakota. Under South Dakota's law, Merchant A is responsible for collecting and remitting sales tax even though it never "owned" or had physical control of the actual item sold.

B. Under Existing Laws In Every State, Amazon Should Be The Sole Party Responsible For Collecting Any Sales Tax Due On Sales Of Products Supplied By Third-Party Merchants

As one state (South Carolina) has recognized in pursuing back taxes from Amazon on marketplace sales of third-party merchandise, under tax laws already in place in every state, Amazon rather than the third-party merchant is the actual retailer in FBA sales and as such should be solely responsible for collecting any sales tax due on those sales.[7]

Amazon has argued that FBA merchants are selling directly to the Amazon customer and consequently the onus is on the merchants to collect and remit sales tax. But based on Amazon's role in the transactions, South Carolina considers the third-party merchants to be suppliers and/or consignors of merchandise and it has therefore concluded that the sales are to Amazon's customers rather than to the third-party's customers. As that state has noted, Amazon handles all of the storing, packaging and shipping of property held in fulfillment centers and controls which fulfillment centers are used for the storage of products. Amazon controls to whom and to where the merchandise is sent and effects the actual transfer of the property to its customers. Amazon accepts payment for that merchandise

---

[7] *South Carolina DOR Goes After Amazon Services For Unreported Sales/Use Tax On Third-Party Transactions*, https://www.brannlaw.com/eyes-on-ecom-law/south-carolina-dor-goes-amazon-services-unreported-salesuse-tax-third-party-transactions/.

and holds the funds, receiving a commission for the sale. Amazon also makes it clear that it owns the customer in all cases. Vendors and third-party merchants cannot contact Amazon's customers unless the communication specifically relates to delivery of their order and uses Amazon's communication system.

As South Carolina has reasoned, the FBA process is less akin to drop shipping, and more like selling based on consignment. In consignment sales, the seller is required to comply with the tax collection, not the provider. In the case of both a consignment shop and FBA, the shop owner (or Amazon) houses the inventory, delivers it to the customer, deducts a commission and other fees from the sale and pays the vendor. Amazon's FBA merchants are not the same as retailers at a mall or farmer's market, nor is selling on Amazon's marketplace like selling to customers on Craig's List. These merchants are prohibited under Amazon's Terms and Conditions from contacting customers with sale offers. Customers pay Amazon, and Amazon controls refunds.

Accordingly, under background laws applicable to every other retailer, Amazon should be the one responsible for collecting and remitting sales tax in states where the inventory is warehoused, just as the consignment shop has to collect and remit sales tax where the shop is located. This approach is manifestly correct because Amazon is the same as a large retailer like Target or Best Buy. Those other large retailers do not get special treatment. There is no agreement that Target can execute with one of its product suppliers that

would allow Target to avoid its responsibilities on collecting taxes on sales of that product at Target. Target could not simply shift its existing legal obligations by claiming to now be the "Target marketplace" in its South Dakota stores and telling Apple that Target no longer wants to take title to Apple's inventory in those stores, that Target now merely provides a marketplace service for Apple via its store locations, and that Apple will therefore be the contractual merchant of record on sales of Apple products even though Target's level of control over the transactions and customer relationship is unchanged.

Neither South Dakota nor any other state would ever allow Target or any other large or small physical retailer to get away with this, yet that is exactly what Amazon has (successfully) sought to do in asserting that it is not responsible for collecting sales tax and that third-party merchants are the retailers because Amazon has contractually designated them as the seller of record on marketplace sales.

II. SOUTH DAKOTA'S STATUTE IS UNWORKABLE AND DISCRIMINATORY IN ITS APPROACH TO SMALL BUSINESSES WHOSE PRODUCTS ARE SOLD ONLINE BY AMAZON

A. South Dakota's Law Violates The Due Process Rights Of Amazon's Third-Party Merchants

Given the way in which Amazon sales of third-party merchandise are conducted, the Due Process Clause would not allow South Dakota to assert a tax nexus over third-party sellers for their role in these sales. As this Court recognized in *Quill*, a business must "purposefully avail itself of the benefits of a [state's] economic market" for the business to be subject to the state's taxing authority. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992).

Here, because Amazon's third-party merchants merely sell or supply their products to Amazon but have no control over where that merchandise is stored or shipped – and Amazon does not even have a physical presence in South Dakota – those merchants cannot be said to have purposefully directed their business activity at the South Dakota market even if those merchants have reason to know that their products might eventually reach consumers in that jurisdiction. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 110 (1987) (concluding that the mere fact that a supplier introduces a product into the stream of commerce is not alone sufficient to establish personal jurisdiction there); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873,

886-87 (2011) (holding that even where there is "an intent to serve the U.S. market," due process requires "purposeful availment of the [state's] market" to subject a business to jurisdiction there).

B. South Dakota's Law Substantially And Unduly Burdens Interstate Commerce Of Small Online Businesses

Even if third-party merchants could be said to purposefully avail themselves of the South Dakota market for due process purposes so as to support the state's assertion of tax collection authority, the law imposes unnecessary and undue burdens on small businesses.

First, the "safe harbor" for small online retailers offers no real protection for these businesses. South Dakota's statute states that it only applies if gross sales exceed $100,000 or there are 200 specific transactions in the State during the year. However, small businesses and startups cannot predict how many transactions will happen during the year in any given state or local jurisdiction. As a result, they have no meaningful choice but to register to collect and remit sales tax in every jurisdiction. The 200th sale may not occur until December 31st, and since many online products cost as little as one cent,[8] gross sales of $2 will trigger liability on December 31st. Yet, because sales tax cannot be collected from buyers retroactively, small businesses must as a practical matter collect at the

---

[8] *One Cent Items*, Amazon, https://www.amazon.com/slp/1-cent-items/gb3sywbtdwrz8da.

beginning of the year in order to avoid subsequent liability if they meet the threshold for tax collection.

Second, there is no comprehensive tax software solution that works on every internet platform in real time. Many sites use custom designed platforms and carts that are not supported by any tax software. For example, Squarespace, which is used by Flipper, does not work with any software, yet Squarespace powers millions of websites.[9] Other major sites are not compatible with the Certified Software Providers, including Wix.[10] Still other sites do not have any mechanism to collect sales tax, including Indiegogo, Kickstarter, Pinterest, Upwork and an unknown number of others. Small business will need to use multiple administrative systems in order to comply with many different jurisdictions, costing hundreds of millions to implement and increasing the risk of inadvertent error. While Amazon offers a tax collection service, this involves an additional 2.9 percent fee that is significant for many third-party merchants and provides Amazon with another profit center that will result in billions of extra dollars in revenue.

Since Amazon already collects on its own sales, it could start collecting tomorrow for all merchants at negligible cost. In fact, in Washington and Pennsylvania –

---

[9] *Customers*, Squarespace, https://www.squarespace.com/customers.

[10] *Wix.com Surpasses 100 Million Registered Users Milestone* (Feb. 15, 2017), https://investors.wix.com/investor-relations/press-releases/press-release-details/2017/Wixcom-Surpasses-100-Million-Registered-Users-Milestone/default.aspx.

the states where Amazon is headquartered and where it has the largest number of warehouses in this country, respectively[11] – Amazon has already agreed to collect and remit sales tax on marketplace sales of third-party merchandise through its new Marketplace Tax Collection service.[12] By contrast, the costs of collecting these taxes would be prohibitive for merchants like Flipper that sell specialty items.

To illustrate the issue more concretely, let's say that out of the five million estimated third-party merchants, one million generate enough sales to be concerned about sales tax liability. Certified Software Provider Avalara charges $3,000 to file sales tax returns in numerous jurisdictions.[13] The aggregate cost to small business is three billion dollars, not including professional and site redesign fees. Net profit margins are already small for niche products like Flipper Remote, so forcing these additional costs will put many out of business. This is actually not in Amazon's best interest because customers go to Amazon to find products that are not available in retail stores.

While these burdens are created by South Dakota's statute, that law is only one approach to the

---

[11] *Amazon Fulfillment Center Locations*, https://www1.avalara.com/trustfile/en/resources/amazon-warehouse-locations.html.

[12] *Amazon to Collect Tax in Pennsylvania: What do eCommerce businesses need to know?* (May 9, 2018), https://taxify.co/2018/03/09/amazon-collect-tax-pennsylvania-ecommerce-businesses-need-know/.

[13] *TrustFile Pricing*, Avalara, http://www1.avalara.com/trustfile/en/pricing.html.

sales and use tax that has been adopted by the states to address online sales. Various models include Colorado's reporting law, New York's click-through nexus law, Virginia's storage-of-inventory nexus law and South Dakota's economic nexus law. This patchwork of laws in itself burdens interstate commerce because small businesses will be forced to navigate a complex legal framework that will detract from product development and substantially reduce their revenues. Moreover, Amazon's platform presents specific challenges in various states because individual merchants cannot control Amazon and therefore have no way of complying with states that have customer notice requirements like Colorado.

These heavy burdens on interstate commerce by small businesses could be eliminated by placing a minimal burden on Amazon (or other marketplace sellers) under existing tax law in South Dakota and other states. However, as further discussed below, most states are unwilling to subject Amazon to such laws out of fear of losing business from that company, and they choose instead to look to small third-party merchants to fulfill Amazon's own tax collection obligation.

C. South Dakota Uses Its Law To Impermissibly Discriminate In Favor Of Amazon And Against Third-Party Merchants

Currently, Amazon only collects and remits sales tax where it deems itself the vendor and not where it

deems the sale from a third-party merchant.[14] However, as the above facts show, the distinction is illusory: Amazon controls all aspects of the sales process and any other company would be treated as the retailer in marketplace transactions. The cost for sites like Amazon to collect and remit sales tax on all its sales is negligible; for small business, and states to administer against small businesses, cumulatively, the costs are astronomical. Yet, because of Amazon's economic power, South Dakota and other states choose to ignore the facts and accept Amazon's assertion that it merely facilitates transactions in which others are retailers. In essence, these states have allowed Amazon to tell them when it can be legally responsible for collecting sales taxes.

Previously, Amazon refused to concede that even its own warehouses constituted a physical presence. As Amazon began rapidly expanding its fulfillment network to provide faster delivery to consumers, it began to change its position, and was able to use sales tax as a negotiating point when it came to building out its network. For instance, when Texas presented Amazon with a $269 million tax demand in 2011, Amazon closed its one Texas fulfillment center and cancelled plans for another it had in the state.[15] Texas eventually capitulated to Amazon's demands and forgave all back

---

[14] *Amazon Sellers Brood as States Come Calling for Taxes* (Nov. 11, 2017), https://www.nytimes.com/2017/11/15/technology/amazon-sales-tax.html.

[15] *Amazon's (not so secret) war on taxes* (May 23, 2013), http://fortune.com/2013/05/23/amazons-not-so-secret-war-on-taxes/.

taxes, and now pays a sales tax incentive to Amazon for opening a distribution center.[16]

Amazon changed course last year and agreed to collect taxes on "vendor" transactions in all states that have a sales tax.[17] Not long after, Amazon announced a competition for states to compete to provide massive subsidies for its new headquarters.[18] Amazon is currently seeking an additional $5-7 billion in tax subsidies from the states in addition to the estimated more than $1 billion that it has already received.[19] In fact, there is evidence that other countries are similarly according Amazon special treatment under their own sales tax laws out of concern that Amazon might not build warehouses there if it is required to comply.[20]

No small out-of-state business has the benefit of Amazon's economic might. Small third-party merchants

---

[16] *Tax incentives get Amazon to build fulfillment center in Katy* (Mar. 29, 2017), https://www.houstonchronicle.com/business/retail/article/Tax-incentives-get-Amazon-to-build-fulfillment-11037679.php.

[17] *Amazon to start collecting state sales taxes everywhere* (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

[18] *Amazon to add second headquarters with up to 50,000 jobs in grab for talent* (Sept. 7, 2017), https://www.usatoday.com/story/money/2017/09/07/amazon-plans-second-headquarters-dubbed-hq-2/640861001/.

[19] *Is Amazon Too Big to Tax* (Mar. 1, 2018), https://newrepublic.com/article/147249/amazon-big-tax.

[20] *Secret recording suggests HMRC told to go easy on Amazon* (Jan. 24, 2018), https://economia.icaew.com/en/news/january-2018/secret-recording-suggests-hmrc-told-to-go-easy-on-amazon.

are subject to enforcement actions that include back taxes, interest and penalties. Unlike Amazon, these businesses cannot stand up to the various states, especially since facing an enforcement action in multiple state and local jurisdictions simultaneously is exceedingly complicated and expensive. Small businesses like Flipper have no choice but to pay, and if facing past tax from multiple jurisdictions, they may well go out of business.

The conduct of the Multistate Tax Commission ("MTC") in which South Dakota and many other states participate further illustrates the coercive nature of state tax collections with respect to third-party merchants and what these merchants will face if the South Dakota law is upheld. The MTC offered an "amnesty" program[21] last fall (conspicuously timed with Amazon's launch of its headquarters contest) that threatened these merchants with the potential for massive back taxes and penalties unless they started to collect taxes.[22] By contrast, Amazon has never paid any back taxes or penalties and, as previously noted, only South Carolina is currently seeking back taxes from Amazon for sales of third-party merchant items through marketplace.

---

[21] *States offer sales tax amnesty program for marketplace sellers* (Aug. 16, 2017), https://www.digitalcommerce360.com/2017/08/16/sales-tax-amnesty-program-marketplace-sellers/.

[22] *States vs. Marketplace vs. Third-Party Sellers – The Amazon Sales Tax Challenge*, https://www.bna.com/states-vs-marketplace-n73014464175/.

The argument made by both MTC and the Certified Software Providers at the time was that because these merchants have inventory in an Amazon warehouse, this "almost certainly" constitutes physical presence and consequently they had better register and collect or face potential liability for back sales tax, penalties and interest,[23] even though no court has ever adopted this position and it conflicts with basic due process principles insofar as FBA merchants have no control over where Amazon stores their inventory. The MTC's approach is particularly problematic because with so many different rules and the inability to retroactively collect sales taxes, small third-party merchants would have no choice but to collect and remit those taxes in every jurisdiction where Amazon might store and/or ship their merchandise.

---

[23] *Amazon Sellers Brood as States Come Calling for Taxes*, *supra* n. 11; *Guide to Sales Tax Collection in Amazon*, https://www1.avalara.com/trustfile/en/guides/amazon/sales-tax.html.

CONCLUSION

Whether or not *Quill*'s bright line rule needs to be updated, the issues presented by Amazon marketplace sales cannot be addressed by a patchwork of discriminatory and unworkable state laws. Instead, a national sales tax framework is needed that properly accounts for marketplace platforms.

Respectfully submitted,

MELANIE L. OXHORN
Counsel of Record
MELANIE L. OXHORN, P.C.
450 East 63rd St. #6C
New York, NY 10065
(917) 414-1987

DANIEL PITKOW
FLIPPER LLC
67-1185 Mamalahoa Hwy, #D104
Kamuela, HI 96743
(310) 266-6933

Counsel for Amicus Curiae

April 3, 2018

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
PETITIONER,

v.

WAYFAIR, INC., OVERSTOCK. CO, INC.
AND NEWEGG, INC.
RESPONDENTS.

On Writ of Certiorari
to the Supreme Court of South Dakota

AMICUS CURIAE BRIEF OF FOUR UNITED STATES SENATORS IN SUPPORT OF PETITIONER

DARIEN SHANSKE
UC DAVIS SCHOOL
OF LAW
400 MRAK HALL DRIVE
DAVIS CA 95616
(530) 752-5860
dshanske@ucdavis.edu

ALAN B. MORRISON
COUNSEL OF RECORD
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H STREET NW
Washington, DC 20052
(202) 994-7120
abmorrison@law.gwu.edu

March 5, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF THE AMICI CURIAE 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5
I. The Physical Presence Rule of *Quill* Should Be Overturned. 5
II. It is Improbable that Undue Burdens on Interstate Commerce Will Develop if the Physical Presence Rule is Overturned. 10
III. Courts are Capable of Preventing an Undue Burden on Interstate Commerce. 12
IV. Congress is Fully Prepared to Act When Needed. 20
CONCLUSION 25
ADDENDUM (Marketplace Fairness Timeline) ..... Add. 1

TABLE OF AUTHORITIES

Cases

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 14
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 5, 6, 16, 21
Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) 6
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 14
Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir.), *cert denied*, 137 S.Ct. 591 (2016) 3, 8
Florida Transp. Servs., Inc. v. Miami-Dade Co., 703 F.3d 1230 (11th Cir. 2012) 20
Goldberg v. Sweet, 488 U.S. 252 (1989) 22
I.N.S. v. Chadha, 462 U.S. 919 (1983) 8, 9
Kraft Foods N. Am., Inc. v. Rockland Cty. Dep't of Weights & Measures, 2003 WL 554796 (S.D.N.Y. Feb. 26, 2003) 20
Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582 (1995). 9
Northwestern States Portland Cement Co. v. Minn., 358 U.S. 450 (1959) 21
Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995) 22
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ..... passim
Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... passim

Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992) 21

Statutes

4 U.S.C. § 117(b) 22
4 U.S.C. §§ 116-24 22
49 U.S.C. § 14505 22
49 U.S.C. § 31705(a) 23
49 U.S.C. § 40116(b) 23
49 U.S.C. §11501(b)(4) 23
Ala. Admin. Code 810-6-2-.90.03 11
Ind. Code § 6-2.5-2-1(c) 11
Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note). 23
Me. Rev. Stat. Ann. tit. 36, §1951-B 11
N.D. Cent. Code Ann. § 57-39.2-02.2 11
Public Law 86-272, 15 U.S.C. § 381 21
S.D. Codified Laws § 10-64-2 11
Vt. Stat. Ann. tit. 32, § 9712 11
Wyo. Stat. Ann. § 39-15-501 11

Legislative Materials

Marketplace Fairness Act of 2017 (S.976) 1

Other Authorities

Boris Bittker & Brannon P. Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* (2004) 20

Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001) 8
Scott Drenkard, *State and Local Sales Tax Base Conformity Issues in Other States*, Tax Foundation (Oct. 28, 2015), ... 12
Federation of Tax Administrators, *State Sales Tax Rates And Vendor Discounts* (Jan. 2018) 18
Walter Hellerstein et al., *State and Local Taxation: Cases and Materials* (10th ed. 2014) 17
Walter Hellerstein, *Tax Reform: What it Means for State and Local Tax and Fiscal Policy, Before the S. Comm. on Fin.*, 112th Cong. (2012) 23
Streamlined Sales and Use Tax Agreement 12

INTEREST OF THE AMICI CURIAE[1]

Amici are four United States Senators who support petitioner in urging this Court to overturn its decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Heidi Heitkamp is a United States Senator from North Dakota, Lamar Alexander is a United States Senator from Tennessee, Richard Durbin is a United States Senator from Illinois, and Michael Enzi is a United States Senator from Wyoming. Two are Democrats, and two are Republicans. Senator Heitkamp previously served as the State of North Dakota's Tax Commissioner and represented the State of North Dakota in *Quill*. Amici, as Senators, maintain a vital interest in the laws affecting their states' ability to assess and collect sales and use taxes by state and local governments. They are among the co-sponsors of S. 976, the Marketplace Fairness Act of 2017 as well as other versions of that bill in prior Congresses.

The States which amici represent have sales and use taxes that this Court's decision in *Quill* prevents them from enforcing. It is estimated that, as of 2015, total sales and use taxes uncollected because of *Quill* amounted to almost $26 billion annually.

---

[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amici and their counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

Not only does *Quill* cause a loss in revenue to their States, but it also places merchants with physical locations in their States at an economic disadvantage because they must, in effect, charge a higher price for a product also sold by an out-of-state retailer that does not have to collect a tax that is imposed on in-state buyers and must be collected by in-state sellers. States that amici represent - Illinois, North Dakota, Tennessee, and Wyoming - rely heavily on state sales taxes for revenue. When respondents make sales there, they have a price advantage over businesses with a physical presence there of up to 11% in Illinois, 8.5% in North Dakota, 9.75% in Tennessee, and 6.0% in Wyoming, simply because they cannot be required to collect those State taxes.

Amici are filing this brief to demonstrate that overturning *Quill* will not leave respondents and other out-of-state sellers without a Dormant Commerce Clause defense and to assure the Court that Congress stands fully prepared to step in if other states or localities, unlike South Dakota, seek to impose excessive burdens on out-of-state retailers that become obligated to collect sales and use taxes.

SUMMARY OF ARGUMENT

Amici agree with petitioner that the physical presence rule established by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), should be overturned. As Justice Kennedy has explained, the decision was "questionable even when decided, [and] now harms States to a degree far greater than could have been anticipated earlier." *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring). This Court does not overturn precedent lightly, but, again as Justice Kennedy concisely indicated, and petitioner has demonstrated at length, the rule established by *Quill* satisfies all of the criteria this Court has established for when it is appropriate to overturn a precedent.

This brief also addresses the important question of what will happen if this Court overturns *Quill*. There is no doubt that the respondents and their amici will argue that vast confusion will ensue if the states are freed from the bright-line rule of *Quill*. That will not happen for (at least) three reasons. First, there is little evidence that the states would rush to enact a welter of burdensome use tax collection laws and much evidence to the contrary. Furthermore, the same technological innovations that have made the adverse impacts of the *Quill* rule so problematic for States like South Dakota have also driven down the cost of compliance, thereby

reducing the likelihood that state laws can impose significant costs on remote sellers.

Second, should this Court overturn the physical presence rule established in *Quill*, that does not mean that this Court, or courts generally, will not be able to protect interstate sellers. There are a number of doctrines that remain to guard against potential abuses. First, should a state or locality impose obligations on remote sellers that do not apply to local vendors, then such laws are virtually per se invalid. Second, should a state or locality impose financially significant obligations on remote sellers, then *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), adequately protects them if the "burden imposed [by state laws] is clearly excessive in relation to the putative local benefits."

Third, Congress is standing by to act should states overstep. The *Quill* rule reversed the default set up by the Constitution under which states are free to act as sovereigns unless Congress acts. If *Quill* is overturned and the constitutional default restored, amici believe that Congress is fully prepared to act, especially if the problem to be solved is overreaching by a few states or by certain local tax schemes that collectively place excessive burdens on out-of-state sellers. Furthermore, with the *Quill* tax shelter no longer available, all the states and interstate sellers will favor establishing standard rules of practice in order to facilitate orderly and efficient

revenue collection. In this regard, it is notable that commercial interstate interests have had considerable success in persuading Congress to pass balanced laws that have served to streamline their interactions with state and local revenue authorities while protecting legitimate state interests.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE REVERSED.

I. The Physical Presence Rule of Quill Should Be Overturned.

Amici will be brief in explaining why this Court should overturn the *Quill* physical presence rule. We wholly concur with the arguments made by petitioner and agree that, properly applied, the South Dakota statute at issue here satisfies the "substantial nexus" prong of the four-part test established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). As this Court explained in *Quill*, "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." 504 U.S. at 312. The South Dakota statute only applies to remote sellers with substantial economic contact with the state and goes to considerable length to mitigate their

compliance burdens. Respondents and other remote sellers therefore have a substantial nexus with South Dakota such that the State is not imposing an undue burden on the national economy.

Although the Court in *Quill* asserted that the four prong test of *Complete Auto* applied, the Court in *Quill* did not proceed to analyze the use tax collection obligation under all of its prongs. Some of the prongs do not seem relevant to a regulation such as the one at issue in this case, which indicates that the *Complete Auto* test itself is not the correct rubric. Take the "fair apportionment" prong of *Complete Auto*. This prong asks whether the taxpayer can demonstrate that "there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise, by proving that the income apportioned to [the taxing State] under the statute is out of all appropriate proportion to the business transacted in that State," *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 180–81 (1983) (internal quotation marks and citations omitted).

This test is vitally important for assessing the constitutionality of a state corporate income tax, where the issue is fair division among states. However, it makes little sense in analyzing a use tax collection law, such as South Dakota's, under which the seller is either obligated to collect the entire tax or not. Neither the South Dakota law

at issue in this case, nor the North Dakota law at issue in *Quill*, attempts to divide income or any other kind of tax. They are simply attempts to impose a collection requirement on certain interstate vendors.

The fact that the bright line physical presence rule mandated by *Quill* would alone render this statute unconstitutional is a clear indicator that this rule does not attempt to strike a proper balance between reasonable efforts by states to collect revenue and the importance of not overburdening the national economy. To the contrary, the *Quill* rule is inequitable, arbitrary, inefficient, and inconsistent with our federal system. The rule is inequitable because it grants a tax advantage to certain remote sellers. As Justice White observed in his dissent in *Quill*, the majority "creates an interstate tax shelter for one form of business — mail-order sellers — but no countervailing advantage for its competitors." 504 U.S. at 329.

The rule is arbitrary because a small remote seller with a physical presence must collect the tax, while a large seller organized so as to avoid physical presence can avoid any use tax collection obligation. The rule is inefficient because it wastes the resources of out-of-state sellers as they contort themselves to avoid physical presence and at the same time diverts the resources of taxing agencies as they seek to demonstrate a physical presence, or, as happened in Colorado, enact a second-best reporting law

designed to minimize the adverse impact of *Quill*. *See Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir.), *cert denied*, 137 S.Ct. 591 (2016).

The *Quill* rule is also inconsistent with our federal system, by creating a tax advantage for remote businesses granted by this Court – and not by Congress. To be sure, and as this Court recognized in *Quill*, Congress has the power to take this advantage away. Yet the Founders deliberately organized our federal government in a manner that makes it difficult for Congress to act. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."). Therefore, this Court's decision in *Quill* placed the states at a structural disadvantage whereby it is *they* that have to appeal to Congress to have their taxing power restored.

This is the reverse of the constitutionally designed balance where the states, as sovereigns, retain the power to act unless Congress, designed to be resistant to change, affirmatively acts to preempt state action. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1371 (2001):

> [F]ederal lawmaking procedures continue to preserve state prerogatives to some

> extent by 'impos[ing] burdens on governmental processes that often seem clumsy, inefficient, even unworkable.' In short, the "gridlock" still decried today frequently prevents the federal government from adopting 'the supreme Law of the Land,' thus leaving states free to govern. (internal citation to *Chadha* supra).

It is particularly perverse for the states to be required to appeal to Congress for restoration of their taxing power given what this Court has described as a "strong background principle against federal interference with state taxation." *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 589 (1995).[2]

Finally, the *Quill* rule has had significant adverse economic consequences for states like South Dakota. The doctrinal misadventure represented by *Quill* has prevented states from collecting the use tax from a vast and growing segment of commercial activity. Not only has the *Quill* rule cost the states millions in lost use tax revenue, but it has hurt their in-state business through the tax advantage that the *Quill* rule

---

[2] The holding of *National Private Truck Council* illustrates the strength of this principle. There the Court held that 42 U.S.C. § 1983 did not authorize injunctive or declarative relief in state court for tax cases when there is an adequate remedy at law. *Nat'l Private Truck Council*, 515 U.S. at 592. On its face, Section 1983 does not contain any such subject area limitation, but this Court unanimously found one nevertheless.

conferred on remote vendors who can charge a "tax free" price for the same product for which local vendors must raise the price in order to collect the tax.

II. It is Improbable that Undue Burdens on Interstate Commerce Will Develop if the Physical Presence Rule is Overturned.

Respondents will argue that the physical presence rule is justified because anything other than this bright-line rule would prove too burdensome for remote vendors. As to most vendors, this fear is impossible to square with common sense or experience. Why would states want to make it difficult for vendors to collect and remit the taxes owed to them? The whole reason that states impose the use tax collection obligation is because it is extremely difficult for them to collect the tax from each individual buyer without that obligation.

This logic applies to imposing the collection obligation on small vendors as well. It is small vendors who could most plausibly suffer excessive harm from use tax collection obligations in multiple jurisdictions. But it is highly unlikely that states will spend valuable enforcement resources to collect the small amounts of tax that small vendors should remit. Indeed, this very case shows that the fear of burdening small vendors is a myth generated by large retailers in the hope of keeping their sales tax cost advantage. South Dakota's statute applies only to vendors who have at least 200 transactions with in-state customers

or who have generated more than $100,000 of sales with them.[3] Indiana, Maine, North Dakota, Vermont, and Wyoming have adopted those same thresholds.[4] Other states have adopted or proposed even higher threshold amounts.[5] And there is no reason to think that in a post-*Quill* era, fair and sensible legislators will suddenly amend their laws to create burdens on collecting the use tax money that they need to fund their programs.

It could perhaps be imagined that a state might have some incentive to make it more difficult for remote sellers so as to advantage domestic sellers, but this scenario is improbable. The use tax is a complement to the sales tax. States already have significant incentives to make their sales tax collection systems as user-friendly as possible for their domestic firms. All the states are essentially asking for in this case is to restore the power to compel remote sellers to utilize the same systems as domestic sellers in order to remit the use taxes validly owed to the states.

Finally in note 6 in *Quill*, this Court cited the fact that there are 6000 taxing jurisdictions in the United States, suggesting that each of them might impose unique and perhaps complex tax

---

[3] S.D. Codified Laws § 10-64-2.

[4] Ind. Code § 6-2.5-2-1(c) (Indiana); Me. Rev. Stat. Ann. tit. 36, §1951-B (Maine); N.D. Cent. Code Ann. § 57-39.2-02.2 (North Dakota); Vt. Stat. Ann. tit. 32, § 9701(9)(F) (Vermont); Wyo. Stat. Ann. § 39-15-501 (Wyoming).

[5] *See, e.g.*, Ala. Admin. Code 810-6-2-.90.03 (adopting a sales threshold of $250,000).

collection obligations on out-of-state sellers but for the physical presence rule. 504 U.S. at 313. However, such large numbers do not matter very much when technology can easily accommodate thousands of jurisdictions. Further, there is another reason such large numbers should not be taken at face value. In the majority of states that permit local sales taxes, those taxes piggyback on the state sales tax in substantial ways.[6] For states that are members of the SSUTA, there is a requirement that state and local taxes be harmonized. Streamlined Sales and Use Tax Agreement § 302. For states that are not members of the SSUTA, there is often substantial state authority over local sales tax regimes. Moreover, in order to prevent challenges under the Dormant Commerce Clause and forestall Congressional action over state collection authority, states will have a significant incentive to prevent excessive local variance.

III. Courts are Capable of Preventing an Undue Burden on Interstate Commerce.

This case and *Quill* before it are about a state law that imposes a use tax collection obligation on small out-of-state sellers. Although

---

[6] *See* Scott Drenkard, *State and Local Sales Tax Base Conformity Issues in Other States*, Tax Foundation (Oct. 28, 2015), https://taxfoundation.org/state-and-local-sales-tax-base-conformity-issues-other-states/. ("Louisiana is one of just a few states that have local sales tax bases, collections, and audit functions which are separate from the state. By our count, just five states other than Louisiana have unique situations in this regard: Alaska, Arizona, Colorado, Idaho, and New Jersey.").

improbable for the reasons adduced above, amici understand that such obligations could provoke the question as to whether they are excessively burdensome relative to their benefits. Although some states other than South Dakota currently have significantly lower thresholds, e.g., $10,000, a decision upholding South Dakota's much higher limits should cause those states to re-think their thresholds.[7]

In the absence of *Quill*, should such questions arise, the courts are capable of preventing undue burdens on interstate commerce. They could do that by applying existing jurisprudence, in particular the test articulated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (internal citations omitted:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found,

---

[7] *See* Brief for Tax Foundation as Amicus Curiae Supporting Petitioner on Petition for Writ of Certiorari at 6-17, South Dakota v. Wayfair, Inc., No. 17-494 (Nov. 2, 2017) (containing a summary of thresholds, including several that are lower than South Dakota's, particularly for so-called "click through nexus" statutes.)

> then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

This is the test that is used to consider whether a facially neutral law, such as one imposing safety measures or affirmative disclosure requirements on a dangerous product, nevertheless imposes undue burdens on interstate commerce.[8]

Classic examples of state laws struck down by this Court for failing this kind of balancing include: an Illinois law requiring that trucks use a certain kind of mudguard that was in conflict with the requirements of other states;[9] an Arizona law forbidding the transport of uncrated cantaloupes (and hence they could not be packaged out-of-state);[10] and a city ordinance that required milk to be pasteurized within five miles of the city, thereby creating an "undue burden" on both in-state and out of-state milk processors.[11]

---

[8] Although many areas today are preempted by federal statutes and regulations, states do still impose many such obligations, much as they create product liability torts.

[9] *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 522-23 (1959).

[10] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138 (1970).

[11] *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350-53 (1951).

The *Pike* balancing test is an appropriate way to determine the validity of the South Dakota law because the heart of respondents' legitimate concern is not that states will – or are likely to - facially discriminate against interstate commerce by imposing onerous use tax collection obligations only on out-of-state sellers. Rather, the concern is that neutral laws would nonetheless impose excessive burdens on those sellers, as this Court illustrated in footnote 6 of *Quill*, 504 U.S. at 313:

> North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce. On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year. Thus, absent the *Bellas Hess* rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty.

Application of *Pike* balancing is in fact called for by the *Quill* decision itself. The *Quill* majority recognized that the law at issue was a regulation of business – not a tax - and yet slid into analyzing the North Dakota law at issue as if

it were a tax. *Compare id.* at 303 ("Quill has taken the position that North Dakota does not have the power to compel it to collect a use tax from its North Dakota customers.") *with id.* at 311 (analyzing law at issue under the first prong of the *Complete Auto* test) *see also id.* at 313 n.6 (*Quill* majority twice uses the notion of an "undue burden" as a touchstone for what the substantial nexus prong of *Complete Auto* forbids).

Amici accept the possibility that a clearly excessive burden on interstate commerce relative to the local benefit is possible and that sellers who object to these laws should have the opportunity to present evidence that they impose such a burden. Although amici believe that respondents here should have a chance to prove their contentions, amici also believe the respondents' prima facie case for demonstrating an excessive burden in this case appears quite weak.[12]

First, unlike in the cases where a state law has failed *Pike* balancing in part because the benefits sought were minimal, the use tax collection laws at issue clearly serve at least two important and non-discriminatory state purposes: the inability to collect the use tax is (1) depriving

---

[12] Indeed, the Tax Foundation, often a critic of state taxing power, in its amicus brief urging this Court to take this case argued that this Court could and should rule in favor of the South Dakota statute without remand. Brief for Tax Foundation as Amicus Curiae in Support of Petitioner on Petition for Writ of Certiorari at 2, South Dakota v. Wayfair, Inc., No. 17-494 (Nov. 2, 2017).

the state of a large and growing amount of revenue; and (2) causing a competitive harm to in-state businesses, which collect sales and use taxes and are also likely to contribute to the state economy in other ways. Both of these costs have been quantified, and both are large and growing. There is therefore a weighty interest on one side of the scale.

Second, on the burden side, there are many reasons that any burden is not likely "clearly excessive." First, sales and use tax laws of the various states typically resemble one another so that complying with one is unlikely to be more difficult than complying with others like South Dakota's. *See* Walter Hellerstein et al., *State and Local Taxation: Cases and Materials* 650 (10th ed. 2014) (observing that "state sales taxes display significant common features and generally operate in a uniform manner. . ."). Second, twenty-three states, including South Dakota, belong to the Streamlined Sales and Use Tax Agreement, which means these state laws have been simplified and the states have harmonized their sales and use tax laws.[13] Third, the technology to comply with multiple use tax collection obligations is readily available and, for states that have joined the Streamlined Sales and Use Tax

---

[13] Brief for Streamlined Sales Tax Governing Board, Inc. as Amicus Curiae Supporting Petitioner on Petition for Writ of Certiorari at 1-3, South Dakota v. Wayfair, Inc., No. 17-494 (Nov. 2, 2017).

Agreement, it is free.[14] The availability of this technology ought to relieve the burdens on most firms of complying with the law in non-SSUTA states. Fourth, as for smaller companies for whom the compliance costs might still loom large, South Dakota and other states have thresholds that will shield occasional sellers from a collection obligation. Fifth, sales and use tax laws often permit a vendor to retain a small portion of the tax collected as compensation for collecting the tax on behalf of the state. *See* Federation of Tax Administrators, State Sales Tax Rates And Vendor Discounts (Jan. 2018), https://www.taxadmin.org/assets/docs/Research/Rates/vendors.pdf (reporting that 28 states make provision for vendor compensation).

Finally, the *Pike* balancing test also asks a court to consider whether a state could adopt a regulation that would promote its legitimate local purpose "as well with a lesser impact on interstate activities." 397 U.S. at 142. State efforts to impose information reporting requirements and other regulatory measures, while helpful in collecting use taxes, have not been, and are not expected to be, completely successful.[15]

---

[14] *Id.* at 12-13.

[15] For a survey of state approaches and their limitations, see Brief for Colorado et al. as Amici Curiae Supporting Petitioner on Petition for Writ of Certiorari at 7-14, *South Dakota v. Wayfair Inc.*, No. 17-494 (Nov. 2, 2017). Colorado's new information reporting requirement is expected, at best, to close 60% of its use tax collection gap. *Id.* at 8.

It is possible that some states may have some combination of a particularly burdensome collection regime, with a particularly low (or no) threshold and with low (or no) vendor compensation or provided software. In such a case the law might fail *Pike* balancing. But the opportunity for a particular out-of-state seller to demonstrate such a failure is a further reason to *support* the overruling of *Quill*, not one to perpetuate it. After all, under current law, a small vendor dealing with such a challenging state will have to collect the use tax if it has even a small physical presence.

In sum, the physical presence rule established in *Quill* was a bright-line rule that indicated whether or not an interstate seller had substantial nexus with a state. With the overturning of the *Quill* rule, the courts are capable of preventing an undue burden on interstate commerce by applying existing jurisprudence. Should the Court establish which test hereafter courts should apply, amici note that the *Pike* balancing test has already been developed in the case law and is appropriately deferential to state action. Applied to the facts of this case, it seems very unlikely that the respondents can prevail, but they – and someday other remote vendors – should be given the opportunity.[16]

---

[16] As a leading treatise writer summarizes the cases, "[w]hile the vast majority of *Pike* claims fail, plaintiffs

IV. Congress is Fully Prepared to Act When Needed.

It is of course possible that the various state and local tax systems will impose a significant, but perhaps not unconstitutional, burden on interstate commerce. In that case, Congress is the appropriate source of relief. Congress has the means to collect evidence and to craft narrow solutions, as well as the ability to revise its approach in light of new evidence. Beyond addressing any problems that might emerge, amici believe that, once freed from the shackles of *Quill*, Congress is fully prepared to step in when needed, an outcome that virtually all parties, including amici, agree would be the best outcome.

Attached as an addendum to this brief is a history of the principal, and so far not yet brought to fruition, efforts in Congress from 2001-2017 to secure passage of legislation to overrule *Quill*. Given this history, one might ask what chance there would be for Congress to step in to overturn unreasonable state laws that are enacted after

---

occasionally prevail . . ." Boris Bittker & Brannon P. Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* § 6.05 (2d. ed. 2012 & Supp. 2017) (listing categories of cases in which plaintiffs occasionally prevail). For instance, unusual local labeling regimes can fail, *Pike* balancing, *Kraft Foods N. Am., Inc. v. Rockland Cty. Dep't of Weights & Measures*, 2003 WL 554796 (S.D.N.Y. Feb. 26, 2003), as can a facially neutral permitting procedure that favors incumbents, *Florida Transp. Servs., Inc. v. Miami-Dade Co.*, 703 F.3d 1230 (11th Cir. 2012).

this Court removes the *Quill* barrier. The answer is that, if Congress believes action is needed to address undue burdens, there is an excellent chance – and rightfully so. The Commerce Clause is supposed to – and does – empower the national Congress to intervene to foster interstate commerce if some states create undue burdens in their use tax collection programs. There are many examples of such targeted interventions.

For instance, in 1959, this Court decided *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). One possible interpretation of this decision (and others) was that it broadened the customary rules for corporate income tax nexus by allowing a state to tax "a company whose only contacts with a State consisted of sending 'drummers' or salesmen into that State . . ." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 221 (1992). Congress quickly passed Public Law 86-272, 73 Stat. 555, 15 U.S.C. § 381 (1959), in response to that broad reading of *Northwestern States*. In general terms, this law prohibits states from imposing a net income tax on a business whose *only* contact with a state is solicitation. Thus, Congress left in place a broad nexus rule, but acted to protect a discrete set of businesses from being overburdened.

Another important example involves the "fairly apportioned" prong of *Complete Auto*. In the corporate income tax context, for example, this

prong requires that a state use a reasonable formula to estimate what share of a multistate corporation's income is produced within the state. In *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175 (1995), the question was how this rule applied to the sales tax imposed on a bus trip between states. Oklahoma sought to tax the entire value of the transaction, even though only a portion of the trip took place in state. This Court held that the requirement of apportionment does *not* apply to a transactional tax like the typical state retail sales tax. Less than eight months later, Congress passed The Interstate Commission Termination Act, 49 U.S.C. § 14505 (1995), which overturned the specific holding of *Jefferson Lines* by prohibiting a state from "levy[ing] a tax . . . on . . . a passenger traveling in interstate commerce by motor carrier." Although Congress acted to shield interstate carriers from the imposition of taxes on interstate travel, Congress did not overturn the broad principle established by the Court in *Jefferson Lines* that sales taxes need not be apportioned.

Most relevant for current purposes is the example of the Mobile Telecommunications Sourcing Act of 2000 (MTSA), 4 U.S.C. §§ 116-24, which established a uniform rule for state and local taxation of mobile telephone calls.[17] The MTSA was in large part a response to this Court's decision in *Goldberg v. Sweet*, 488 U.S. 252 (1989),

---

[17] 4 U.S.C. § 117(b).

which provided a narrow nexus test for whether a state can tax an interstate phone call, a test that was overtaken by the rapid development of mobile phones. Both the states and commercial interests supported sensible national standards, and the resulting federal law has won praise as "a poster child for horizontal federal-state tax coordination at its best." *Hearing on Tax Reform: What it Means for State and Local Tax and Fiscal Policy Before the S. Comm. on Fin.*, 112th Cong. 14-16 (2012) (statement of Walter Hellerstein, Federal-State Tax Coordination: What Congress Should or Should Not Do, http://digitalcommons.law.uga.edu/fac_artchop/762.)

Other examples of targeted Congressional interventions to limit state taxing power in favor of interstate commerce abound. For example, Congress restricts the states from taxing the internet directly,[18] from taxing individuals "traveling in air commerce"[19] and from imposing any tax that discriminates against railroads.[20] And Congress has permitted states to tax interstate motor fuels only if they are members of the International Fuel Tax Agreement.[21]

---

[18] Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note).

[19] 49 U.S.C. § 40116(b).

[20] 49 U.S.C. § 11501(b)(4).

[21] 49 U.S.C. § 31705(a).

In sum, this Court's decision in *Quill* put the onus on Congress to pass a law that would broadly restore the power of the states to collect use taxes from out-of-state sellers. It has been twenty-five years, and Congress has not been able to do so. By contrast, Congress has been able to act often, and even expeditiously, to protect interstate commerce, by passing narrow laws, to deal with specific problems. Amici are fully confident that Congress would do so again if, contrary to reasonable expectations, some states abused their powers in the post-*Quill* era.

CONCLUSION

For the foregoing reasons, in addition to those in the brief of petitioner, the judgment should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Alan B. Morrison
Counsel of Record
George Washington
University Law School
2000 H Street NW
Washington D.C. 20052
(202) 994-7120
abmorrison@law.gwu.edu

Darien Shanske
UC Davis School of Law
400 Mrak Hall Drive
Davis CA 95616
(530) 752-5860
dshanske@ucdavis.edu

March 5, 2018

ADDENDUM

MARKETPLACE FAIRNESS TIMELINE

107th Congress (2001-2002)

S. 512, Internet Tax Moratorium and Equity Act
Senator Byron Dorgan - introduced 3/9/2001
Referred to: Senate Finance
Finance Committee hearing – 8/1/2001

S. 1542, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/11/2001
Referred to: Senate Commerce

S. 1567, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/18/2001
Referred to: Senate Commerce

Senate Amdt. # 2156 to H.R.1552
Motion to table amendment was agreed to – 57-43 on 11/15/2001

108th Congress (2003-2004)

S. 1736, Streamlined Sales and Use Tax Act
Senator Michael Enzi - introduced 10/15/2003
Referred to: Senate Finance

109th Congress (2005-2006)

S. 2152, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 12/20/2005
Referred to: Senate Finance

S. 2153, Streamlined Sales Tax Simplification Act
Senator Byron Dorgan - introduced 12/20/2005
Referred to: Senate Finance

Senate Finance Subcommittee on International Trade hearing on sales tax fairness and other state/local tax issues – 7/25/2006

110th Congress (2007-2008)
S. 34, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 5/22/2007
Referred to: Senate Finance

Senate Commerce Committee hearing on "Communications, Federalism, and Taxation" where it was discussed – 5/23/2007

111th Congress (2009-2010) - No bill introduced

112th Congress (2011-2012)
S. 1452, The Main Street Fairness Act
Senator Dick Durbin - introduced 7/29/2011
Referred to: Senate Finance

S. 1832, The Marketplace Fairness Act
Senator Michael Enzi – introduced 11/9/2011
Referred to: Senate Finance

11/30/2011 – House Judiciary Committee hearing on "Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce."

1/31/2012 – Official letter requesting Finance Committee hearing on S. 1832

4/25/2012 – Senate Finance Committee hearing on state and local tax issues, including S. 1832

8/1/2012 – Senate Commerce Committee hearing on Marketplace Fairness: Leveling the Playing Field for Small Business

11/29/2012 – S. Amdt. 3223 filed to the National Defense Authorizations Act

113th Congress (2013-2014)

S. 336, The Marketplace Fairness Act
Senator Michael Enzi - introduced 2/14/2013
Referred to: Senate Finance

3/21/2013 – S. Amdt. 578 (Enzi 2nd Degree S. Amdt. #656) – Deficit Neutral Reserve Fund enabling Congress to pass the Marketplace Fairness Act
Senate Record Vote # 62 - Enzi Amendment agreed to 75 to 24
S. 743, Marketplace Fairness Act of 2013 (revised)
Senator Michael Enzi – introduced April 16, 2013
Referred to: Senate Finance

05/06/13 – S. 743 was passed by the Senate in a vote of 69 to 27

S. 2609, Marketplace and Internet Tax Fairness Act
Senator Michael Enzi – introduced July 15, 2014
Referred to: Senate Finance
March 2014: Hearing entitled "Exploring Alternative Solutions on the Internet Sales Tax Issue" before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary.

114th Congress (2015-2016)
S. 698, Marketplace Fairness Act of 2015
Senator Michael Enzi – introduced March 10, 2015
Referred to: Senate Finance

H.R. 2775, Remote Transactions Parity Act of 2015
Congressman Jason Chaffetz – introduced June 15, 2015
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

115th Congress (2017-2018)
S. 976, Marketplace Fairness Act of 2017
Senator Michael Enzi – introduced April 27, 2017
Referred to: Senate Finance

H.R. 2193, Remote Transactions Parity Act of 2017
Representative Kristi Noem – introduced April 27, 2017
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

No. 17-494

In The

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF FOR DAVID A. FRUCHTMAN AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

DAVID A. FRUCHTMAN
RIMON P.C.
245 Park Avenue, 39th Floor
New York, NY 10167
(646) 681-2268
david.fruchtman@rimonlaw.com

March 5, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF NONSUPPORT FOR EITHER PARTY 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

A. *National Bellas Hess* and *Quill* Set Forth Long-Enduring and Still Valid Constitutional Principles Protecting All Remote Retailers From Unjustified Local Entanglement 6

B. Retail Sales of Services Involve Considerations Different From Retail Sales of Tangible Personal Property 8

1. The Services Sector Has Thrived in Part Due to an Absence of State Sales Taxes and Sales Tax Compliance Requirements on Service Providers 9

2. States Have Been Unsuccessful in Their Attempts to Fashion Sales Taxes Applicable to a Broad Base of Services 12

3. Notwithstanding the Above, Sales Taxation of the Services Sector Seems Inevitable Due to the Amount of Potential Tax Revenues 19

C. Any Rollback of the Physical Presence Requirement Should be Confined to Retailers of Tangible Personal Property 24

TABLE OF CONTENTS – Continued

Page

D. State Revenue Departments and Tax Practitioners Know How to Distinguish Sales of Services From Sales of Tangible Personal Property 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662 (1981) 7

National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967) ..... *passim*

National Geographic Society v. California Bd. of Equalization, 430 U.S. 551 (1977) 19

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 8

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 7

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

CONSTITUTION

U.S. Const. art. I, §8, cl. 3 ..... *passim*

RULES

S. Ct. R. 37.3(a) 2

S. Ct. R. 37.6 1

STATE STATUTES AND LOCAL ORDINANCES

Michigan P.A. 93 of 2007 repealed by P.A. 145 of 2007 17

NYC Administrative Code §11-2001(d) 17

NYC Administrative Code §11-2002(c) 17

TABLE OF AUTHORITIES – Continued

Page

SDCL 10-45-1 3

SDCL 10-45-2, et seq. 2

SDCL 10-45-12.1, et seq. 3

REGULATIONS

California Code Regs. 1501 25

TECHNICAL MEMORANDA AND ADVISORY OPINIONS

New York State Dept. of Tax. and Fin., TSB-A-13(27)S (Sept. 9, 2013) 17

New York State Dept. of Tax. and Fin., TSB-M-15(4)S (July 24, 2015) 18

Virginia Dept. of Tax., P.D. 94-325 (Oct. 24, 1994) 26

LEGISLATIVE MATERIALS

California Senate Bill 8, Introduced December 1, 2014 20

OTHER AUTHORITIES

"*Mikesell Report Says Sales Tax on Services Would Be Feasible in Indiana*," Brian Bardwell, State Tax Today, 2015 STT 69-4 (April 10, 2015) 23

TABLE OF AUTHORITIES – Continued

Page

"*Kentucky Blue Ribbon Commission on Tax Reform Issues Recommendations*," Governor Steve Beshear's Communications Office, State Tax Today, 2012 STT 244-16 (Dec. 17, 2012).....22

"*State Sales Taxes on Services: Massachusetts as a Case Study*," Samuel B. Bruskin and Kathleen King Parker, Tax Lawyer, v. 45 (Fall, 1991).....13, 17

"*Georgia's Incredible Shrinking Sales Tax Base*," Robert D. Bushman, Fiscal Research Center, Georgia State University (Oct. 6, 2015).....22

"*Estimate of Potential Revenue to be Derived From Taxation of Currently Non-Taxable Services*," California State Board of Equalization (April 14, 2015).....20

"*Issue Brief: Expanding the Base of Illinois' Sales Tax to Consumer Services Will Both Modernize State Tax Policy and Help Stabilize Revenue*," The Center for Tax and Budget Accountability and the Taxpayers' Federation of Illinois, State Tax Today, 2015 STT 97-12 (May 20, 2015).....22

"*Lawmakers Consider Sales Tax on Several Consumer Services*," Neil Downing, State Tax Notes, 79 STN 263 (Jan. 25, 2016).....22

TABLE OF AUTHORITIES – Continued

Page

"Sale Taxation in Connecticut: For Presentation Before the Connecticut Tax Study Panel," William F. Fox, Tax Analysts Doc. 2015-23784 (Oct. 27, 2015) 23

The Federalist Nos. 7, 11 (A. Hamilton) 7

"Georgia State University Releases Report on State's Eroding Tax Base," State Tax Today, 2015 STT 197-21 (Oct. 6, 2015) 22

"Florida's Sales Taxes on Services," Walter Hellerstein, National Tax Journal, Vol. XLI (March 1988) 17

"California Lawmaker Says Taxing 'High-End' Services Could Blunt Tax Reform Blow," Paul Jones, State Tax Today, 2018 STT 2-2 (Jan. 3, 2018) 21

"Economic and Revenue Impacts of Sales Taxation on Selected Services, Per H489," from Tom Kavet, Nic Rockler and Jeff Carr, State Economist for the Administration to Steve Klein, Chief Fiscal Officer (Vermont) Joint Fiscal Office (Jan. 15, 2016) 22

"Expanding Sales Taxation of Services: Options and Issues," Michael Mazerov, Center on Budget and Policy Priorities, State Tax Today 2009 STT 161-2 (Aug. 24, 2009) 13, 14

"Did Distortionary Sales Taxation Contribute to the Growth of the Service Sector?", David Merriman and Mark Skidmore, National Tax Journal, Vol. LIII (March 2000) 11

TABLE OF AUTHORITIES – Continued

Page

"Considering Sales Taxation of Services in Indiana: A Report Prepared for the Indiana Fiscal Policy Institute," John Mikesell, Indiana School of Public and Environmental Affairs, State Tax Today, 2015 STT 55-17 (report dated March 18, 2015).....23

Newegg.com Internet site, Corporate Summary, Who We Are (accessed Feb. 13, 2018).....3

Overstock.com Form 10-K (Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Commission Act of 1934 for the Fiscal Year Ended Dec. 31, 2016).....3

"Memorandum: Governor Wolf's Sales Tax Proposal," Pennsylvania Department of Revenue (March 18, 2015).....22

"New York Tax Reform Commission Presents Final Report," Tax Reform and Fairness Commission (Released Nov. 14, 2013) State Tax Today, 2013 STT 221-44 (Nov. 15, 2013).....21

"State Government Tax Collections Summary Report: 2014," U.S. Census Bureau (Released April 16, 2015) (available at https://www.census.gov/content/dam/Census/library/publications/2015/econ/g14-stc.pdf) (accessed on Feb. 23, 2018).....20

TABLE OF AUTHORITIES – Continued

Page

"2014 State Government Tax Collections Methodology," U.S. Census Bureau (Released April 16, 2015) (available at http://www.census.gov/govs/statetax/population_of_interest.html) (accessed on Feb. 23, 2018) 21

Wayfair, Inc. Form 10-K (Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Commission Act of 1934 for the Fiscal Year Ended Dec. 31, 2016) 3

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae's interest in this case is attributable to his specialized tax practice, as described below.

Amicus is an attorney in private practice and is the chair of Rimon, P.C.'s State and Local (Subnational) Taxation practice. For the last 26 years, his practice has been devoted exclusively to state and local tax planning and controversy issues across the United States. In 2003, he was a Special Deputy Attorney General of the state of Hawaii regarding a specific tax issue. For some 24 years, he has been the co-author of the Illinois chapter of the American Bar Association's annual "Sales and Use Tax Deskbook," and he is a former chairman of the Income and Franchise Taxes Subcommittee of the American Bar Association's state tax committee. He is the author of many articles, has guest lectured at many universities and tax organizations and, for 13 years, lectured at New York University's Summer State and Local Tax Institute on topics including "Constitutional and Other Jurisdictional Constraints on State and Local Taxation."

Amicus is submitting this Brief out of a concern that, because the points raised in this Brief do not favor the result sought by either party, these important

---

[1] Rule 37.6 statement: All parties received notice of *Amicus Curiae's* intent to file this Brief and consented. Further, no counsel for any party authored this Brief in whole or in part and no person or entity other than *Amicus* funded the preparation or submission of this Brief.

considerations will not otherwise be presented to this Court.

STATEMENT OF NONSUPPORT FOR EITHER PARTY

The question presented is "Should this Court abrogate *Quill*'s[2] sales tax only physical presence requirement?"

This Brief is filed pursuant to Supreme Court Rule 37.3(a) and takes no position as to whether this Court should respond "Yes" or "No" to the Question Presented. Rather, this Brief takes the position that *if* the Question Presented is answered "Yes," then the abrogation of *Quill*'s physical presence requirement should be limited to retail sales of tangible personal property. That is, in-state physical presence should continue to be required before a state may impose a sales tax collection responsibility on retailers of services.

Neither party is expected to assert or support the position set forth herein, hence the need for this Brief:

- Petitioner is a state that imposes sales tax on retail sales of all types of tangible personal property, with a few exceptions.[3] Petitioner also imposes sales tax on retail sales of all services, but specifically exempts a lengthy list of services from sales

[2] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[3] SDCL 10-45-2, et seq.

taxation.[4] Petitioner can remove any (or all) of those service exemptions at any time. As such, Petitioner has no interest in arguing that *Quill*'s physical presence requirement should be retained with respect to retail sales of services.

- Respondents are retailers of tangible personal property.[5] As such, Respondents' focus in this case is expected to relate exclusively to Petitioner's attempt to impose sales tax collection and remittance responsibilities on Respondents' sales of goods. Respondents have no interest in arguing that, if the Question Presented is answered "Yes," *Quill*'s physical presence

---

[4] SDCL 10-45-1 and 10-45-12.1, et seq.

[5] *See* Wayfair, Inc. Form 10-K (Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Commission Act of 1934 for the Fiscal Year Ended Dec. 31, 2016), page 2 (describing itself as "one of the world's largest online destinations for the home . . . we have built one of the largest online selections of furniture, décor, decorative accents, housewares, seasonal décor, and other home goods."; Newegg Inc., which on its Newegg.com Internet site, Corporate Summary, Who We Are, describes itself as "a leading online retailer. . . . With more than 10.5 million products . . . " (accessed Feb. 13, 2018); and Overstock.com Form 10-K (Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Commission Act of 1934 for the Fiscal Year Ended Dec. 31, 2016), pages 6-7 (describing itself as "We are an online retailer and incubator of blockchain technology. . . . In our retail business, we deal primarily in price-competitive, new and replenishable merchandise and use the Internet to aggregate both supply and demand to create an efficient marketplace for selling these products" and at page 47 explaining that its blockchain technology activity is insignificant as compared to its retailing business.

requirement should be retained with respect to retail sales of services.

SUMMARY OF ARGUMENT

The reasoning and physical presence requirement of *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967) and *Quill* apply to all remote retailers,[6] including retailers of tangible personal property and retailers of services. Remote retailers in both sectors are potentially subject to sales tax collection and remittance requirements throughout the United States, which the Court in *National Bellas Hess* and *Quill* considered to be an unjustifiable local entanglement with the national economy.

Even if this Court determines that retailers of tangible personal property have outgrown the physical presence requirement, the Court should retain that requirement as applicable to sales of services. This is because, as contrasted with the well-developed principles controlling the taxation of sales of tangible personal property, the taxation of sales of services is in its early stages. The states do not yet know how to impose sales taxes on multistate services, as demonstrated by the fundamental questions that are as-yet unanswered and by three large states' quick repeal of their

[6] "Remote retailer" refers to a retailer that does not have physical presence in a particular state, either by itself or through any representative.

attempts to impose sales taxes on a broad base of services.

The importance of the retention of the physical presence requirement for services is underscored by the enormous amount of sales taxes potentially at issue when services are taxed, which the states are finding impossible to ignore. For example, California found that legislation proposed in 2014 to tax services would have generated $122 billion in sales taxes. While that bill did not become law, efforts to enact a California sales tax on services continue to this day. Moreover, in just over the last five years, there have been high-level proposals and published studies recommending the taxing of a broad base of services in New York, Pennsylvania, Illinois, Kentucky, Georgia, Vermont, Connecticut, and Indiana, as well as California.

It seems clear that the states have begun a period of actively attempting to tax retail sales of services, and of enforcing the collection of those taxes by service providers outside of the taxing state. This process will involve many trials and, unavoidably, many errors. To protect the nation's services sector from being unjustifiably entangled in this experimental process, this Court should retain *National Bellas Hess* and *Quill*'s physical presence requirement for the services sector.

ARGUMENT

A. *National Bellas Hess* and *Quill* Set Forth Long-Enduring and Still Valid Constitutional Principles Protecting All Remote Retailers From Unjustified Local Entanglement.

In *National Bellas Hess*, with Archibald Cox advocating for the remote retailer, this Court interpreted the Commerce Clause[7] to require some physical presence of a retailer in a state before that state can require the retailer to collect its use tax. The Court based its holding on the "welter" of tax compliance rules that would entangle interstate commerce if every state, municipality, and school district were empowered to require remote retailers to administer their taxes. *Id.* at 759-760. The Court concluded that "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements." *Id.* at 760.

This Court and Professor Cox's reasoning provided a barrier between a growing national economy and thousands of tax-hungry jurisdictions. A quarter of a century later, in *Quill*, this Court reaffirmed the importance of that Commerce Clause barrier. The Court did so with reasoning building on *National Bellas Hess*:

> "the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.

---

[7] U.S. Const. art. I, § 8, cl. 3.

> Under the Articles of Confederation, State taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. *See generally* The Federalist Nos. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that that Clause prohibits discrimination against interstate commerce, *see, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and bars state regulations that unduly burden interstate commerce, *see, e.g., Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662 (1981)."

Quill at 312.

The *Quill* Court thereafter fully endorsed *National Bellas Hess*'s bright-line rule requiring retailers to have physical presence in a state before those retailers can be subjected to the burdens of the state's sales tax compliance system:

> "Such a [bright-line] rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their

> indispensable power of taxation.' *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959)."

Quill at 315-316. Furthermore, the Court credited the barriers and boundaries of *National Bellas Hess* and *Quill* with nothing less than the growth of an industry:

> Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter-century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.

Quill at 316 (footnote omitted).

B. Retail Sales of Services Involve Considerations Different From Retail Sales of Tangible Personal Property.

In *National Bellas Hess*, this Court explained that the Commerce Clause protects the national economy from "unjustifiable local entanglements." *National Bellas Hess* at 760. The need for protection from unjustifiable entanglements applies to retail sales of services as much as it applies to retail sales of tangible personal property. However, the practicalities in the taxing of these sectors differ, such that the states are still in a "trial and error" phase in the sales taxation of services.

As is discussed below, states have had significant difficulties taxing services even when the services are performed and benefits are received in the same state. The complications when multiple states are involved include all of these and more. In this unstable environment, if the states can require remote service providers to collect and remit their sales taxes, the result will be an unjustifiable local entanglement of the national economy in a welter of local tax laws.[8]

1. The Services Sector Has Thrived in Part Due to an Absence of State Sales Taxes and Sales Tax Compliance Requirements on Service Providers.

This Court stated in *National Bellas Hess* that the Commerce Clause protects the national economy from *unjustifiable* local entanglements. *National Bellas Hess* at 760. The states are now highly experienced in sales and use taxation of retail sales of tangible personal property. Nonetheless, they are unable to reliably collect this longstanding and important source of tax revenue. Therefore, this Court might now conclude that remote retailers of tangible personal property have outgrown the physical presence requirement and that the states may enforce their tax collection requirements against such remote retailers. However, even if the Court reaches that conclusion regarding retailers

---

[8] In one of the important trends in state taxation, the states are actively looking for opportunities to expand their sales taxes to cover a broad-base of services, including services performed in other states. Section B.3 below provides an analysis of this trend.

of tangible personal property, the Commerce Clause concerns and principles set out in *National Bellas Hess* and *Quill* remain valid and apply fully to remote service providers.

At the time of *National Bellas Hess*, the states made little effort to impose sales taxes on retail sales of services. Moreover, the states' focus on retailers of tangible personal property but not on retailers of services remained much the same over the next 25 years. So, while *National Bellas Hess* applies to the services sector no less than it applies to the rest of the national economy, there was little if any development in this area of the law.

State sales and use taxation was much the same 25 years later when this Court decided *Quill*: a focus on the taxation of retail sales of tangible personal property, including remote retailing of tangible personal property. Relatively little sales tax attention was paid to the taxation of retail sales of services.

Those extended periods of quiet for the national economy's services sector fostered the growth of that sector, as was found in a 2000 university study. That study concluded that the services sector was growing because it was relatively untouched by state and local sales taxes:

> "We believe that increased sales taxation [of tangible personal property] is a contributing factor to the growth of the service sector. Across states, after controlling for many other factors, the value of service receipts as a share

> of income is positively correlated with the sales tax rate [on tangible personal property], while the value of retail receipts is inversely correlated (see Table 5, columns (1) and (3)).”[9]

The study's conclusion is strikingly similar to this Court's observation in *Quill*, as is quoted above, that the mail-order industry's dramatic growth was due, in part, to not having to contend with a welter of subnational taxes and tax compliance obligations.

This Court should reject any claim that the states know how to impose sales tax collection obligations on remote retailers of services without unjustifiably harming the services sector of the national economy. The overwhelming evidence is to the contrary, namely:

- The growth in the services sector when it is not entangled with a mass of state and local tax compliance requirements. This gives the states a very high standard to meet to demonstrate a lack of harm to the services sector;
- The small reliance presently by states on tax receipts from sales taxation of services (intrastate and interstate) as, in general, states tax only those few services that are specifically identified; and

---

[9] *“Did Distortionary Sales Taxation Contribute to the Growth of the Service Sector?”*, David Merriman and Mark Skidmore, National Tax Journal, Vol. LIII, pp. 125, 140 (March 2000) (referenced table omitted from this Brief).

- The great difficulties the states have encountered in their attempts to impose broad-based sales taxes on services, including remote services, as is discussed below. This belies any possible claim that the states can impose sales tax collection and remittance obligations on remote service providers without entangling them in local laws.

2. States Have Been Unsuccessful in Their Attempts to Fashion Sales Taxes Applicable to a Broad Base of Services.

The states' posture today regarding the sales taxation of tangible personal property and services is much the same as what it has been since the issuance of *National Bellas Hess*: Almost every state that imposes a sales tax does so on all retail sales of tangible personal property (each state has a few exceptions). States and vendors are very experienced with the taxation of these sales.

In contrast, most states do not impose sales and use taxes on retail sales of services unless those sales are expressly made taxable.[10] Thus, in almost all states only a few services are subject to sales taxation. Consequently, a very large portion of the nation's economy has no familiarity with sales tax laws, regulations, or

---

[10] Only Hawaii, New Mexico and South Dakota impose sales taxes on a broad-base of services.

principles, and no familiarity with sales tax collection and remittance procedures.

Moreover, the states themselves have not yet resolved many thorny issues raised by taxing retail sales of services, including:

- basic considerations affecting the taxation of both intrastate and interstate sales of services, such as definitions (e.g., what are "legal services"? Do legal services include assistance with a real estate filing? Assistance obtaining a business license? Assistance obtaining a sales tax license? Assistance obtaining a marriage license? What about an unregulated service, such as interior design services – which activities come under the umbrella of that phrase? Which do not?);
- the avoidance of pyramiding of taxes.[11] This complication affects tax collection requirements for both intrastate and interstate sales of services;
- the sourcing and apportioning of sales.[12] This complication affects tax collection

---

[11] "*Expanding Sales Taxation of Services: Options and Issues*," Michael Mazerov, Center on Budget and Policy Priorities, State Tax Today, 2009 STT 161-2 at pp. 51-52 (Aug. 24, 2009). *See also* "*State Sales Taxes on Services: Massachusetts as a Case Study*," Samuel B. Bruskin and Kathleen King Parker, Tax Lawyer, v. 45 at 49 (Section E) (Fall, 1991).

[12] "*Expanding Sales Taxation of Services*" at p. 53. *See also* "*State Sales Taxes on Services*" at Section D.

requirements of interstate sales of services only.

The pyramiding issue is important because it violates a fundamental principle of sales taxation that only end-consumers should be taxed. When tangible personal property is sold, determining who is the end-consumer of that tangible personal property is generally straightforward.

However, determining who is the end-consumer of services is more difficult. As a result, it is possible that purchasers of services will pay tax on those services, even though the service will be resold (and taxed again) or will be a component of another service (and taxed again). For example, hotels often offer a service of overnight dry cleaning. The hotel pays a drycleaner to do the work. The hotel then marks up the cost of the dry cleaning and charges the guest the higher amount. Here, no tax should be due on the hotel's purchase of the dry-cleaning service, with tax instead being charged on the guest's payment for the service. But whether that result can be achieved will depend on the contours of the state's resale exemption.

Pyramiding of sales taxation of services also creates artificial incentives for businesses to use their own employees to provide a service even if an outside business can perform the service more efficiently.[13] This inefficiency occurs because no sales tax is charged when an employee performs a service for his employer,

---

[13] "*Expanding Sales Taxation*" at 53.

but sales tax is charged when that same employer engages a third-party to perform the service.

Likewise, sourcing and apportioning of sales of services presents a series of complications unparalleled in sales of tangible personal property. These include identifying the location of delivery of a service, identifying the locations where the benefits of the service are received, determining the percentage of the service used in a state, and more.

For example, states are increasingly requiring service providers to collect sales tax on the sale of cloud computing services. However, cloud computing services are not "delivered" in any state in the way that tangible personal property is delivered. Thus, in transactions involving Software as a Service ("SaaS"), the purchaser may be anywhere in the world when accessing the service provider's software. Furthermore, a purchaser might access the SaaS application from multiple states, either because the purchaser is traveling or because several employees in the purchaser's business are authorized to access the SaaS. Moreover, that software itself might be anywhere in the world, including in a location that is unknown to both the purchaser and the service provider.

The states have differing approaches to taxing cloud computing services, and those approaches are continuing to evolve. As such, it is difficult for a remote service provider of cloud computing services to know where it must collect sales taxes and how much tax it is supposed to collect. Left unchecked, the ability of

states to impose a variety of tax collection burdens across state lines will create an unjustifiable local entanglement with these providers, and with the services sector, generally.

Certainly, the states will continue to experiment with methods for taxing sales of services. Unavoidably, this process will involve fundamental missteps, as demonstrated by the unsuccessful attempts by three of the most populous states (Florida, Massachusetts, and Michigan) to impose broad-based sales taxes on the services sector. Each of those attempts was quickly repealed.

Florida's 5% tax on services went into effect in July 1987. From the start, taxpayers were confused regarding the reach and administration of the tax, and the tax met enormous opposition. This culminated in the repeal of the services tax less than six months after it became effective. After that repeal, one of architects of Florida's tax acknowledged the difficulty of imposing sales tax on services, writing that:

> "Once the tax became effective July 1, 1987, confusion over the scope of the tax and difficulties encountered by taxpayers who sought to comply with it added to the swell of public indignation. . . . Multistate businesses claimed that it was simply impossible to comply with the rules for apportioning the sales tax base, particularly when a purchase was made by

> one member of an affiliated group of corporations."[14]

Significantly, remote retailers are directly impacted by both of those items (confusion over the tax's scope and impossibility of apportioning the sales tax base).

Massachusetts and Michigan had even worse experiences when they attempted to impose sales taxes on the services sector. Massachusetts's attempt to tax services became effective on March 6, 1991 and was repealed *two days later*, on March 8, 1991, retroactive to March 6.[15] And, in 2007, Michigan's service tax did not last even one day.[16]

Of the 45 states that impose sales taxes, few have considered in any depth the issues raised by requiring retailers of interstate services to collect sales taxes. The New York State Department of Taxation and Finance ("Department") has addressed the issue in limited circumstances, and its experience is telling:

- In 2013, Department issued an advisory opinion informing a business as to how to collect New York City sales taxes on its sale of a credit rating services.[17] The

---

[14] *"Florida's Sales Tax on Services,"* Walter Hellerstein, National Tax Journal, Vol. XLI, pp. 1, 15 (March 1988).

[15] *See "State Sales Taxes on Services," supra.*

[16] Michigan P.A. 93 of 2007 repealed by P.A. 145 of 2007.

[17] TSB-A-13(27)S (Sept. 9, 2013). (Following New York City's financial crises in the 1970s, responsibility for administration of its sales tax was shifted to the New York State Department of Taxation and Finance. NYC Administrative Code §§ 11-2001(d) and 11-2002(c).)

> business's customer was based in North Carolina, with offices within and without New York State. The advisory opinion instructed the taxpayer to collect New York City sales tax on the sale of the credit rating service if the customer's representative who signed the engagement letter with the taxpayer is in New York City when the taxpayer delivers its rating letter to that representative.
>
> Less than two years later, the Department changed its position. It now advised that credit rating services would be subject to New York City sales tax if the address to which the taxpayer's invoice is sent is in New York City.[18] This is an entirely different method for determining the location of the sale of the service and establishing tax collection responsibility.

There is nothing inherently wrong with either of those approaches to determining tax collection responsibility for sales of services. However, such changing of tax collection rules is a problem for the economy's services sector, especially considering that there are up to 45 states for which such compliance might be required, along with thousands of political subdivisions within those states. And not all rules for determining tax collection obligations will be as unobjectionable as New York's. Litigation regarding more aggressive state approaches is likely.

---

[18] TSB-M-15(4)S (July 24, 2015).

The hazards for the national economy from this state experimentation are obvious. Indeed, this is very much the welter of tax compliance rules, and entanglement of interstate commerce, that concerned the Court in *National Bellas Hess*. Retaining the physical presence requirement of *National Bellas Hess* and *Quill* protects remote service providers from that entanglement while the states experiment with new approaches to taxing services.[19]

3. Notwithstanding the Above, Sales Taxation of the Services Sector Seems Inevitable Due to the Amount of Potential Tax Revenues.

Despite a history of limited or no sales taxation of services, and despite the difficulties and unanswered fundamental questions regarding sales taxation of services, it is virtually certain that the states will continue to attempt by trial and error to create an administrable method of imposing sales taxes on intrastate services.[20] The tax receipts potentially available are so great that no other outcome seems realistic.

---

[19] The states undoubtedly will treat a corporation that is both a retailer of goods and a retailer of services as having company-wide tax presence if any line of its business has tax presence in a state. This treatment may be justified under *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977).

[20] This Brief does not dispute the states' right to impose sales taxes on services, whether (i) wholly performed and wholly received within the one state, or (ii) performed in multiple states and received in multiple states. Rather, this Brief opposes any

Of course, taxing interstate services raises additional complications, which the states could choose to avoid by taxing intrastate services only. However, no state has yet indicated a desire to do this. Rather, every bill, budget proposal, and report discussed below proposes the sales taxation of services without regard to whether doing so crosses state lines.

California's very recent experience demonstrates why broad-based sales taxation of the services sector is highly likely, if not inevitable. On December 1, 2014, California Senate Bill 8 was introduced with the purpose of imposing sales tax on all retail sales of services. The California State Board of Equalization estimated that the new tax would generate $122 billion in new tax revenue for the state and its sub-state units of government during fiscal 2016.[21] To put that figure in perspective, consider that the U.S. Census Bureau reports that during fiscal 2014 all states collected $866 billion from all taxes.[22] Allowing for uncertainty as to whether the Census Bureau treated California municipalities

---

state being permitted to impose sales tax collection responsibility on service providers lacking the in-state physical presence required by the Commerce Clause as interpreted by *National Bellas Hess* and *Quill*.

[21] *"Estimate of Potential Revenue to be Derived From Taxation of Currently Non-Taxable Services,"* California State Board of Equalization (April 14, 2015).

[22] *"State Government Tax Collections Summary Report: 2014,"* U.S. Census Bureau (Released April 16, 2015) (available at https://www.census.gov/content/dam/Census/library/publications/2015/econ/g14-stc.pdf) (accessed on Feb. 23, 2018).

as fiscal bodies independent of the state,[23] California's new tax on services would have generated 7% to 14.1% *of the total amount of all taxes collected by all states during 2014*. Or, considering only sales taxes, California's new tax on services would be 14.8% to 29.6% *of the total amount of sales taxes collected by all states during 2014*. This is in addition to the sales taxes California already collects on the retail sale of tangible personal property.

Although that 2014 California Senate Bill did not become law, efforts to enact a California sales tax on services continue to this day. *See, e.g.*, *"California Lawmaker Says Taxing 'High-End' Services Could Blunt Tax Reform Blow,"* Paul Jones, State Tax Today, 2018 STT 2-2 (Jan. 3, 2018).

In just over the last five years, expansions of the types of services subject to sales tax have been proposed in states literally coast-to-coast. Governors, legislators, university studies, "Blue Ribbon" studies, and tax organizations in New York,[24]

---

[23] The Census Bureau report cautions that "The state government tax data presented by the U.S. Census Bureau may differ from data published by state governments because the Census Bureau may be using a different definition of which organizations are covered under the term, 'state government'." *See "2014 State Government Tax Collections Methodology,"* U.S. Census Bureau (Released April 16, 2015) (available at http://www.census.gov/govs/statetax/population_of_interest.html) (accessed on Feb. 23, 2018).

[24] *"New York Tax Reform Commission Presents Final Report,"* Tax Reform and Fairness Commission (Released Nov. 14, 2013) State Tax Today, 2013 STT 221-44 (Nov. 15, 2013) describing, at p. 14, one of its conclusions as "Add additional services to the

Pennsylvania,[25] Illinois,[26] Kentucky,[27] Georgia,[28] Vermont,[29]

---

sales tax base to create greater uniformity between the State and local tax bases."

[25] Governor Tom Wolf's 2015-2016 budget proposal included a recommendation to expand the Commonwealth's sales tax to include many services not then taxable. These included accounting services, investment advisory services, consulting services, advertising services, architectural services, legal services, graphic design services, computer programming services, computer design services and dozens of other services. *"Memorandum: Governor Wolf's Sales Tax Proposal,"* Pennsylvania Department of Revenue (March 18, 2015).

[26] *"Issue Brief: Expanding the Base of Illinois' Sales Tax to Consumer Services Will Both Modernize State Tax Policy and Help Stabilize Revenue,"* The Center for Tax and Budget Accountability and the Taxpayers' Federation of Illinois, State Tax Today, 2015 STT 97-12 (May 20, 2015).

[27] *"Kentucky Blue Ribbon Commission on Tax Reform Issues Recommendations,"* Governor Steve Beshear's Communications Office, State Tax Today, 2012 STT 244-16 (Dec. 17, 2012).

[28] *"Georgia State University Releases Report on State's Eroding Tax Base,"* State Tax Today, 2015 STT 197-21 providing a link to *"Georgia's Incredible Shrinking Sales Tax Base,"* Robert D. Bushman, Fiscal Research Center, Georgia State University, *see* p. 15 (Oct. 6, 2015) ("The shifts in household consumption toward services and online sales, for example, are likely permanent, but both can also be added to the sales tax base through legislation.").

[29] "Lawmakers Consider Sales Tax on Several Consumer Services," State Tax Notes, Neil Downing, 79 STN 263 (Jan. 25, 2016) which contains a link to a January 15, 2016 study commissioned by the Vermont legislature on the imposition of sales tax on services (*"Economic and Revenue Impacts of Sales Taxation on Selected Services, Per H489,"* from Tom Kavet, Nic Rockler and Jeff Carr, State Economist for the Administration to Steve Klein, Chief Fiscal Officer (Vermont) Joint Fiscal Office (Jan. 15, 2016). On page two, the study describes one of its conclusions as follows:

Connecticut,[30] Indiana,[31] and, as stated, California have all proposed such an expansion.

"No matter what, the cross-border effects are negative to the economy, but likely to be relatively small for the five taxes [sic: sample taxed services] considered – and probably smaller than for goods in general."

[30] "*Sale Taxation in Connecticut: For Presentation Before the Connecticut Tax Study Panel*," William F. Fox, Tax Analysts Doc. 2015-23784 (Oct. 27, 2015) at p. 20 ("Policy Option 4: Broaden the sales tax to more services used by consumers, including residential utilities and repairs to residential real property.").

[31] "*Mikesell Report Says Sales Tax on Services Would Be Feasible in Indiana*," Brian Bardwell, State Tax Today, 2015 STT 69-4 (April 10, 2015) reporting on the study "*Considering Sales Taxation of Services in Indiana: A Report Prepared for the Indiana Fiscal Policy Institute*," John Mikesell, Indiana School of Public and Environmental Affairs, State Tax Today, 2015 STT 55-17 (report dated March 18, 2015). The Report's Executive Summary includes the following conclusion:

> Adding services to the tax base would require considerable attention to insuring [sic: ensuring] that the tax not apply to services purchases made as business inputs. This problem would be particularly acute for services that may be purchased by either households or businesses (dual-use services).

The Report also identifies the following three "administrative concerns":

> (i) Services could be taxed either by redefining the tax to apply to sales both of tangible personal property and services, except those specifically exempt, or by selectively adding certain services to the short list now already taxed. Neither approach is without problems, as experience in Florida, Michigan, and Massachusetts illustrates. The experience does show the problems associated with trying to include services predominantly purchased by businesses in the expanded base.

The states are entering a process of actively attempting to tax retail sales of services, and to enforce collection of those taxes by service providers outside of the taxing state.

C. Any Rollback of the Physical Presence Requirement Should be Confined to Retailers of Tangible Personal Property.

The elimination of physical presence as a prerequisite to the imposition of tax collection responsibilities, combined with the states' interest in imposing sales taxes on the services sector, risks material, adverse effects on the national economy. This Court can avoid that hazard by limiting any rollback of the physical presence requirement to retail sales of tangible personal property.

The states do not now have a mature approach to requiring the collection of sales taxes on interstate sales of services, and it is unknown how long it will take for them to arrive at that point. The only

---

(ii) Small business retailers may have compliance problems. Making the expanded tax as simple to comply with as possible matters for all businesses, especially small entities.

(iii) Many vendors who would face obligations to collect and remit sales tax on services already are in the state retail sales tax system because they sell taxable tangible personal property. Much of the new tax base undoubtedly is with these existing registered vendors. Special attention, however, would be warranted to assist the transition of new vendors into the sales tax system.

certainties are that there will be many trials and errors, and that this will be a contentious process. Therefore, until the states develop an efficient methodology for taxing interstate sales of services, this Court should continue to apply the physical presence requirement to service providers.

D. State Revenue Departments and Tax Practitioners Know How to Distinguish Sales of Services From Sales of Tangible Personal Property.

Imposing tax collection responsibilities on remote retailers of tangible personal property, while not imposing that responsibility on remote retailers of services, requires distinguishing between such retailers based upon what is being sold. Fortunately, that is not the additional burden that it might seem, as for decades this analysis has been a regular practice among state revenue departments and tax practitioners.

The analysis is known as the "true object" test (sometimes also called the "essence of the transaction" test or "dominant purpose" test).[32] Whatever the name,

---

[32] *See, e.g.*, California Code Regs. 1501 ("The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true objects of the contract; that is, is the real object sought by the buyer the service per se or the property produced by the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred.").

the concept is essentially the same: One evaluates whether the purchaser wanted to acquire tangible personal property or a service. For example, the retail sale of prepaid telephone cards has been held to be a nontaxable sale of a service, as the "true object" in purchasing a calling card is the long-distance service. The card serves only as a medium for securing the telephone service.[33]

Most important, for purposes of the position set forth in this Brief, is that the work of distinguishing sales of goods from sales of services is already being done.

CONCLUSION

Any abrogation of the Commerce Clause's physical presence requirement, as described in *National Bellas Hess* and *Quill*, should be limited to retailers of tangible personal property. The physical presence requirement should continue to apply to sales of services.

Respectfully submitted,

DAVID A. FRUCHTMAN
RIMON, P.C.
245 Park Avenue, 39th Floor
New York, NY 10167
(646) 681-2268
david.fruchtman@rimonlaw.com

[33] *See, e.g.*, Virginia Dept. of Tax., P.D. 94-325 (Oct. 24, 1994).

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF HOUSE JUDICIARY COMMITTEE CHAIRMAN BOB GOODLATTE; SENATE FINANCE COMMITTEE RANKING MEMBER RON WYDEN; SENATORS MAGGIE HASSAN, JEANNE SHAHEEN, AND JON TESTER; REPRESENTATIVES STEVE CHABOT, RON DeSANTIS, ANNA G. ESHOO, JIM JORDAN, ANN McLANE KUSTER, ZOE LOFGREN, MARK MEADOWS, DANA ROHRABACHER, KURT SCHRADER, AND JIM SENSENBRENNER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DAVID SALMONS
Counsel of Record
BRYAN KILLIAN
JAMES NELSON
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
T. 202.739.3000
david.salmons@morganlewis.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE ISSUE BEFORE THE COURT RAISES COMPLEX POLICY QUESTIONS, LEGISLATIVE IN NATURE	6
II. CONGRESS IS INSTITUTIONALLY BEST SITUATED TO ADDRESS THE ISSUES IN THIS LITIGATION	8
III. THE HOLDINGS IN *BELLAS HESS* AND *QUILL* SHOULD BE ACCORDED THE GREATEST *STARE DECISIS* FORCE BECAUSE CONGRESS IS EMPOWERED TO AUTHORIZE STATE TAXATION OF REMOTE SALES	14
IV. CONGRESS HAS REPEATEDLY EXERCISED ITS INTERSTATE COMMERCE POWER TO REGULATE STATE TAXATION OF THE INTERNET, AND CONTINUES TO DO SO	18
V. THE SOLICITOR GENERAL'S INVITATION TO DISCRIMINATE AGAINST INTERNET COMMERCE BY REINTERPRETING *QUILL* CONTRAVENES THE ITFA	28
CONCLUSION	32

TABLE OF AUTHORITIES

Page

CASES

Bonaparte v. *Tax Court*, 104 U.S. 592 (1881) 25

Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932).....15

Bush v. *Lucas*, 462 U.S. 367 (1983).....12

Commonwealth Edison Co. v. *Montana*, 453 U.S. 609 (1981).....17

Diamond v. *Chakrabarty*, 447 U.S. 303 (1980) 11, 16

Gen. Motors Corp. v. *Tracy*, 519 U.S. 278 (1997).....12

Ill. Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 15

Kimble v. *Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015).....15

Michigan v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).....4

National Bellas Hess Inc. v. *Dep't of Revenue*, 386 U.S. 753 (1967) .....*passim*

Patsy v. *Bd. of Regents of State of Fla.*, 457 U.S. 496 (1982).....13

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989).....15, 16

Pearson v. *Callahan*, 555 U.S. 223 (2009) 16

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992).....*passim*

Rice v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70 (1955).....21

TABLE OF AUTHORITIES—Continued

Page

S.C. State Highway Dep't v. *Barnwell Bros., Inc.*, 303 U.S. 177 (1938) 29, 30, 31

S. Pac. Co. v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) 17, 24

State v. *Wayfair, Inc.*, 901 N.W.2d 754 (S.D. 2017) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 29

STATUTES

Internet Tax Freedom Act, Pub. L. No. 105-277, § 1100, 112 Stat. 2681-719 (1998), made permanent in Pub. L. No. 114-125, § 922(a), 130 Stat. 281 (Feb. 24, 2016) and codified at 47 U.S.C. § 151 note 4

Internet Tax Freedom Act § 1105 ..... 22, 29, 30

Trade Facilitation and Trade Enforcement Act of 2015 § 922, Pub. L. No. 114-125, 130 Stat. 122, 281 20

OTHER AUTHORITIES

144 Cong. Rec. E1288-03 (June 23, 1998), https://www.congress.gov/crec/1998/07/14/CREC-1998-07-14-pt1-PgE1288-3.pdf 18

TABLE OF AUTHORITIES—Continued

Page

Gov't Accountability Office, *Sales Taxes: States Could Gain Revenue from Expanded Authority but Businesses Are Likely to Experience Compliance Costs* (Nov. 2017) 7, 19, 24

House Judiciary Committee Chairman Bob Goodlatte on Efforts to Resolve the Remote Sales Tax Issue (Dec. 4, 2017), https://goodlatte.house.gov/uploadedfiles/efforts_to_resolve_the_remote_sales_tax_issue.pdf 25

Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis* (Mar. 15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948 19

Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC § 20 (Boston, Hillard, Gray, & Co. 1834) 25

Kelsey Snell, *Web access tax vote hurts sales tax*, POLITICO (July 15, 2014), https://www.politico.com/story/2014/07/internet-access-tax-vote-108960 4

Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUE SIMPLIFICATION OF TAXATION (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf 12

Marketplace Fairness Act of 2017, S. 976 27

No Regulation Without Representation Act of 2017, H.R. 2887 27

TABLE OF AUTHORITIES—Continued

Page

Online Sales Simplification Act, 114th Cong. (2016), http://www.mtc.gov/getattachment/2016-08-25-Online-Sales-Simplification-Act-of-2016-(OSSA).pdf.aspx 25

Oral Argument Transcript, *United States* v. *Microsoft*, No. 17-2 8

Remote Transactions Parity Act of 2017, H.R. 2193 27

Report to Congress of the Advisory Commission on Electronic Commerce (2000), https://govinfo.library.unt.edu/ecommerce/acec_report.pdf 9

Richard Wolf, *Supreme Court will decide if online retailers must collect sales tax*, USA TODAY (Jan. 12, 2018, 2:51 PM), https://www.usatoday.com/story/news/politics/2018/01/12/supreme-court-decide-if-online-retailers-must-collect-sales-tax/1021423001 20

Sarah E. Larson, Ph.D., *Analysis of the Remote Transactions Parity and Simplification Act and the Remote Transactions Parity Act of 2017*, U. CENTRAL FLA. (2017), https://www.cohpa.ucf.edu/wp-content/uploads/2018/03/sl-use.pdf 26

S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016) 13

S. Rep. No. 105-184, at 2 (1998), https://congress.gov/105/crpt/srpt184/CRPT-105srpt184.pdf 18

TABLE OF AUTHORITIES—Continued

Page

South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf 11

South Dakota Department of Revenue Annual Reports, 13 (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/ 11

South Dakota GDP, DEPARTMENT OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ 11

Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017), https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052 26

The GOP's Internet Tax, WALL ST. J. (Mar. 15, 2018), https://www.wsj.com/articles/the-gops-internet-tax-1521153858 1

INTEREST OF THE *AMICI CURIAE*[1]

In the U.S. House of Representatives, the Committee on the Judiciary has jurisdiction over legislation addressing State taxation of interstate commerce. As Chairman of the Committee in the 115th Congress, Bob Goodlatte (R-VA) has conducted extensive hearings and markups of legislation addressing the interstate commerce concerns with Chapters 10-45 and 10-52 of the South Dakota Codified Laws and similar "kill *Quill*" laws of other States.[2] In his Committee leadership capacity he is currently deeply engaged in fashioning legislation to support States in collecting sales and use taxes by making compliance simple and ensuring that each State's tax and regulatory reach does not extend beyond its borders. He was the author of the House bill making the Internet Tax Freedom Act ("ITFA") permanent, which President Obama signed into law in 2016. The ITFA prohibits specific kinds of taxes affecting Internet commerce, including the South Dakota tax that is the subject of this litigation. He has more than two decades' experience as a Member of the

---

[1] This brief is filed pursuant to the parties' blanket consent. No party or counsel for a party has authored or contributed monetarily to the preparation or submission of any portion of this brief.

[2] State efforts to undermine the physical presence rule of *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), have led to the enactment of statutes in several states that deliberately violate the rule in that case. For a contextual description of "kill *Quill*" laws generally, see *The GOP's Internet Tax*, WALL ST. J. (Mar. 15, 2018), https://www.wsj.com/articles/the-gops-internet-tax-1521153858.

Judiciary Committee working on the issues of Internet commerce and State taxation.

In the U.S. Senate, Ron Wyden (D-OR) serves as Ranking Member on the Committee on Finance. In this capacity he has responsibility for revenue measures affecting commerce over the Internet. Senator Wyden was co-author of the original Internet Tax Freedom Act, enacted in 1998. In addition to protecting remote Internet commerce from burdensome tax compliance demands by multiple States, the ITFA established a process by which Congress and the States can address the question of sales and use tax collection responsibilities of out-of-state vendors. Senator Wyden has for many years been a leading participant in that ongoing process and in congressional deliberations on these issues.

The additional Senators and Representatives who have joined as *amici* in this brief have all been deeply involved in considering the economic, competitive, and fiscal policy questions surrounding State taxation of remote electronic commerce. Each is concerned with the unintended consequences of a potential decision by this Court to deem "virtual presence" sufficient for jurisdictional purposes. *Amici* strongly disagree with South Dakota's contention that the courts, rather than Congress, should establish the future rules for the regulation of interstate commerce in this area.

Amici are thus able to bring to the attention of the Court relevant matters not already addressed by the parties.

SUMMARY OF ARGUMENT

Taxes are a burden. Tax compliance can be an even greater burden. The Framers knew first-hand the consequences of individual States saddling interstate commerce with burdensome regulation and taxation, and so they wrote the Constitution's Commerce Clause to give Congress ultimate authority over all regulation and taxation of interstate commerce.

Fifty years ago, amid a shift in the Court's Commerce Clause jurisprudence from clear, formal rules to less predictable substantive standards, the Court announced an astonishingly simple rule to control State taxation of interstate commerce: only sellers physically present in a State can be compelled by the State to collect its taxes. See *Nat'l Bellas Hess Inc.* v. *Dep't of Revenue*, 386 U.S. 753 (1967). To that rule's naysayers, the Court pointed across First Street: "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Id.* at 760.

For years, Congress has legislated on the subject of Internet taxes, most recently in 2016 through the

permanent Internet Tax Freedom Act ("ITFA"),[3] and consistently has sided with interests of interstate commerce and against the parochial interests of States and their taxing subdivisions. See, *e.g.*, Kelsey Snell, *Web access tax vote hurts sales tax*, POLITICO (July 15, 2014).[4] Unhappy with their failure to get their way from Congress, the naysayers have reemerged. This case, like others since *Bellas Hess*, tests the Court's commitment to the rule of law—not just the particular rule of law announced in *Bellas Hess*, but to *stare decisis*, "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). As it did in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), the Court should reaffirm "that Congress has the ultimate power to * * * evaluate the burdens that use taxes impose on interstate commerce," *id.* at 318.

South Dakota and its *amici*—including the Solicitor General—all approach this case as if this Court truly was their last resort. It isn't. Congress is the branch of government constitutionally entrusted to decide whether the physical presence rule of *Bellas Hess* should stay or go. Congress also is the branch of government best able to measure and weigh the exceptionally difficult policy questions presented by South Dakota's plea for greater taxing authority. Because of Congress's station and institutional capacity, the

---

[3] Pub. L. No. 105-277, § 1100, 112 Stat. 2681-719 (1998), which was made permanent in Pub. L. No. 114-125, § 922(a), 130 Stat. 281 (Feb. 24, 2016) and codified at 47 U.S.C. § 151 note.

[4] Available at https://www.politico.com/story/2014/07/internet-access-tax-vote-108960.

holdings of *Bellas Hess* and *Quill* deserve the greatest strength of *stare decisis* and can be overruled only *after* intervening action by Congress.

Congress has acted—and not contrary to *Quill*. Beginning in 1998 and on eight occasions since, it has enacted successive iterations of its most sweeping policy pronouncement on the taxation of remote Internet sales, the ITFA, ultimately making the law's tax proscriptions and national policy on Internet commerce permanent in 2016. During the same period, Congress has continuously investigated new compromises that might get South Dakota most (or all) of what it is asking this Court to give.

The Solicitor General's suggestion that the Court restrict the rule of *Bellas Hess* and *Quill* to catalog sales and obliterate the physical presence rule for everyone else would be a blatant violation of the ITFA. Reinterpreting *Quill* in this way would run headlong into the ITFA's statutory prohibition on taxes that treat e-commerce worse than other forms of commerce. And in the face of the ITFA's prohibition on treating the mere maintenance of a website as a basis for nexus, it would have the Court embrace the fiction that out-of-state e-tailers are "virtually" present inside a State. They aren't, and it is for Congress—not the Solicitor General, this Court, or the States—to decide the best interstate taxation scheme for Internet sales.

ARGUMENT

I. THE ISSUE BEFORE THE COURT RAISES COMPLEX POLICY QUESTIONS, LEGISLATIVE IN NATURE.

The question before the Court is, nominally, whether to overrule its precedents in *Bellas Hess* and *Quill*. A review of the Petitioner's arguments, however, makes clear that the true issues under debate involve economics, the efficacy of software, trends in the retail industry, and myriad other non-legal questions that resist proof in a court of law. Dozens of *amici* have weighed in on these questions; their contributions, too, are laden with policy prescriptions more properly addressed to the Congress.

Members of Congress are accustomed to reviewing economic and fiscal claims like those South Dakota has included in its brief before this Court. We are also familiar with the maxim that there are "lies, damned lies, and statistics." Congressional committees spend much of their time in hearings and on field investigations listening to experts defend their data and findings. Many if not most of the economic assertions presented to the Court, by contrast, do not come from experts or serious studies but come directly from counsel in the form of pure argument, or from lightly sourced "studies," many of them tendentious. Throughout the course of this litigation, these latter-day Brandeis briefs have been immune from any test of their veracity, thanks to South Dakota's fast-track procedure designed specially to speed the admittedly unconstitutional law to this Court's docket.

This is not to say that none of the information South Dakota and its sister States have presented to the Court is true. The problem is knowing what information is true and what isn't. A novel interpretation of the Commerce Clause should not be predicated on such infirm "science" and a nonexistent factual record. These provide a weak basis indeed for abandoning *stare decisis* and the obvious reliance that Internet enterprises across the country have placed on this Court's rulings, and a sore substitute for thorough, considered congressional fact-finding and deliberation.

Even many of those who counsel overturning *Quill* admit the difficulties inherent in States taxing and regulating beyond their borders. For example, the Tax Foundation has submitted a brief supporting South Dakota's "kill *Quill*" law, but only because it includes some progress toward needed simplifications (*e.g.*, a simpler tax base and a reduction to two local rates). The brief further notes that it is "hard to overstate the * * * hard decisions" that still must be made to simplify State sales tax collection. Br. of Tax Foundation as *Amicus Curiae*, at 12. That is one reason most States have not acted to simplify their sales and use tax regimes for remote sales, complicating congressional efforts to enact a balanced solution that will support State tax collections while at the same time protecting interstate commerce from excessively burdensome tax compliance demands that could come from more than 12,000 State, county, municipal, and tribal taxing subjurisdictions. See Gov't Accountability Office, *Sales Taxes: States Could Gain Revenue from Expanded*

Authority but Businesses Are Likely to Experience Compliance Costs ("GAO Report"), 3 (Nov. 2017).

II. CONGRESS IS INSTITUTIONALLY BEST SITUATED TO ADDRESS THE ISSUES IN THIS LITIGATION.

As *amici*, we are bipartisan and represent both the House and the Senate. We have particular leadership responsibilities to resolve the competing policy interests at issue in this litigation. As may be seen in the other *amicus* briefs submitted by our colleagues, some of them agree with South Dakota's argument and some do not. That is to be expected in the political process that leads to legislated outcomes. As outlined in Part IV below, six different legislative solutions have been offered in recent years to address various aspects of these issues. The complexity and nuance of these bills are testament to the complexities of the actual details of multistate taxation of interstate remote commerce. Only legislation can reliably resolve these complexities, taking into account the many competing interests among commercial entities of various sizes and rapidly evolving business models, as well as the fiscal interests of the States. As Justice Ginsburg recently observed, Congress "can write a statute that takes account of various interests," whereas there is "nothing nuanced about" what the Court can do. Oral Argument Transcript, *United States* v. *Microsoft*, No. 17-2, at 6.[5]

---

[5] Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-2_9pl4.pdf.

If this Court rewards South Dakota for intentionally violating its rulings, overturning the settled precedent of *Quill* and opening the way for the next wave of extraterritorial regulatory expansion by the States, there will no longer be any incentive for the States to simplify their sales and use tax regimes for interstate sales. Yet that is something Congress, and the Advisory Committee on Electronic Commerce which it established, have been encouraging them to do for many years.[6] The result will be needless continuation of these already too-burdensome compliance impositions, multiplied more than a thousandfold once every tax jurisdiction in America is greenlighted to levy and enforce its own idiosyncratic system far beyond its borders.

Congress is best positioned to address these issues, which are inherently legislative in character. They arise due to the rapid evolutions in e-commerce. See Part IV, *infra*. Initially, this shift increased the number of remote sellers that were not required to collect sales or use taxes, but more recently, Internet retailers led by Amazon have created physical presence everywhere as competition increasingly focuses on speed of delivery to the customer. The trend among large- and medium-size retailers now is to collect in every jurisdiction. This is rapidly eliminating the remote collection issue even while the convenience of Internet commerce is adding to the State's domestic

---

[6] See generally Report to Congress of the Advisory Commission on Electronic Commerce (2000), https://govinfo.library.unt.edu/ecommerce/acec_report.pdf.

product. With the contours of the retail industry continuously in flux, Congress is far better equipped than the courts to gather the latest facts, attend to details, and respond to ongoing market developments.

The Court will receive hundreds of pages of briefs in this case, but little in the way of solid evidence since there is no factual record from the courts below. Congress has received and gathered many thousands of pages of information, heard thousands of hours of testimony, spoken with countless witnesses, experts, and interested constituents, and devoted thousands of hours to understanding and resolving these very issues. Congress has both an information advantage and, via legislation, finer tools to address these issues.

This is a rare case. Billions of dollars ride on the Court's decision to reaffirm or overrule *Quill*. Parties and *amici* have filed dozens of briefs. Questions largely of policy, not law, are at the fore. Yet no group, including e-commerce businesses, continues to oppose a federal legislative solution. It is simply a matter of striking the proper balance regarding the terms of legislation, a challenge on which both the House and Senate are currently hard at work.

This work entails finding facts, choosing among policy alternatives, and crafting workable technical solutions for complex commercial and administrative problems. The fast-track nature of this litigation has deprived the Court of even the most elemental factual bases to begin these tasks, most of which in any case are typically the responsibility of legislative bodies.

Nor is the judiciary ordinarily jealous of these responsibilities. Time and again, this Court has affirmed Congress's superior institutional competence to undertake the quintessentially legislative tasks that South Dakota begs this Court to usurp. *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980) ("Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.").

Consider the specific issues raised by Petitioner and its *amici*. South Dakota asserts that "state revenues have decreased." *State* v. *Wayfair, Inc.*, 901 N.W.2d 754, 756 (S.D. 2017). This questionable assertion is based solely on the "finding" to that effect in the South Dakota law. But that claim is demonstrably false, belied by the State's own data showing that sales and use taxes have been rising for years, at a rate faster than the growth in the State's economy.[7] South Dakota asserts that the burdens of various tax-collecting obligations will have no meaningful impact on

---

[7] See South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf; South Dakota Department of Revenue Annual Reports, 13 (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/; *South Dakota GDP*, DEPARTMENT OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ (reporting data from Bureau of Economic Analysis, U.S. Department of Commerce). Effective for the second half of 2016, the State increased its sales tax rate by 0.5%; the trends were well established before that. Further evidence of this is that the State's projected 4% revenue increase for 2018 is based on no change in sales tax rate from 2017.

various types of Internet sellers. This claim is also false. Significant data to the contrary exist, including studies demonstrating that software such as that proffered by South Dakota can actually increase rather than reduce regulatory compliance costs. See Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUE SIMPLIFICATION OF TAXATION (Sept. 2013).[8]

This Court will have trouble sorting through these disputed issues in the context of an expedited test case with a threadbare factual record. In contrast, "Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match, joined with the authority of the commerce power to run economic risks that the Judiciary should confront only when the constitutional or statutory mandate for judicial choice is clear." *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 309 (1997); see *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983) (Congress "may inform itself through fact-finding procedures such as hearings that are not available to the courts"). Congress has the power to subpoena witness upon witness in order, for example, to assess whether e-commerce software has truly become a panacea, as South Dakota and its *amici* breezily proclaim.

From the evidence it collects, Congress can decide not only *whether* to overrule *Quill*, but also *how* to implement or effectuate a change in the status quo. The

---

[8] Available at http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

ultimate question in this case, about States' power to compel collection of taxes by sellers who have no physical presence in a state, is one the Court can answer only Yes or No. Congress has more options. It can confront and address the "equally difficult questions concerning the design and scope" of a new Internet taxation regime. *Patsy* v. *Bd. of Regents of State of Fla.*, 457 U.S. 496, 513 (1982). Congress can design a process for collection and remittance that does not entail direct payments to foreign States. Congress can iterate; it can tweak and tinker after observing how things work in the real world.

Importantly, Congress can exempt small merchants for whom collecting taxes on behalf of 12,000-plus separate jurisdictions is simply too burdensome. The failure of South Dakota's law to include a meaningful small business exception is one of its most troubling features; were the Court to extend the State its constitutional blessing, the law would quickly envelop thousands of small and micro enterprises with what heretofore could not have amounted to the requisite minimum contacts under the Due Process Clause.[9] And once this Court decides states may, consistent with the Due Process and Commerce Clauses, exercise taxing jurisdiction over small Internet retailers, it would throw open the door to the exercise of other

[9] The law's threshold of 200 transactions per year, independent of any dollar amount, would reach even a merchant selling 99-cent song downloads. Thus an out-of-state seller with less than $200 of sales in South Dakota would be subjected to its *in personam* jurisdiction. S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016).

forms of jurisdiction as well. Indeed, the challenge of crafting a meaningful and balanced small business threshold is a significant reason the Congress has not yet come to final agreement on Internet sales tax legislation. Were the Court to address this issue, by way of Due Process and Commerce Clause analysis or another constitutional rubric, its ruling would necessarily be wholly arbitrary—lacking, as it must, the evidentiary basis for a specific threshold and the specialized knowledge to craft it.

For all of these reasons, Congress is institutionally best situated to address the issues in this litigation.

III. THE HOLDINGS IN *BELLAS HESS* AND *QUILL* SHOULD BE ACCORDED THE GREATEST *STARE DECISIS* FORCE BECAUSE CONGRESS IS EMPOWERED TO AUTHORIZE STATE TAXATION OF REMOTE SALES.

South Dakota isn't the first State to ask this Court for the power to conscript out-of-state merchants into collecting and remitting use taxes that in-state purchasers are supposed to be paying (but aren't). Twenty-five years ago, North Dakota asked and got no for an answer in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). And twenty-five years before that, Illinois asked and also got no for an answer in *National Bellas Hess Inc.* v. *Dep't of Revenue*, 386 U.S. 753 (1967).

Complaining about the "sharp distinction" between States' power over in-state sellers and out-of-state sellers, *id.* at 758, has become something of a regular event. But in our system, a precedent's life expectancy is longer than a quarter century. Precedents like *Bellas Hess* and *Quill* are expected to live indefinitely.

That is *stare decisis*—"the idea that today's Court should stand by yesterday's decisions" without regard to whether a different or better rule could be devised. See *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). *Stare decisis* is fundamental to the rule of law. Most of the time, it is "more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Only when maintaining a precedent *subverts* the rule of law may overruling that precedent be warranted. See *Kimble*, 135 S. Ct. at 2409–11.

With those rule-of-law considerations in mind, the Court has recognized two types, or strengths, of *stare decisis*. In constitutional cases, where this Court's say is final, *stare decisis* has less strength; precedents may be overruled for a variety of (rare) reasons. In statutory cases, however, *stare decisis* has more strength because "Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172–73 (1989); see *Ill. Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). Statutory holdings are overruled more infrequently than constitutional holdings—mostly after there has been an "intervening development of the law, through either the growth of judicial doctrine or

further action taken by Congress." *Patterson*, 491 U.S. at 173. When Congress hasn't taken further action, complaints about a precedent's unworkability or aspersions that the precedent has become outdated aren't enough to cause this Court to revisit a holding that Congress is able to revisit. See *id.* at 174.[10]

Superficially, *Bellas Hess* and *Quill* may seem to deserve only the relatively weaker *stare decisis* of constitutional cases. After all, the Commerce Clause is a major obstacle to South Dakota's making tax collectors out of all merchants who do business with South Dakotans. See Pet. Br. 53. But the Commerce Clause is one area of constitutional law where this Court's holdings deserve the extra *stare decisis* strength accorded to this Court's statutory interpretations. For, in Commerce Clause cases (just as in statutory cases), Congress is the ultimate backstop. Congress can authorize State laws that would otherwise offend the Commerce Clause and, thereby, override any Commerce Clause

---

[10] Citing *Pearson* v. *Callahan*, 555 U.S. 223 (2009), South Dakota argues that the traditional *stare decisis* dichotomy—which makes it harder to overrule holdings Congress can overturn and easier to overrule holdings Congress cannot—has broken down in recent years. See Pet. Br. 53. *Pearson* didn't upset any *stare decisis* norms. All *Pearson* recognizes is that holdings about judicial procedure are easier to overrule because, though Congress technically has final say over those rules, they are too central to the administration of the courts' business. See *Pearson*, 555 U.S. at 233–34. Insofar as *stare decisis* is a function of institutional capacity, *Pearson* makes sense: the Court, not Congress, is best able to "investigat[e], examin[e], and study" the pros and cons of different procedural rules because the Court, not Congress, has frontline experience with procedural rules. *Diamond*, 447 U.S. at 317.

decision that seems unworkable or outdated. Congress is able to "redefine the distribution of power over interstate commerce" by "permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." *S. Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); see *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 637 (1981) (White, J., concurring) ("Congress has the power to protect interstate commerce from intolerable or even undesirable burdens.").

Quill makes a nice example of these dual *stare decisis* principles in action. The *Quill* Court overruled the Due Process holding of *Bellas Hess*, a constitutional holding with less *stare decisis* strength, because minimum-contacts jurisprudence had "evolved substantially in the 25 years since *Bellas Hess*." *Quill*, 504 U.S. at 307. In contrast, the *Quill* Court did not overrule the Commerce Clause holding of *Bellas Hess*, even though those constitutional-law doctrines also had "evolved substantially over the years," *id.* at 309, because Congress was able to resolve the underlying issues, *id.* at 318. "Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Ibid.*

What the Court recognized in *Quill* remains true today. To overrule *Bellas Hess* would be to usurp Congress's role as final arbiter of major questions of interstate commerce. Whether or not *Bellas Hess* and *Quill* were right about the Commerce Clause, they surely were right that Congress has the institutional capacity

and constitutional authority to finally resolve *all* issues of interstate commerce. Congress, therefore, remains "better qualified," *ibid.*, to resolve South Dakota's plea for taxing authority over remote sellers who have no physical presence in the state.

IV. CONGRESS HAS REPEATEDLY EXERCISED ITS INTERSTATE COMMERCE POWER TO REGULATE STATE TAXATION OF THE INTERNET, AND CONTINUES TO DO SO.

South Dakota ignores Congress's unique capabilities and argues that "25 years of inaction" prove that Congress "cannot 'fix' " *Quill*. Pet. Br. 20–21. But *whether* it is desirable to "fix" (*i.e.*, overrule) *Quill* is the threshold question this formulation begs. That Congress has not authorized state taxation of Internet commerce is no sign of congressional incapacity. To the contrary, it indicates congressional approval of *Quill*'s physical presence rule. See, *e.g.*, S. Rep. No. 105-184, at 2 (1998)[11] (in crafting the ITFA, Congress expressly relied upon *Quill*'s physical presence rule for nexus); 144 Cong. Rec. E1288-03 (June 23, 1998)[12] (the ITFA is intended to provide "certainty" that *Quill*'s physical presence principles "will continue to apply to electronic commerce just as they apply to mail-order commerce,

---

[11] Available at https://congress.gov/105/crpt/srpt184/CRPT-105srpt184.pdf.

[12] Available at https://www.congress.gov/crec/1998/07/14/CREC-1998-07-14-pt1-PgE1288-3.pdf.

unless and until a future Congress decides to alter the current nexus requirements").

In recent years, as the old paradigm of the pure "brick-and-mortar" store has given way to a ubiquitous e-commerce market that marries physical presence and technology, doubt about the consequences of expanding States' ability to tax and regulate businesses beyond their borders has given Congress pause. South Dakota's complaint is actually a backward-looking response to the decade after *Quill*, the first decade of e-commerce. Then, the proportion of sellers using the Internet remotely was large, and most of them were small businesses. It took many years for long-established brick-and-mortar businesses to respond by entering the e-commerce marketplace themselves. Now virtually every retailer uses the Internet to drive sales in some way. See generally Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis* (Mar. 15, 2018) ¶¶ 13–34.[13]

The evolution of the retail marketplace has dramatically changed the trajectory of congressional action by changing the nature of the problem that most needs Congress's attention. Revenue collection is decidedly *not* the biggest problem any longer (if it ever was). The GAO recently estimated that "about 80 percent of the potential revenue from requiring all Internet retailers to collect is already collectible." GAO

---

[13] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948.

Report, *supra*, at 9. Even this number is already out of date. Today, all but one of the eighteen largest Internet sellers are collecting state and local taxes. Richard Wolf, *Supreme Court will decide if online retailers must collect sales tax*, USA TODAY (Jan. 12, 2018, 2:51 PM).[14] In the second decade of the 21st century, the pressing problems are fairness and how to treat small businesses.

Congress has been exceptionally active in pursuing these issues. Just as previous Congresses considered many proposals to amend or overturn *Bellas Hess* in the years after it was decided, see *Quill*, 504 U.S. at 318, so did later Congresses consider many proposals to amend or overturn *Quill* in its wake. See Addendum to Br. of Four U.S. Senators as *Amici Curiae* in Support of Petitioner (collecting dozens of bills introduced since 2001).

Six years after *Quill*, Congress enacted the first of several iterations of the ITFA. The law was first signed by President Clinton in 1998. It has been amended and renewed by subsequent Congresses no fewer than eight times, and made permanent in 2016. See Trade Facilitation and Trade Enforcement Act of 2015 § 922, Pub. L. No. 114-125, 130 Stat. 122, 281.[15]

---

[14] Available at https://www.usatoday.com/story/news/politics/2018/01/12/supreme-court-decide-if-online-retailers-must-collect-sales-tax/1021423001.

[15] An unfortunate feature of the "fast track" procedure South Dakota contrived to bring its Internet tax law before the Court is that there has been no discussion of how the State law violates the ITFA. Before this Court decides the underlying constitutional

The principal purpose of the ITFA is to prevent the thousands of state and local taxing authorities from burdening e-commerce with a confusing and cumbersome patchwork of tax-collecting duties. It does this primarily by prohibiting any "discriminatory tax" on Internet commerce, which is defined to include "any tax imposed by a State or political subdivision thereof on electronic commerce" that:

- "is not generally imposed and legally collectible" by the state or local taxing authority "on transactions involving similar property, goods, services, or information accomplished through other means";
- "is not generally imposed and legally collectible at the same rate * * * on transactions involving similar property, goods, services, or information accomplished by other means";
- "imposes an obligation to collect or pay the tax on a different person or entity

---

questions, prudence dictates that some court should decide on the federal statute. Cf. *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 76–77 (1955) ("Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been [b]rought here in the first instance."); *id.* at 74 ("[W]here the issues involved reach constitutional dimensions, * * * there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."). Nonetheless, the ITFA evidences repeated congressional action and policymaking on the question of nexus for sales and use tax purposes, taking this case out of the realm of the dormant Commerce Clause.

> than in the case of transactions involving similar property, goods, services, or information accomplished through other means."

ITFA §§ 1105(2)(A)(i)–(iii).

The ITFA goes further. It also defines discriminatory taxes to include any state or local tax if:

- "the sole ability to access a site on a remote seller's out-of-state computer server is considered a factor in determining a remote seller's tax collection obligation; or
- "a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of" the Internet access service or online service provider's "display of a remote seller's information or content" or "processing of orders."

ITFA §§ 1105(2)(B)(i)–(ii).

In addition to expressing Congress's strong preference for protecting remote Internet retailers from multiple State tax collection burdens, the ITFA's initial and subsequent enactments demonstrate that Congress has been consistently active in legislating in this area. South Dakota and its sister States opposed the ITFA in each of its iterations, including the law signed by President Obama in 2016, but that hardly erases the fact that Congress has acted, and acted repeatedly. Despite this fact, South Dakota—while nominally

criticizing the dormant Commerce Clause—is actually proposing that the Court rely on it, by deciding the Commerce Clause question as if this were a case arising "in the absence of any action by Congress." *Quill*, 504 U.S. at 309. Manifestly, this is not such a case.

Overruling *Quill* (or reinterpreting it as the Solicitor General suggests, see Part V, *infra*) would function as a rejection of the clear congressional policy expressed in the repeated enactments of the ITFA. It would significantly increase the burden on remote sellers, by requiring them to comply with the tax and regulatory requirements of distant state and local governments. Beyond merely calculating an amount owed and collecting it from a buyer at the time of sale, the trope by which South Dakota and its *amici* trivialize the compliance burden, a small seller located in a single jurisdiction will have to contend with multiple auditing and reporting requirements. Different jurisdictions have different remittance requirements (monthly or weekly or immediately). Most time-consuming and expensive of all, different jurisdictions have densely reticulated rules governing which specific versions of an item are and are not subject to taxation.

It is hard enough for a business to determine whether and, if so, how a particular item is taxed under the laws of a single jurisdiction. Multiplying that task by many items in a constantly changing product line, and by the thousands of jurisdictions making their own idiosyncratic demands, renders it herculean. Not only is this not a task that software alone can

accomplish, but software has been shown to be yet another source of cost and complexity which introduces its own errors. See GAO Report at 17.[16]

Mitigating the burdens of the regulatory requirements that accompany taxation is one of Congress's chief concerns. This is not only because those burdens may bog down interstate commerce, but also because taxing jurisdictions are not politically accountable to the out-of-state merchants who will bear the brunt of those burdens. Cf. *S. Pac.*, 325 U.S. at 768 n.2 ("[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

Thus, a key principle animating multiple congressional proposals is "No Regulation Without Representation," the idea that a seller's home-state taxing authorities, rather than the authorities of the myriad jurisdictions in which buyers may happen to reside, should control the seller's duty to collect taxes. The "No Regulation Without Representation" idea encapsulates bedrock understandings of state power and interstate commerce inherent in our constitutional

---

[16] "For example, apparel is treated differently across states. Pennsylvania exempts clothing, except for formal apparel; items made of real, imitation, or synthetic fur; and athletic apparel. Across the border, New York State exempts clothing sold for less than $110; however, some jurisdictions do not apply these exemptions and charge a local sales tax on these items." GAO Report at 17.

structure. See Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC § 20 (Boston, Hillard, Gray, & Co. 1834) ("No State * * * can, by its laws, directly affect, or bind * * * persons not resident therein."); see also *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

Under the leadership of the House Judiciary Committee and Chairman Goodlatte, "No Regulation Without Representation" has become the starting point for developing a national framework for the taxation of Internet commerce. For example, a bipartisan proposal from Chairman Goodlatte and Representative Eshoo in the 114th Congress, the "Online Sales Simplification Act of 2016,"[17] would allow remote sellers to volunteer to collect and remit use taxes for foreign jurisdictions, as the vast majority of large online retailers already do. Other sellers would follow their home-state taxability rules but collect taxes at out-of-state rates. Payment would be remitted to home-state governments, who in turn would forward amounts to other governments through a clearinghouse. Audits would be performed locally, by the home-state taxing authorities.

---

[17] For a detailed discussion of this proposal, see *House Judiciary Committee Chairman Bob Goodlatte on Efforts to Resolve the Remote Sales Tax Issue* (Dec. 4, 2017), https://goodlatte.house.gov/uploadedfiles/efforts_to_resolve_the_remote_sales_tax_issue.pdf. For the draft bill, see Online Sales Simplification Act (OSSA), 114th Cong. (2016), http://www.mtc.gov/getattachment/2016-08-25-Online-Sales-Simplification-Act-of-2016-(OSSA).pdf.aspx.

As Chairman Goodlatte explained:

> In 2015, we proposed a revised compromise, under which sellers would follow their home state rules on taxability (base), but would collect at the rates applicable in their customers' states, provided that the seller's home state incorporated those rates into its own tax laws. This approach achieved critical price parity for traditional retailers while keeping compliance simple for online sellers. In fact, because compliance would be so simple, no State-subsidized software would be necessary for sellers to identify taxability, saving States an estimated $2 billion annually as compared to other approaches. As before, Internet sellers would answer only to their home state taxing authority, so there would be no cross-border reach.[18]

The Online Sales Simplification Act of 2016 was a breakthrough and generated substantial discussion. An independent economic study estimated it would collect at least 80% of cross-border taxes that States are currently not collecting, exceeding the revenue estimates for the States' own legislative proposal by over $400 million in the first year of implementation.[19] But

---

[18] Statement of Chairman Robert W. Goodlatte, at 1–3 (Dec. 4, 2017), https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.

[19] Sarah E. Larson, Ph.D., *Analysis of the Remote Transactions Parity and Simplification Act and the Remote Transactions Parity Act of 2017*, U. CENTRAL FLA. (2017), https://www.cohpa.ucf.edu/wp-content/uploads/2018/03/sl-use.pdf.

even with marathon committee sessions, the 114th Congress ran out of time.

That wasn't the end, though. In the current Congress, both the House and Senate have introduced legislation building on these concepts:

- The "No Regulation Without Representation Act of 2017," H.R. 2887, restricts sales and use tax only to buyers and sellers with in-state presence (defined so as to exclude persons with *de minimis* physical presence) and carves out "marketplace providers," that is, persons who facilitate sales between sellers and buyers.
- The "Remote Transactions Parity Act of 2017," H.R. 2193, authorizes states to require remote sellers to collect use taxes so long as there are simplified requirements for taxing, auditing, and remittance. There is an exception for small sellers (defined in terms of a seller's gross annual receipts) and for sellers who use online marketplaces.
- The "Marketplace Fairness Act of 2017," S. 976, is conceptually similar to the Remote Transactions Parity Act of 2017, and has different details (like a different definition for a small seller).

Unfortunately, the pendency of this case has put these proposals on hold, as one-half of the debate (that

is, South Dakota and its *amici*) hopes for a winner-take-all result in court they know they cannot obtain in Congress. The surest way to facilitate legislative progress is for the Court to affirm its commitment to *stare decisis* and its twin holdings, in *Bellas Hess* and *Quill*, that Congress alone can decide whether, when, and how States can require out-of-state sellers to collect and remit sales and use taxes.

V. THE SOLICITOR GENERAL'S INVITATION TO DISCRIMINATE AGAINST INTERNET COMMERCE BY REINTERPRETING *QUILL* CONTRAVENES THE ITFA.

The Solicitor General urges the Court to restrict *Quill*'s physical presence standard to mail-order catalogs. This, the Solicitor General explains, will draw a line between retailers whose only contacts with a state are by mail, and those whose only contacts are by wired or wireless transmission. See U.S. Br. 24–28. This should be seen for what it is: an invitation to the Court to interpret the Commerce Clause in a way that violates an existing federal statute regulating interstate commerce.

Congress, exercising its ultimate authority in Commerce Clause matters, has already rejected the Solicitor General's proposal. The ITFA prohibits taxation that treats e-commerce sales differently from sales accomplished through means other than the Internet.

Specifically, the ITFA prohibits any state tax that is not "generally imposed * * * on transactions involving similar property, goods, services, or information accomplished through other means." ITFA § 1105(2)(A)(i). It also prohibits any state tax if the "obligation to collect or pay the tax" is imposed "on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means." ITFA § 1105(2)(A)(iii).

As the quoted statutory language makes clear, the ITFA requires that Internet commerce and all other commerce be treated the same, though the sales are accomplished by different means. Despite this explicit congressional command, the Solicitor General asks the Court to interpret the Commerce Clause so as to require remote Internet commerce to be treated differently from other forms of remote commerce.

In the Solicitor General's approach, retailers selling remotely via mail order would have no tax collection or payment obligations. Only retailers selling via the Internet would.

Thus, the Court would rely on the "dormant" Commerce Clause—that is, Art. I, § 8, cl. 3 acting "by its own force," *Quill*, 504 U.S. at 309 (quoting *S.C. State Highway Dep't* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938))—to overrule an express regulation of interstate commerce by the Congress. The enumerated power "to regulate commerce among the States" would be undone by ignoring Congress's clear actions when

interpreting the "dormant" Commerce Clause. *Id.* at 305.

In support of this upside-down approach to the Constitution, the Solicitor General advances his view that "virtual" presence should be enough to establish nexus. If a State's consumers can access a remote seller's out-of-state computers, he argues, then the out-of-state seller has "a continuous presence" inside the State. U.S. Br. 24. For good measure, he adds his view that in some ways visiting a website is "like shopping in a physical store." Or at least more "like" it "than ordering goods from a catalog." *Id.* at 25.

But here, too, the Congress has definitively exercised its power to regulate interstate commerce, and reached the opposite conclusion. The ITFA prohibits a state from "determining a remote seller's tax collection obligation" on the basis that the seller's website is accessible to consumers in the state. ITFA § 1105(2)(B)(i).

Whether or not South Dakota must, under the dormant Commerce Clause, "conform to standards which Congress might, but has not adopted," *Barnwell Bros.*, 303 U.S. at 187, there can be no question that it and its sister States must conform to regulations of interstate commerce that Congress has already enacted. This is not a case of dormant congressional power but its active use. Congress has "plenary power to regulate interstate commerce," and in the ITFA it has done so, deciding that certain tax compliance "burdens imposed on [that commerce] by state regulation, otherwise

permissible, are too great." *Id.* at 189–90. Moreover, making such determinations "is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce." *Id.* at 190.

Establishing "virtual presence" as a means of satisfying the Commerce Clause test and Due Process minimum contacts would open the door for the multiple States to exercise jurisdiction over out-of-state retailers in areas beyond tax collection. See Part II, *supra*. If small online retailers with physical presence in only one State are virtually present in *every* State by virtue of a website alone, not only could every State require they collect all state and local taxes, but they could be subject to *in personam* jurisdiction in every State for lawsuits and any other purpose. Indeed, they would be subject to foreign States' jurisdiction for all purposes *except* getting to vote in those States. But such a result would violate both the Due Process Clause *and* Congress's express policy determinations in the ITFA.

Despite the Solicitor General's invitation to do so, this Court should not expand and distort the dormant Commerce Clause to overturn a congressional regulation of interstate commerce. Refashioning *Quill* to discriminate against Internet commerce in direct violation of a statutory prohibition against doing so would stand the Court's Commerce Clause jurisprudence on its head. It would also require rejecting the rule of *stare decisis*, since a decision to limit a prior holding, though technically distinct from a decision to

overrule it, presents the same questions of judicial predictability and public reliance. Respecting the role the Constitution gives solely to Congress in this area, the Court should provide *Quill* the highest level of *stare decisis* respect.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the decision of the South Dakota Supreme Court.

Respectfully submitted,

DAVID SALMONS
Counsel of Record
BRYAN KILLIAN
JAMES NELSON
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
T. 202.739.3000

April 4, 2018

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR AMICI CURIAE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INVESTMENT PROGRAM ASSOCIATION, NAREIT, NATIONAL ASSOCIATION OF REALTORS®, REAL ESTATE ROUNDTABLE, NATIONAL MULTIFAMILY HOUSING COUNCIL, NAIOP, AMERICAN FARM BUREAU FEDERATION, AND SOUTH DAKOTA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

JANINE M. LOPEZ
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

SETH P. WAXMAN
Counsel of Record
ARI HOLTZBLATT
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE *QUILL* RULE HARMS THE ECONOMIC AND SOCIAL VITALITY OF COMMUNITIES ACROSS THE COUNTRY, PARTICULARLY IN RURAL AREAS 5

A. *Quill* Directly Harms Brick-And-Mortar Retailers 6

B. *Quill* Undermines The Social Fabric Of Local Communities 8

C. *Quill* Severely Burdens The Retail Real Estate Industry 11

D. *Quill* Deprives State And Local Governments Of Much-Needed Revenue 15

E. *Quill* Inflicts Particularly Severe Harm On Rural Communities 19

II. THIS COURT SHOULD ABROGATE *QUILL*'S PHYSICAL-PRESENCE REQUIREMENT 22

A. *Quill* Discriminates Against And Burdens Interstate Commerce, Unlike South Dakota's Economic-Presence Statute 22

TABLE OF CONTENTS—Continued

Page

B. *Stare Decisis* Does Not Justify Retaining The Physical-Presence Rule 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Page(s)

American Trucking Ass'ns v. *Scheiner*, 483 U.S. 266 (1987) 25

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 22

Direct Marketing Ass'n v. *Brohl*, 135 S. Ct. 1124 (2015) 6, 25, 26

National Bellas Hess, Inc. v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967) 3, 25

Pearson v. *Callahan*, 555 U.S. 223 (2009) 27

Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992) 25

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) 3, 18, 22, 25, 26

United Haulers Ass'n v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007) 23, 24

OTHER AUTHORITIES

Abrams, Rachel & Robert Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017, https://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html?_r=0 20

Adamy, Janet & Paul Overberg, *Rural America Is the New Inner City*, Wall St. J., May 26, 2017, https://www.wsj.com/articles/rural-america-is-the-new-inner-city-1495817008 20

TABLE OF AUTHORITIES—Continued

Page(s)

Alster, Norm, *Investing in Malls, Despite Store Closings*, N.Y. Times, July 14, 2017, https://www.nytimes.com/2017/07/14/business/mutfund/real-estate-investment-malls.html?_r=0 13

American Booksellers Association et al., *Amazon and Empty Storefronts, 2015 Update: The Fiscal and Land Use Impacts of Online Retail* (Sept. 2016), *available at* http://www.civiceconomics.com/empty-storefronts.html 11, 17

Anderson, Eric T., et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229 (Apr. 2010) 13

Baugh, Brian, et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* (Apr. 2014, revised Sept. 2016), *available at* http://www.nber.org/papers/w20052.pdf... 7

Baen, John S., *The Effects of Technology on Retail Sales, Commercial Property Values, and Percentage Rents* (2000), *available at* http://jrdelisle.com/JSCR/IndArticles/Baen_N100.pdf 12

TABLE OF AUTHORITIES—Continued

Page(s)

Bodamer, David, *Retail Real Estate Trends 2017, Part 3: Sliding Fundamentals*, National Real Estate Investor (Aug. 18, 2017), http://www.nreionline.com/retail-cre-market-study/retail-real-estate-trends-2017-part-3-sliding-fundamentals 11

Corkery, Michael, *Is American Retail at a Historic Tipping Point?*, N.Y. Times, Apr. 15, 2017, https://www.nytimes.com/2017/04/15/business/retail-industry.html 8, 18

Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* (Oct. 2011), *available at* http://www.efairness.org/pdf/economicscenter-study.pdf 12

Fung, Esther, *Mall Dividends Soar Above 15%, Tempting Big Investors*, Wall Street Journal, Feb. 13, 2018, https://www.wsj.com/articles/mall-dividends-soar-above-15-tempting-big-investors-1518523200 12

Goolsbee, Austan, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, (Dec. 1998), *available at* http://www.nber.org/papers/w6863.pdf 7

Green, Dennis, *Bonobos Is Opening Retail Stores—But You Can't Actually Take Any of the Clothes Home*, Business Insider, July 16, 2015, http://www.businessinsider.com/bonobos-opened-a-store-where-you-cant-physically-buy-anything-2015-7 14

TABLE OF AUTHORITIES—Continued

Page(s)

Gustafson, Krystina, *As Online Sales Reach New Highs, Rent the Runway Goes Analog*, CNBC, Dec. 5, 2016, https://www.cnbc.com/2016/12/05/as-online-sales-reach-new-highs-rent-the-runway-goes-analog.html 14

Howland, Daphne, *Rent the Runway Boosting Physical Store Strategy with New Flagship*, Retail Dive, Dec. 6, 2016, http://www.retaildive.com/news/rent-the-runway-boosting-physical-store-strategy-with-new-flagship/431747/ 14

Hughes, C.J., *Pop Up Goes the Retail Scene as Store Vacancies Rise*, N.Y. Times, May 30, 2017, https://www.nytimes.com/2017/05/30/realestate/commercial/pop-up-stores-retail-vacancies.html 13

International Council of Shopping Centers, *How Do Shopping Centers Impact the U.S. Economy?*, https://www.icsc.org/uploads/t07-subpage/US-Economic-Impact-2017.pdf (last visited Mar. 4, 2018) 17

International Council of Shopping Centers, *Shopping Centers: America's First and Foremost Marketplace* (Oct. 2014), *available at* https://www.icsc.org/uploads/research/general/America-Marketplace.pdf 9

TABLE OF AUTHORITIES—Continued

Page(s)

Isidore, Chris, *Store Closings Have Tripled So Far This Year*, CNN Money, June 23, 2017, http://money.cnn.com/2017/06/23/news/companies/store-closings/index.html 8

Jeffres, Leo, et al., *The Impact of Third Places on Community Quality of Life* (2009), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1011&context=clcom_facpub 9

Joffe-Walt, Chana, *Most People Are Supposed To Pay This Tax. Almost Nobody Actually Pays It*, NPR, Apr. 16, 2013, http://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax 16

L2, *Intelligence Report: Death of Pureplay Retail* (Jan. 12, 2016), *available at* https://www.l2inc.com/research/death-of-pureplay-retail 15

Lerner, Michele, *Retail REITs in Adaptation Mode*, REIT, July 27, 2017, https://www.reit.com/news/reit-magazine/july-august-2017/retail-reits-adaptation-mode 13

TABLE OF AUTHORITIES—Continued

Page(s)

Lund, Donald J., et al., *Brick vs. Click: A Resource Based View of Community Engagement*, *in* Society for Marketing Advances, Advances in Marketing (Rebecca VanMeter & Jeri Weiser eds., 2015), *available at* http://c.ymcdn.com/sites/www.marketingadvances.org/resource/resmgr/2015_Forms/2015_SMAProceedings-V2.pdf#page=379 11

Marketplace Fairness Coalition, *Case for Fairness*, http://www.efairness.org/files/united-states.pdf (last visited Mar. 4, 2018) 16

Morton, Lois & Troy C. Blanchard, *Starved for Access: Life in Rural America's Food Deserts*, Rural Realities, Vol. 1 No. 4 (2007), https://www.iatp.org/sites/default/files/258_2_98043.pdf 21

Parker, Richard, *Flawed System: Online Sales Tax Collection: Economic Impact upon California Businesses and Employers* (Aug. 2010), *available at* https://media.gractions.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/1d71e284-6837-4452-a1f4-0a2f90faaf4c.pdf 6, 7, 12, 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Portnoy, Jenna, *Va. Gas Tax Set to Increase After Congress Fails to Pass Online Sales Tax Bill*, Wash. Post, Nov. 27, 2014, https://www.washingtonpost.com/local/virginia-politics/va-gas-tax-set-to-increase-after-congress-fails-to-pass-online-sales-tax-bill/2014/11/27/609952ea-74fa-11e4-9d9b-86d397daad27_story.html?utm_term=.46d4e18314c4 19

PwC, *Total Retail 2015: Retailers and the Age of Disruption* (Feb. 2015), *available at* https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf 7

Rigby, Darrell, et al., Bain & Co., *Digical® Retail and Why Stores Matter*, Dec. 18, 2015, http://www.bain.com/publications/articles/retail-holiday-newsletter-2015-2016-4.aspx 8

Shulman, David, *In the E-Commerce Revolution, Brick-and-Mortar Defenses Are Limited and Costly* (Oct. 2017), *available at* http://www.anderson.ucla.edu/Documents/areas/ctr/ziman/UCLA_Economic_Letter_Shulman_10.10.17.pdf 12

Testimony of Dr. Bruce Weber, Senior Economist, Rural Policy Research Institute, Before the S. Comm. on Agriculture, Nutrition, and Forestry, May 25, 2017, https://www.agriculture.senate.gov/imo/media/doc/Dr.%20Weber%20Testimony.pdf 19

TABLE OF AUTHORITIES—Continued

Page(s)

United States Government Accountability Office, GAO-18-114, *Sales Taxes: States Could Gain Revenue from Expanded Authority, But Businesses Are Likely to Experience Compliance Costs* (Nov. 2017), https://www.gao.gov/assets/690/688437.pdf 16

Urban Institute, *State and Local Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-expenditures (last visited Mar. 4, 2018). 18

Velasco, Schuyler, *America's Stores Are Closing. Why Isn't That Raising a Jobs Alarm?*, Christian Science Monitor, Aug. 4, 2017, https://www.csmonitor.com/Business/2017/0804/America-s-stores-are-closing.-Why-isn-t-that-raising-a-jobs-alarm 10

Wiley, Jonathan A., *The Impact of Commercial Development on Surrounding Residential Property Values* (Apr. 2015), *available at* https://www.gamls.com/images/jonwiley.pdf 9, 10

Wolff-Mann, Ethan, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016, http://time.com/money/4192512/walmart-stores-closing-small-towns/ 20

TABLE OF AUTHORITIES—Continued

Page(s)

Yetter, Diane L. & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes (Aug. 7, 2017), *available at* http://www.yettertax.com/wp-content/uploads/2017/09/State_Tax_Notes_Automation_Article.pdf 26

INTEREST OF AMICI CURIAE[1]

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry, and represents over 70,000 shopping center owners, developers, managers, investors, retailers, brokers, academics, lawyers, and public officials. ICSC represents the interests of all 124 shopping centers in South Dakota, which employ over 43,870 people and generate approximately $137.5 million in state sales tax revenue.

The Investment Program Association is a nonprofit organization that engages in advocacy and education relating to portfolio diversifying investment products, including Real Estate Investment Trusts.

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners, and investors of office, industrial, retail, and mixed-use real estate.

Nareit is the global association of Real Estate Investment Trusts and publicly traded real estate companies with an interest in U.S. real estate and capital markets.

The National Association of REALTORS® is a trade association that represents 1.2 million members, including residential and commercial brokers, salespeo-

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties giving blanket consent to the filing of amicus briefs are on file with the Clerk.

ple, property managers, appraisers, counselors, and others engaged in the real estate industry.

The National Multifamily Housing Council is a national association representing the interests of the apartment industry in the United States. Its members include owners, developers, managers, and financiers of large apartment firms.

The Real Estate Roundtable is a non-profit public policy organization that brings together business and trade association leaders to address policy issues relating to real estate and the overall economy.

The American Farm Bureau Federation is a voluntary organization that represents the business, economic, social, and educational interests of American farmers and ranchers. Its mission is to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities.

The South Dakota Farm Bureau Federation is a grassroots membership organization established in 1917 and dedicated to representing, upholding, and improving South Dakota's agricultural industry. It represents more than 16,000 farm, ranch, and rural member families across South Dakota. It is a member of amicus American Farm Bureau Federation.

Collectively, amici and their members seek to promote the economic and social vitality of communities across the country—through retail centers, housing developments, and family farms. All of amici's members have an interest in seeing brick-and-mortar stores succeed: Main Streets and shopping malls draw new residents, create jobs, and generate state and local tax revenue by providing local opportunities to obtain goods and services. By the same token, amici's members suf-

fer when the competitive advantage *Quill* confers on online retail reduces the viability of brick-and-mortar stores. Store closings, for example, mean fewer tenants for members that own, operate, and/or finance retail real estate. And a shrinking sales tax base means higher property tax rates, which severely burdens real estate interests, farmers, and ranchers alike.

Amici's members also benefit greatly when online retailers establish storefronts, warehouses, and distribution centers in their communities. These investments generate new business for the retail and commercial real estate industry that many amici represent. And, more generally, they revitalize struggling communities and provide much-needed employment, particularly in the nation's rural areas. Amici thus have an interest in incentivizing online retailers to expand their physical presence into new areas across state lines—an interest that *Quill* impedes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Brick-and-mortar retail stores across the country have long collected state and local sales taxes as a necessary cost of doing business. At the register, in-store customers pay not just the price of their merchandise, but also an amount ranging anywhere from 3 percent to 10 percent of the purchase price, depending on state and local tax rates.

As a result of this Court's decisions in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967), online and mail-order customers very often do not pay the same taxes. Shielded by *Quill*, out-of-state retailers, including online companies, cannot be required to collect sales taxes unless they have a

"physical presence" in the State. While their customers still owe an equivalent "use" tax, they rarely pay it and instead mistakenly view the transaction as being tax-free. As other amici explain in greater depth, the direct harm this rule inflicts on brick-and-mortar retail is considerable. Local businesses struggle and increasingly fail to compete against online retailers that can offer customers identical goods for what is in effect up to a 10 percent discount.

Quill's distorting effects reach far beyond brick-and-mortar stores themselves. *First*, the loss of physical stores, many of which are integral to the social fabric of their communities, increases unemployment and creates a sense of dislocation among community residents. *Second*, the decline in the retail sector reduces the value of retail real estate, discourages further development of retail properties, and impedes innovation in the retail sector. *Third*, the lost revenue from sales, property, and income taxes threatens the ability of state and local governments to provide much-needed public services, including those that benefit online retailers. *Finally*, although the decline in brick-and-mortar retail affects all communities, the impact on the nation's rural areas is particularly acute: As local grocery stores, pharmacies, and shops disappear, rural communities struggle to maintain access to basic goods and to replace important sources of off-farm income.

These cascading effects call for abrogating *Quill*. As *Quill* all but acknowledged, the physical-presence rule is out of step with developments in this Court's dormant commerce clause jurisprudence. The Court has now repeatedly held that the dormant commerce clause is meant to level the playing field so that businesses can compete fairly, not skew the playing field toward one subset of interstate actors and away from

others. By mandating differential treatment of in-state and out-of-state interests that are competing for the same customer base, and by stifling commerce rather than promoting it, *Quill* offends the clause's animating principles.

Stare decisis does not justify retaining the physical-presence rule. Many of the reasons this Court has recognized for departing from precedent apply with special force here. Most notably, the dramatic economic and technological changes over the past 25 years have substantially undermined *Quill*'s reasoning and made its unfairness to retailers, States, and others all the more apparent.

The Court should abrogate the physical-presence rule and uphold South Dakota's economic-nexus law as consistent with the dormant commerce clause.

ARGUMENT

I. THE *QUILL* RULE HARMS THE ECONOMIC AND SOCIAL VITALITY OF COMMUNITIES ACROSS THE COUNTRY, PARTICULARLY IN RURAL AREAS

Quill effectively discriminates against brick-and-mortar retail stores, which must collect sales taxes, in favor of online and mail-order companies, which need not. As explained below, tilting the playing field in this way imposes severe, concrete harms not just on brick-and-mortar retailers, but also on related industries, the communities that surround them, and the state and local governments that support those communities. These downstream effects demonstrate the importance of abrogating *Quill*'s physical-presence rule to ensure that all retailers play by the same rules.

A. *Quill* Directly Harms Brick-And-Mortar Retailers

As a direct result of *Quill*, customers often do not pay sales taxes when making purchases from out-of-state mail-order and online companies. Although they technically owe *use* taxes at exactly the same rate, online and mail-order customers overwhelmingly (albeit wrongly) perceive their purchases to be tax-free—and thus substantially cheaper than if they had bought the same items in person. This ostensible subsidy can add up quickly. For high-priced items like jewelry, electronics, and appliances, a 5 or 10 percent difference in the effective price can translate to hundreds of dollars.

Unsurprisingly, then, brick-and-mortar stores are losing sales as a result of this competitive disadvantage. *See Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (acknowledging that *Quill* unfairly harms "local retailers and their customers who do pay taxes at the register"). One study estimates that, in 2010, brick-and-mortar stores in California alone lost $4.1 billion in sales to online retailers—a number expected to reach $14.3 billion by 2020.[2] Several factors, including convenience, have contributed to the rise of online shopping. But tax avoidance has played an important role. The most commonly cited reason for online shopping is the perception that online retailers offer lower prices than

---

[2] Parker, *Flawed System: Online Sales Tax Collection: Economic Impact upon California Businesses and Employers* 11 (Aug. 2010) [hereinafter *California Study*], *available at* https://media.gractions.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/1d71e284-6837-4452-a1f4-0a2f90faaf4c.pdf.

their brick-and-mortar counterparts—a perception directly tied to *Quill*.[3]

Several studies confirm that customers, including online shoppers, are sensitive to changes in sales tax. As an obvious example, consumers who live near state lines often shop across the border to take advantage of lower sales-tax rates. Amazon observed a similar phenomenon when it began collecting sales taxes in certain States. Households in those States reduced their Amazon purchases by 9.4 percent (or more, for low-income families and larger purchases).[4] The study concluded that at least some of those sales were likely diverted to online-only competitors that continued to enjoy a tax advantage.[5]

Consistent with those findings, one influential study estimated that approximately 24 percent of online buyers and 30 percent of online purchases would shift back to brick-and-mortar stores if online retailers were required to collect sales taxes.[6] In other words, in a fair, competitive environment, a substantial portion of online shoppers would return to shopping at local stores. That should not be surprising. Even as online

---

[3] PwC, *Total Retail 2015: Retailers and the Age of Disruption* 6 (Feb. 2015), *available at* https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf.

[4] Baugh et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* 4-5 (Apr. 2014, revised Sept. 2016), *available at* http://www.nber.org/papers/w20052.pdf.

[5] *Id.* at 21.

[6] Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce* 16 (Dec. 1998), *available at* http://www.nber.org/papers/w6863.pdf; *see also California Study* 9-10, *supra* note 2.

commerce increases, the phenomenon of "showrooming"—in which prospective customers visit stores to ask questions and to see, feel, and try on merchandise—confirms that customers still value the in-person shopping experience.[7]

As long as customers can order the same items online at lower effective prices, however, local businesses will continue struggling to remain profitable. A growing number of national retailers have in fact filed for bankruptcy, and stores, large and small, are shuttering at an alarming rate. In the first half of 2017 alone, an estimated 5,300 retail locations closed around the country,[8] putting the industry "on pace ... to eclipse the number of stores that closed in the depths of the Great Recession of 2008."[9] This upheaval results not just from shifting consumer preferences and evolving technology but also from *Quill*'s market-distorting rule.

B. *Quill* Undermines The Social Fabric Of Local Communities

The decline in the retail industry tangibly impacts the economic and social vitality of local communities in various ways. Some are obvious: Shuttering local

---

[7] *Cf.* Rigby et al., Bain & Co., *Digical® Retail and Why Stores Matter*, Dec. 18, 2015, http://www.bain.com/publications/articles/retail-holiday-newsletter-2015-2016-4.aspx (noting that in-store conversion rates are 25% to 45%, while online conversion is only 2% to 5%).

[8] Isidore, *Store Closings Have Tripled So Far This Year*, CNN Money, June 23, 2017, http://money.cnn.com/2017/06/23/news/companies/store-closings/index.html.

[9] Corkery, *Is American Retail at a Historic Tipping Point?*, N.Y. Times, Apr. 15, 2017, https://www.nytimes.com/2017/04/15/business/retail-industry.html.

stores causes unemployment to rise and forces residents to travel greater distances to purchase groceries, clothing, and other basic items.

And communities lose more than sources of jobs and merchandise. As one architect stated, "the physical world of the marketplace—unlike the Internet—captures the vitality of civic life, which can yield a potentially unparalleled and needed experience for customers."[10] The physical space provided by retail stores—particularly Main Streets and shopping malls—helps foster and maintain a sense of community in an increasingly mobile and disconnected world. Shopping is often a social activity, and retail centers serve as important "third places" that bring people together outside the home and the workplace.[11] Retail centers also often draw other "third places"—like coffee shops, restaurants, and bars—to the area, further enhancing the community environment.[12]

In fact, studies have shown that home prices increase significantly in areas surrounding new brick-and-mortar retail developments.[13] People will naturally pay more to live in a vibrant, walkable area with

---

[10] International Council of Shopping Centers, *Shopping Centers: America's First and Foremost Marketplace* 11 (Oct. 2014) (quoting Eric Kuhne), *available at* https://www.icsc.org/uploads/research/general/America-Marketplace.pdf.

[11] *Id.*

[12] Jeffres et al., *The Impact of Third Places on Community Quality of Life* (2009), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1011&context=clcom_facpub.

[13] Wiley, *The Impact of Commercial Development on Surrounding Residential Property Values* 3-4, 15-16 (Apr. 2015), *available at* https://www.gamls.com/images/jonwiley.pdf.

easy access to stores, restaurants, and markets. New retail development is thus considered a "neighborhood amenity and an important aspect to community revitalization."[14]

Store vacancies, by contrast, have the opposite effect. As South Dakota has noted (Br. 37), empty storefronts can signal a community in decline, increasing anxiety among community members and discouraging new residents from settling in the area. As the area becomes less attractive to new residents, home prices and property values will likely decline. New businesses, too, are less likely to move into a community where stores have already begun to close, as unemployment in the area is likely higher and disposable income lower.[15] The community thus loses important "third places," and vacant stores and strip malls instead become places to avoid—potentially even places of vandalism and criminal activity. The overall level of social interaction in the community decreases. Neighbors no longer run into each other at their local stores, and the social fabric frays.

Relatedly, the loss of a locally owned store means the loss of a crucial community resource. Retail stores provide daily opportunities for local business owners to build relationships with their neighbors and benefit from their patronage. These interactions build a sense of loyalty and accountability to the community, and make locally owned stores substantially more likely

---

[14] *Id.* at 3-4.

[15] Velasco, *America's Stores Are Closing. Why Isn't That Raising a Jobs Alarm?*, Christian Science Monitor, Aug. 4, 2017, https://www.csmonitor.com/Business/2017/0804/America-s-stores-are-closing.-Why-isn-t-that-raising-a-jobs-alarm.

than faceless online retailers to invest in their neighborhoods. Their activities run the gamut from granting scholarships to local students; donating to local charities, schools, civic groups, and little leagues; and hosting workshops, fundraisers, and other philanthropic events. By actively participating in civic life, businesses give back to the communities that support them while also "generating goodwill and enhancing [their] image."[16] Online retailers with no physical presence in the area—the companies benefited by *Quill*—are substantially less likely to serve this role.

C. *Quill* Severely Burdens The Retail Real Estate Industry

The decline in brick-and-mortar retail stores also predictably impacts the retail real estate industry that provides the space these stores use. By 2015, the growth in online commerce had reduced the demand for retail space by 133 million square feet.[17] As stores close down, retail operators expect to see lower occupancy rates and lower rents.[18] These trends drive down property values.[19]

---

[16] Lund et al., *Brick vs. Click: A Resource Based View of Community Engagement*, *in* Society for Marketing Advances, Advances in Marketing 379 (VanMeter & Weiser eds., 2015), *available at* http://c.ymcdn.com/sites/www.marketingadvances.org/resource/resmgr/2015_Forms/2015_SMAProceedings-V2.pdf#page=379.

[17] American Booksellers Association et al., *Amazon and Empty Storefronts, 2015 Update: The Fiscal and Land Use Impacts of Online Retail* 3 (Sept. 2016) [hereinafter *Empty Storefronts*], *available at* http://www.civiceconomics.com/empty-storefronts.html.

[18] Bodamer, *Retail Real Estate Trends 2017, Part 3: Sliding Fundamentals*, National Real Estate Investor (Aug. 18, 2017),

Shopping centers in less desirable areas have been hit particularly hard, as the markets already reflect substantially lower property values.[20] Shopping centers in higher-income areas have been better able to adapt to the changing market—but only at considerable cost. These malls are undergoing fundamental transformations as they move toward "experiential" retail. High-end restaurants are increasingly important tenants, yet require significant capital expenditures before they can open.[21] Markets, fitness centers, grocery stores, and other non-traditional tenants are replacing department stores as anchors, but these, too, require substantial investments and come with additional risk. Thus, even in these shopping malls, *Quill*'s impact can

---

http://www.nreionline.com/retail-cre-market-study/retail-real-estate-trends-2017-part-3-sliding-fundamentals.

[19] Baen, *The Effects of Technology on Retail Sales, Commercial Property Values, and Percentage Rents* 98-101 (2000), *available at* http://jrdelisle.com/JSCR/IndArticles/Baen_N100.pdf; *see also* Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* 10 (Oct. 2011) (estimating that retail real estate values in Ohio would decrease by $168 million in 2011 and $184 million in 2012), *available at* http://www.efairness.org/pdf/economicscenter-study.pdf; *California Study* 13-14, *supra* note 2 (estimating that retail real estate values in California would decrease by $3.4 billion in 2020).

[20] Shulman, *In the E-Commerce Revolution, Brick-and-Mortar Defenses Are Limited and Costly* (Oct. 2017) http://www.anderson.ucla.edu/Documents/areas/ctr/ziman/UCLA_Economic_Letter_Shulman_10.10.17.pdf; *see also* Fung, *Mall Dividends Soar Above 15%, Tempting Big Investors*, Wall Street Journal, Feb. 13, 2018 ("[S]econd-tier malls have little upside when online shopping is gaining prominence."), https://www.wsj.com/articles/mall-dividends-soar-above-15-tempting-big-investors-1518523200.

[21] Shulman, *supra* note 20.

readily be felt. That impact reverberates to real estate investors, including pension funds and investors in Real Estate Investment Trusts ("REITs").[22]

What is more, *Quill* actively impedes the industry's efforts to adapt. Retailers and real estate companies are experimenting with innovative ways to attract new tenants and customers notwithstanding the growth of online retail. One promising strategy is to cater to online-only retailers seeking to develop or expand their brick-and-mortar presence, either permanently or through "pop-up" shops.[23] These arrangements would undoubtedly be much more robust if not for *Quill*, which *expressly* penalizes physical presence. One study found that a 1 percent increase in a State's sales tax rate would decrease the probability that an online-only retailer would open a store in that State by approximately 4 percent.[24] And an online-only retailer seeking to open a temporary pop-up store in a new state might be even more hesitant to do so, given con-

---

[22] Lerner, *Retail REITs in Adaptation Mode*, REIT, July 27, 2017 (noting that retail REIT investors earned approximately 10 percent less in dividends in early 2017 than in the same period in 2016), *available at* https://www.reit.com/news/reit-magazine/july-august-2017/retail-reits-adaptation-mode; Alster, *Investing in Malls, Despite Store Closings*, N.Y. Times, July 14, 2017 (noting 17 percent average negative return among retail REITs since last June), https://www.nytimes.com/2017/07/14/business/mutfund/real-estate-investment-malls.html?_r=0.

[23] *See, e.g.*, Hughes, *Pop Up Goes the Retail Scene as Store Vacancies Rise*, N.Y. Times, May 30, 2017, https://www.nytimes.com/2017/05/30/realestate/commercial/pop-up-stores-retail-vacancies.html.

[24] *See* Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 238 (Apr. 2010).

siderable uncertainty about how the physical-presence rule could affect its long-term operations (*e.g.*, whether a temporary pop-up store would be enough to trigger the tax-collection obligation and whether that obligation would continue even after the pop-up store had run its course).

Quill's physical-presence rule thus hampers the very innovation that retailers and real estate companies are undertaking in response to the rise of online retail (which *Quill* itself has helped fuel). What is innovative about these new arrangements is the seamless integration of online and in-store shopping experiences. The clothing company Bonobos, for example, now has over a dozen "guideshops" where customers can try on clothing in every size, color, fit, and fabric that the company offers, order their desired merchandise, and receive those items in the mail a few days later.[25] Similarly, Warby Parker's brick-and-mortar stores allow shoppers to try on dozens of pairs of glasses, assisted by employees with easy access to their online accounts. And at Rent the Runway's flagship store, employees can immediately see the options customers have been eyeing online and offer on-the-spot personal styling.[26]

---

[25] Green, *Bonobos Is Opening Retail Stores—But You Can't Actually Take Any of the Clothes Home*, Business Insider, July 16, 2015, http://www.businessinsider.com/bonobos-opened-a-store-where-you-cant-physically-buy-anything-2015-7.

[26] Howland, *Rent the Runway Boosting Physical Store Strategy with New Flagship*, Retail Dive, Dec. 6, 2016, http://www.retaildive.com/news/rent-the-runway-boosting-physical-store-strategy-with-new-flagship/431747/; Gustafson, *As Online Sales Reach New Highs, Rent the Runway Goes Analog*, CNBC, Dec. 5, 2016, https://www.cnbc.com/2016/12/05/as-online-sales-reach-new-highs-rent-the-runway-goes-analog.html.

All these companies have combined the most valuable features of online shopping—convenience and selection—with the attentive, one-on-one customer experience that online companies cannot provide. These experiences also help recapture the sense of place and community that many retail centers are in danger of losing as traditional retailers close down. The results have been positive for the retail industry; companies that have both an online and a physical presence have proven more profitable than companies that rely on either channel alone.[27] The retail real estate companies that many amici represent also benefit significantly from this kind of innovation, as the unique experiences offered by online companies draw new customers and help revitalize their shopping centers.

The law should foster this kind of innovation. *Quill*, however, stifles it, by raising the costs and creating uncertainty for online companies experimenting with physical presence as a way to reach new markets. That provides yet another reason for this Court to abrogate *Quill*.

D. *Quill* Deprives State And Local Governments Of Much-Needed Revenue

All the consequences of *Quill* described above—on brick-and-mortar retail, on unemployment, on property values, and so on—have a concrete impact on public coffers. State and local governments derive an overwhelming percentage of their budgets from three key sources of tax revenue: sales, property, and income

---

[27] L2, *Intelligence Report: Death of Pureplay Retail* 39 (Jan. 12, 2016), *available at* https://www.l2inc.com/research/death-of-pureplay-retail.

taxes. *Quill* reduces all three revenue streams, with severe consequences for public services.

First, *Quill* directly and indirectly reduces sales-tax revenue in the 45 States that collect it by permitting—and even encouraging—widespread tax evasion. Sales tax is most easily collected at the point of sale, but *Quill* prevents States from requiring online and mail-order retailers to take on the responsibility of collecting it. While *Quill* does not absolve consumers of the obligation to pay taxes on their purchases (an online customer still owes the State a *use* tax set at exactly the same rate), few taxpayers are even aware of this obligation, and only 1.6 percent nationwide comply.[28]

As South Dakota has explained (Br. 34-35), state and local governments would have collected billions more in sales-tax revenue in recent years if not for *Quill*'s loophole. By one estimate, they lost $23 billion in sales-tax revenue in 2012—a number that is projected to rise to $33.9 billion in 2018 and $51.9 billion in 2022.[29] And the loss of brick-and-mortar stores drives that number up even higher by further eroding the tax base. Once shuttered, these businesses can neither

---

[28] Joffe-Walt, *Most People Are Supposed To Pay This Tax. Almost Nobody Actually Pays It*, NPR, Apr. 16, 2013, http://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax.

[29] Marketplace Fairness Coalition, *Case for Fairness*, http://www.efairness.org/files/united-states.pdf (last visited Mar. 4, 2018); *see also* U.S. Gov't Accountability Office, GAO-18-114, *Sales Taxes: States Could Gain Revenue from Expanded Authority, But Businesses Are Likely to Experience Compliance Costs* 11-12 (Nov. 2017) (estimating that state and local governments would have gained between $8 billion and $13 billion in 2017 if not for *Quill*), https://www.gao.gov/assets/690/688437.pdf.

make additional sales themselves nor purchase goods from their own suppliers in other sectors. Although difficult to quantify, *Quill*'s total effect on sales tax revenues is undeniably significant.

Second, *Quill*'s impact on the real estate industry reduces state and local property tax revenues. Shopping centers, for example, currently pay $27.8 billion in local property taxes nationwide.[30] But that figure will decrease as more and more retail real estate remains vacant and property values decline. A nationwide study estimated that, by lowering the value of retail real estate, the decline in demand for such real estate has resulted in foregone property taxes of $528 million dollars.[31] A California-specific study estimated that retail real estate value in that State alone will decrease by $3.4 billion by 2020, resulting in lost property taxes of approximately $34 million.[32] And, as explained above (at 9-10), the decline in retail also reduces residential property values in surrounding neighborhoods. That, too, will ultimately reduce the property taxes that state and local governments can collect.

Third, *Quill* further strains state and local coffers by contributing to rising unemployment in the retail industry. An estimated 89,000 employees in general merchandise stores lost their jobs between October 2016 and April 2017—a number that exceeds the entire

---

[30] International Council of Shopping Centers, *How Do Shopping Centers Impact the U.S. Economy?*, https://www.icsc.org/uploads/t07-subpage/US-Economic-Impact-2017.pdf (last visited Mar. 4, 2018).

[31] *Empty Storefronts* 3, *supra* note 17.

[32] *California Study* 13-14, *supra* note 2.

workforce of the U.S. coal industry.[33] Again, *Quill* is responsible for at least some of this job loss: In California, for example, the ability of online retailers to avoid sales taxes will cause the loss of approximately 38,900 jobs in the retail sector (and 63,400 jobs total) by 2020.[34] The increase in unemployment decreases state income tax revenues and burdens state unemployment programs.

These budget shortfalls strain state and local governments' ability to provide much-needed public services. Notably, many of those services *directly benefit* online retailers. For example, approximately 8 percent of state spending and 4 percent of local spending goes toward building and maintaining highways and roads[35]—*i.e.*, the very infrastructure online retailers use to deliver their goods from distant States. *Cf. Quill*, 504 U.S. at 328-329 (White, J., dissenting in part) (noting that "out-of-state seller" may "creat[e] the greatest infrastructure burdens"). These improvements are often funded by sales-tax revenue. For example, Virginia's legislature hoped to fund its 2013 transportation bill with revenue from online sales taxes, but after Congress failed to pass the necessary leg-

---

[33] Corkery, *Is American Retail at a Historic Tipping Point?*, *supra* note 9.

[34] *California Study* 15, *supra* note 2.

[35] Urban Institute, *State and Local Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-expenditures (last visited Mar. 4, 2018).

islation the State had to increase the state gas tax instead.[36]

Other state and local services that may suffer as a result of *Quill* include health care, fire protection, law enforcement, and, perhaps most importantly, education. In South Dakota, for example, the lost sales-tax revenue directly impacted the State's ability to pay teachers' salaries and forced the State to increase the sales-tax rate to make up the difference. Pet. Br. 16. *Quill* thus severely burdens state and local governments' ability to provide needed services and accurately plan for their futures.

E. *Quill* Inflicts Particularly Severe Harm On Rural Communities

The loss of brick-and-mortar retail and the resulting downstream effects are sobering nationwide. But they are particularly devastating in the nation's rural and agricultural communities, where the decline in employment opportunities and the rise in store closings have left rural families struggling.

As one rural economist explains, "[f]arm household well-being is very dependent on rural community prosperity," in part because "farm households have become more dependent on off-farm income."[37] As jobs in man-

---

[36] Portnoy, *Va. Gas Tax Set to Increase After Congress Fails to Pass Online Sales Tax Bill*, Wash. Post, Nov. 27, 2014, https://www.washingtonpost.com/local/virginia-politics/va-gas-tax-set-to-increase-after-congress-fails-to-pass-online-sales-tax-bill/2014/11/27/609952ea-74fa-11e4-9d9b-86d397daad27_story.html?utm_term=.46d4e18314c4.

[37] Testimony of Dr. Bruce Weber, Senior Economist, Rural Policy Research Institute, Before the S. Comm. on Agriculture, Nutrition, and Forestry, at 2, May 25, 2017 (emphasis omitted),

ufacturing and other non-farm industries dwindled, rural households increasingly looked to the retail industry for jobs. Now that brick-and-mortar stores are likewise closing or scaling back, residents have even fewer employment options. Online retail is unlikely to fill the void, particularly if *Quill* remains in place. As noted, the physical-presence rule discourages online retailers from opening warehouses, manufacturing facilities, or distribution centers in rural areas to avoid triggering new collection obligations.[38] Rural and small metropolitan areas enjoy only 13 percent of jobs relating to online commerce, compared to 23 percent of brick-and-mortar retail positions.[39]

The loss of brick-and-mortar stores also adversely affects day-to-day life in rural communities, as residents are forced to travel substantial distances to access essential goods and services. Wal-Mart, for example, recently closed over 100 stores, primarily in rural areas, leaving some rural towns with no grocery stores or pharmacies in a *50-mile* radius.[40] Again, online retail

---

https://www.agriculture.senate.gov/imo/media/doc/Dr.%20Weber%20Testimony.pdf.

[38] *See, e.g.*, Adamy & Overberg, *Rural America Is the New Inner City*, Wall St. J., May 26, 2017 (noting that, over the past decade, "Amazon shifted its warehousing strategy," moving warehouses away from rural areas), https://www.wsj.com/articles/rural-america-is-the-new-inner-city-1495817008.

[39] Abrams & Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017, https://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html?_r=0.

[40] Wolff-Mann, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016, http://time.com/money/4192512/walmart-stores-closing-small-towns/.

is often a poor substitute. Even for residents who can afford regular Internet access and high shipping fees, online shopping is no substitute for the convenience of a nearby grocery store or pharmacy when an unexpected need for certain items—a pain reliever, for example—arises.

The lack of convenient access to food and other necessities accelerates economic decline in many rural towns. Younger generations of farm families are already less likely to remain in towns that have few retail stores and few of the restaurants, movie theaters, and other "third places" that retail often draws—the spaces that often give the community life. *See supra* pp. 9-10. Those generations are even more likely to move and raise their families elsewhere given the increasing prevalence of rural "food deserts"—areas where people have highly limited access to affordable, nutritious food, often with serious health consequences.[41]

Finally, reduced state and local tax revenues harm rural communities in all the ways already described—*e.g.*, by reducing funding for infrastructure, schools, and other critical public services. And the measures States take to make up for lost revenue often impose special burdens on agricultural communities. In particular, state and local governments often increase property tax rates—a burden that falls particularly heavily on land-based business owners like farmers and ranchers.

---

[41] Morton & Blanchard, *Starved for Access: Life in Rural America's Food Deserts*, Rural Realities, Vol. 1 No. 4 (2007), https://www.iatp.org/sites/default/files/258_2_98043.pdf.

II. This Court Should Abrogate *Quill*'s Physical-Presence Requirement

South Dakota has explained at length why *Quill* is out of step with modern dormant commerce clause principles and should be overruled. Amici focus on only two points, both of which follow from the discussion above. First, *Quill itself* violates the principles animating the dormant commerce clause by systematically discouraging investment across state lines. Second, *Quill*'s unfairness to brick-and-mortar retailers and its substantial spillover effects on local communities make adhering to *stare decisis* particularly unwarranted here. Accordingly, the Court should abrogate *Quill*'s physical-presence rule and approve South Dakota's statute—which focuses on *economic* presence instead—as consistent with the dormant commerce clause.

A. *Quill* Discriminates Against And Burdens Interstate Commerce, Unlike South Dakota's Economic-Presence Statute

As *Quill* itself acknowledged, the dormant commerce clause is meant to safeguard the national economy against the "structural ills" that afflicted it under the Articles of Confederation—namely, state taxes and duties that "hindered and suppressed interstate commerce." *Quill*, 504 U.S. at 312. Accordingly, this Court has applied the dormant commerce clause to promote a unified economy, striking down state regulations and taxes that "discriminat[e] against" or "unduly burden" interstate commerce. *Id.*; *see also Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

Quill, however, produces the very effects the dormant commerce clause was intended to avert. The physical-presence rule forces States to discriminate

against interstate commerce by mandating "'differential treatment of in-state and out-of-state economic interests.'" *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). By its own terms, the decision "create[d] a safe harbor" for out-of-state online and mail-order retailers, retaining the "'sharp distinction'" between them and their in-state, brick-and-mortar counterparts. *Quill*, 504 U.S. at 307, 315.

Quill also directly stifles interstate commerce by skewing the playing field toward some interstate actors and away from others. Online and mail-order companies' interstate operations thrive thanks to the effective tax subsidy *Quill* provides. But other interstate companies suffer, including the retail real estate companies that many amici represent. These companies often own properties in multiple States that could be leased to out-of-state companies looking to open retail stores, office space, local distribution centers, or warehouses. Yet *Quill* gives out-of-state companies a powerful incentive to maintain all physical infrastructure in as few States as possible.

The incentive to minimize physical presence, in turn, burdens interstate commerce by hindering innovation that would ultimately benefit consumers, local communities, and online companies themselves. As amici have explained, the relationship between online and brick-and-mortar retail can and should be complementary. *See supra* pp. 13-15. But *Quill*'s bright-line rule systematically discourages online companies from experimenting with physical stores by exposing them to new tax-collection obligations every time they expand into a new State.

By contrast, South Dakota's law would neither discriminate against nor burden interstate commerce. By focusing on retailers' *economic* rather than physical presence, the law would level the playing field for all retailers with in-state sales above a certain threshold. *See* Pet. App. 19a; *see, e.g.*, *United Haulers*, 550 U.S. at 345 (no dormant commerce clause violation where local ordinances "treat[ed] in-state private business interests exactly the same as out-of-state ones"). That would certainly benefit local retailers, which stand to regain a considerable number of shoppers. *See supra* p. 7. But the law would also promote interstate commerce by removing disincentives to investing across state lines. Out-of-state retailers that previously enjoyed a price advantage if they had no physical presence in South Dakota would be more likely to open innovative storefronts across the state—thereby generating new jobs and tax revenue, boosting struggling malls, and revitalizing local neighborhoods.

South Dakota's "economic presence" law thus provides a reasonable, workable model for state taxation of remote sellers (although other models may well develop). Unlike *Quill*, an economic-presence rule achieves the primary goal of the dormant commerce clause: encouraging, rather than suppressing, interstate commerce. In addition to abrogating *Quill*, the Court should expressly approve the economic-presence model as consistent with the dormant commerce clause, providing needed guidance to state legislatures, lower courts, and regulated entities.

B. *Stare Decisis* Does Not Justify Retaining The Physical-Presence Rule

The Court has explained that *stare decisis* has considerably less force where the "facts have so changed

... as to have robbed the old rule of significant ... justification." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-855 (1992); *see American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 302 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate[.]"). That is the case here. *Quill* rested on assumptions about technology that are no longer accurate and on a judgment that any costs of the physical-presence rule would be "offset by [its] benefits," *Quill*, 504 U.S. at 315. That, too, has proved incorrect.

Quill was decided in 1992, before the global internet boom. At that point, it may have been reasonable to conclude that a "'sharp distinction'" could be drawn between retailers with a physical presence in a State and retailers that "'[did] no more than communicate with customers in the State by mail or common carrier.'" *Quill*, 504 U.S. at 307 (quoting *Bellas Hess*, 386 U.S. at 758). In today's world, that distinction is illusory. As Justice Kennedy has observed, "cell phones, tablets, and laptops" now allow businesses to "be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Direct Mktg. Ass'n*, 135 S. Ct. at 1135 (Kennedy, J., concurring). A brick-and-mortar presence is thus no longer necessary to ensure an adequate "nexus" between the taxed activities and the taxing State.

Similarly, collecting sales taxes in multiple States is now a straightforward task, not a "'virtual welter of complicated obligations.'" *See Quill*, 504 U.S. at 313 n.6; *Bellas Hess*, 386 U.S. at 759-760. As one study explained: "Since *Quill*, we have witnessed a proliferation of more sophisticated technology through which sellers can affordably track sales tax collection rules, collect taxes owed, remit them to taxing jurisdictions,

and comply with other requirements. The technology available today bears no resemblance to what existed in 1992."[42] Thus, that aspect of *Quill*'s reasoning cannot be squared with today's circumstances either.

Most notably for amici, the fundamental transformation of the retail industry has called into question *Quill*'s cost-benefit analysis—*i.e.*, its conclusion that the "artificiality" of requiring a physical presence "is more than offset by the benefits of a clear rule." *Quill*, 504 U.S. at 315. Those benefits are considerably weaker today. As noted earlier, the pop-up store phenomenon suggests that applying the rule in today's retail industry may not be as straightforward as *Quill* envisioned. Nor is it clear that the physical-presence rule still "encourages settled expectations" and "fosters investment." *Id.* at 316. As explained above, the physical-presence rule often *deters* investment. Brick-and-mortar stores facing an uncertain future are less likely to invest in their communities. *Supra* pp. 10-11. And online retailers seeking to minimize their tax obligations are less likely to expand to new states. *Supra* pp. 13-14.

The costs, by contrast, are undeniably greater than *Quill* anticipated. As Justice Kennedy explained, the physical-presence rule is "now inflicting extreme harm and unfairness on the States" in the form of "startling revenue shortfall[s]." *Direct Mktg. Ass'n*, 135 S. Ct. at 1134-1135 (Kennedy, J., concurring). And the harm extends well beyond States to encompass the diverse industries and communities that amici represent. The past 25 years of experience have thus amply "pointed

---

[42] Yetter & Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 571 (2017).

up [the] shortcomings" of *Quill*'s physical-presence rule. *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). The Court should therefore depart from *stare decisis* and abrogate the *Quill* rule.

CONCLUSION

Quill's physical-presence rule should be abrogated and the judgment of the Supreme Court of South Dakota should be reversed.

Respectfully submitted.

JANINE M. LOPEZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

SETH P. WAXMAN
Counsel of Record
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

MARCH 2018

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND ECONOMISTS IN SUPPORT OF PETITIONER

Daniel J. Hemel
UNIVERSITY OF CHICAGO
LAW SCHOOL
1111 East 60th Street,
Suite 610
Chicago, Illinois 60637

Debra L. Greenberger
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
600 Fifth Avenue, 10th Fl.
New York, New York 10020
(212) 763-5000
dgreenberger@ecbalaw.com

QUESTION PRESENTED

Whether this Court should overrule the dormant Commerce Clause holding of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii-vi

INTEREST OF THE *AMICI* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. *STARE DECISIS* APPLIES WITH "LESS-THAN-USUAL FORCE" TO THE PHYSICAL PRESENCE RULE 3

II. THE COURT SHOULD OVERRULE *QUILL* IN LIGHT OF CHANGED COMPETITIVE CONDITIONS AND EVOLVING ECONOMIC UNDERSTANDINGS 10

A. Revenue Losses Resulting from the Physical Presence Rule Have Skyrocketed Since *Quill* 11

B. The Physical Presence Rule Leads to Economically Inefficient Consumption Choices 13

C. The Physical Presence Rule Discourages Vendors from Expanding Across State Lines 16

D. The Physical Presence Rule Likely Raises the Aggregate Cost of Complying with State Sales and Use Tax Laws 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 18

Compare State v. Wayfair Inc.,
2017 SD 56 (2017) 6

Complete Auto Transit v. Brady,
430 U.S. 274 (1977) 4, 13

Comptroller of the Treasury of Md. v. Wynne,
135 S. Ct. 1787 (2015) 9

Dennis v. Higgins,
498 U.S. 439 (1991) 18

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 4

Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.,
435 U.S. 734 (1978) 4

Direct Marketing Ass'n v. Brohl,
135 S. Ct. 1124 (2015) 13

Healy v. Beer Inst.,
491 U.S. 324 (1989) 4

Joseph E. Seagram & Sons, Inc. v. Hostetter,
384 U.S. 35 (1966) 4

Joseph v. Carter & Weekes Stevedoring Co.,
330 U.S. 422 (1947) 4

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) ..... *passim*

National Bellas Hess, Inc. v. Department of Revenue of Illinois,
386 U.S. 753 (1967) 2

Or. Waste Sys. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994) 13

Pike v. Bruce Church,
397 U.S. 137 (1970) 8

Puget Sound Stevedoring Co. v. State Tax Comm'n,
302 U.S. 90 (1937) 4

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Spector Motor Serv. v. O'Connor,
340 U.S. 602 (1951) 4

United States v. Ross,
456 U.S. 798 (1982) 6

W. Lynn Creamery v. Healy,
512 U.S. 186 (1994) 9

Walling v. Michigan,
116 U.S. 446 (1886) 9

OTHER AUTHORITIES

Alm, James & Mikhail I. Melnik, *Sales Taxes and the Decision to Purchase Online*,
33 Pub. Fin. Rev. 184, 186 (2005) 14

Anderson, Eric T. et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*,
47 J. Marketing Research 229 (2010) 14, 16

Avalara, *Avalara TrustFile: Pricing*,
https://perma.cc/S65G-2WRP 19

Brynjolfsson, Erik & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 Mgmt. Sci. 563 (2000) 18

Cong. Budget Office, Economic Issues in Taxing Internet and Mail-Order Sales (Oct. 2003)... 16

Crosby, Joe & Diane Yetter, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571 (Aug. 7, 2017)..... 19

Dumain, Emma, *Last-Ditch Push to Pass Marketplace Fairness Act in House Falls Short*, Roll Call (Dec. 3, 2014) 5

Einav, Liran et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1 (2014)..... 14

Fed'n of Tax Adm'rs, *State Sales Tax Rates and Vendor Discounts* (Jan. 2017), https://perma.cc/K4TH-A3JQ 20

Fox, William F., *Retail Sales and Use Taxation, in* The Oxford Handbook of State and Local Government Finance (Robert D. Ebel & John E. Petersen eds., 2012)..... 12

Goolsbee, Austan, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q. J. Econ. 561 (2000) 14

Goolsbee, Austan, *The Implications of Electronic Commerce for Fiscal Policy (and Vice Versa)*, 15 J. Econ. Perspectives 13 (2001) 15

Greene, Jay, *Amid Rapid Expansion, Amazon to Shutter Kansas Warehouse*, Seattle Times (Oct. 1, 2014)..... 17

Klassen, Michael L., Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer Purchasing Decisions*, 8 J. Direct Marketing 21 (1994) 14

Manzi, Nina, *Use Tax Collection on Income Tax Returns* 10 (Minn. House of Representatives, Research Dep't, Policy Brief, Apr. 2015)..... 21

Marketplace Fairness Coalition, *$221 Billion in Lost Revenue Over the Next 5 Years*, https://perma.cc/5YDL-WAZW 11

Nat'l Ass'n of State Budget Officers, Budget Processes in the States (2015)..... 12

PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate—Volume One: Main Report* 18 (2006) 19

Qiu, Linda, *Does Amazon Pay Taxes? Contrary to Trump Tweet, Yes*, N.Y. Times (Aug. 16, 2017)..... 17

TaxJar, *Pricing*, https://perma.cc/VR3V-J9N4..... 20

Thimmesch, Adam, *Undue Burdens and the Retroactivity Issue in* Wayfair, The Surly Subgroup (Feb. 28, 2018), https://perma.cc/A6GV-CDTG. 8

U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm..... 12

Woo, Stu, *Amazon Battles States Over Sales Taxes*, Wall St. J. (Aug. 3, 2011)..... 17

INTEREST OF THE *AMICI*

Amici are professors of tax law and economics at universities across the United States. As scholars and teachers, they have considered the economic consequences of this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and have concluded that *Quill*'s dormant Commerce Clause holding should be overruled. *Amici* join this brief solely on their own behalf and not as representatives of their universities. A full list of *amici* appears in *Appendix A.*[1]

SUMMARY OF THE ARGUMENT

While the Supreme Court is rightly reluctant to overrule its own precedents under any circumstances, the force of *stare decisis* is less powerful in some contexts than in others. Specifically, *stare decisis* exerts a weaker pull when judicial doctrine in the relevant area is based not on statutory interpretation but on changing competitive circumstances and evolving economic understandings. Antitrust law is a paradigmatic example of an area in which these conditions are met, but the argument for a flexible application of

---

[1] Pursuant to Supreme Court Rule 37.2, petitioner and respondents have granted blanket consent to *amicus* briefs. None of the parties or their counsel authored any part of this brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief, and no person or entity other than *amici* and their counsel made such a monetary contribution to the preparation or submission of this brief.

precedent is similarly strong with respect to dormant Commerce Clause tax cases such as this one.

In *Quill Corp. v. North Dakota*, the Court emphasized that its dormant Commerce Clause analysis was based on "structural concerns about the effect of state regulation on the national economy." 504 U.S. 298, 312 (1992). The Court was especially concerned about the effect of taxation on the mail-order industry, and it believed that maintaining the physical presence rule would "foster[] investment by businesses and individuals." *Id.* at 315-18. It also believed that its rule would reduce compliance costs for businesses and individuals engaged in commerce across state lines. *See id.* at 313 n.6. For those reasons, the Court reaffirmed the physical presence rule first announced in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

The Court's decision in *Quill* was predicated on the competitive circumstances and economic understandings of its time. And in the quarter century since *Quill*, those circumstances and understandings have evolved. While the *Quill* Court was focused on the mail-order industry, it could not and did not foresee the meteoric rise of online retail, which has magnified the revenue losses that result from the physical presence rule. In the age of online retail, the physical presence rule has become a drag on economic efficiency and a potential impediment to investment across state lines. Meanwhile, the development of tax automation software over the past quarter century has led to a dramatic reduction in sales tax compliance costs for multistate retailers—so much so that overruling *Quill* would likely *reduce* aggregate compliance costs for

individuals and firms seeking to abide by state tax laws.

Thus, to overrule *Quill* now based on changed competitive circumstances and evolving economic understandings would be to take it on its "own terms." *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2413 (2015). It would be to acknowledge that, regardless of whether *Quill* was rightly decided at the time, the factual assumptions upon which it was based do not apply to the Internet age. The Court should reverse the judgment below, eliminate the anachronistic physical presence rule for state sales tax collection, and update its dormant Commerce Clause jurisprudence to reflect a new technological and economic environment.

ARGUMENT

I. *STARE DECISIS* APPLIES WITH "LESS-THAN-USUAL FORCE" TO THE PHYSICAL PRESENCE RULE

It is "never a small matter" for the Supreme Court to overrule its own precedent. *See Kimble*, 135 S. Ct. at 2409. But it is a smaller matter in some areas of law than in others. For example, the Court "has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act." *Id.* at 2412. The same reasons that justify a less rigid approach to precedent in the antitrust context apply equally to dormant Commerce Clause tax cases such as this one.

The Court in *Kimble* identified a number of factors that determine the strength of *stare decisis*, and each of these factors favors a flexible application of precedent here. First, "*stare decisis* carries

enhanced force when a decision . . . interprets a statute"—and correspondingly weaker force when a decision does not. *Id.* at 2409. Dormant Commerce Clause rules are, of course, nonstatutory. And while Congress could in theory modify any rule rooted in the dormant Commerce Clause doctrine, that fact alone has not stopped this Court from revising its dormant Commerce Clause precedents in the past. *See Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989) (overruling *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)); *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749-50 (1978) (overruling *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) and *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937)); *Complete Auto Transit v. Brady*, 430 U.S. 274, 289 (1977) (overruling *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951)). Indeed, one objective of the Court's dormant Commerce Clause case law is "to eliminate the demand and necessity for sweeping national legislation." *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 365 (2008) (Kennedy, J., dissenting).

Second, *stare decisis* is stronger where Congress intervenes with frequency—and thus where Congress's decision not to supersede a judicial decision might be interpreted as acquiescence. *See Kimble*, 135 S. Ct. at 2409-10. In the area of state sales and use tax collection, congressional intervention is rare, and Congress cannot be said to have acquiesced to the Court's dormant Commerce

Clause holding in *Quill*.[2] To the contrary, the Senate voted 69-27 in May 2013 to pass the Marketplace Fairness Act, which would have overturned *Quill*'s holding and allowed states to impose sales tax collection obligations on retailers with annual gross receipts in total remote sales exceeding $1 million nationwide. *See* S. 743, 113th Cong. (as passed by Senate, May 6, 2013). The Marketplace Fairness Act also enjoyed strong bipartisan support in the House of Representatives, but that chamber's leadership refused to bring the bill to a floor vote. *See* Emma Dumain, *Last-Ditch Push to Pass Marketplace Fairness Act in House Falls Short*, Roll Call (Dec. 3, 2014), https://perma.cc/5WM3-YY6Q. The failure of the Marketplace Fairness Act suggests—at most—that a handful of members of one house of Congress are reluctant to jettison the physical presence rule; it does not indicate broad congressional support for the status quo.

Third, *stare decisis* is more powerful with respect to precedents that generate significant reliance interests. *See Kimble*, 135 S. Ct. at 2410 ("[C]onsiderations favoring *stare decisis* are at their acme" in "cases involving property and contract rights" because "parties are especially likely to rely on such precedents when ordering their affairs." (internal quotation marks omitted)). But

---

[2] The last significant congressional act addressing nexus requirements for state tax collection came nearly six decades ago, with the Interstate Income Act of 1959, Pub. L. No. 86-272, 73 Stat. 555 (codified at 15 U.S.C. §§ 381–391). That legislation concerned income tax collection rather than the sales and use tax collection issues implicated by *Quill*.

importantly, the Court has said that only a "legitimate reliance interest" will warrant judicial accommodation. *See United States v. Ross*, 456 U.S. 798, 824 (1982) (noting that "the doctrine of *stare decisis* does not preclude" overruling precedent when "it is clear that no *legitimate* reliance interest can be frustrated by our decision" (emphasis added)). While other dormant Commerce Clause precedents may engender legitimate reliance interests, the physical presence rule has not. As long as consumers comply with state tax law, there is no tax advantage in purchasing goods from out-of-state vendors because consumers must pay use taxes when vendors fail to collect sales taxes.[3] Thus, insofar as consumers and vendors have come to rely on the tax evasion opportunities that the physical presence rule avails, that reliance interest is illegitimate because it is based on noncompliance with valid use tax laws.

Respondents have suggested that overruling *Quill* would upset the reliance interests of retailers who could be subject to "retroactive liability in dozens, if not hundreds, or even thousands of jurisdictions." *See* Resp'ts' Brief in Opp'n 35. That concern has no basis. South Dakota has not sought to collect sales taxes

---

[3] Taxes collected and remitted by out-of-state vendors are sometimes denominated as "sales taxes" and sometimes as "use taxes." *Compare State v. Wayfair Inc.*, 2017 S.D. 56, ¶5 (2017) (decision below) (describing tax that South Dakota requires out-of-state vendors to remit as "sales tax"), *with Quill*, 504 U.S. at 301 (describing tax that North Dakota sought to require out-of-state vendors to remit as "use tax"). The brief refers to taxes collected and remitted by vendors as "sales taxes" to distinguish them from "use taxes" remitted by consumers.

from any retailer for past transactions,[4] and thus this Court can—if it chooses—grant South Dakota all the relief that the state requests while making its ruling in this case purely prospective. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (applying new rule in a civil case on a purely prospective basis); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 110–111 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (noting that "it is sometimes appropriate in the civil context to give only prospective application to a judicial decision" when the decision "overrule[s] clear past precedent"). Moreover, no state or municipality has suggested that it will seek to collect sales taxes on past transactions from remote retailers, and dormant Commerce Clause precedents that go unchallenged in this case would likely prevent any jurisdiction from doing so.[5] Respondents' fear of retroactive

---

[4] *See* S.B. 106, § 5 ("No obligation to remit the sales tax required by this Act may be applied retroactively."); *id.* § 6 (providing that retailers who lack a physical presence in South Dakota will not be liable for sales tax on transactions that occur while this litigation is pending).

[5] One obstacle that would potentially prevent a state from collecting sales taxes retroactively from a remote retailer is the fact that all states with sales taxes also maintain use taxes which they have imposed on (though not always collected from) consumers who purchased goods from out-of-state sellers. Org. for Econ. Co-Operation & Dev., OECD Economic Surveys: United States 96 (2005). Remote retailers could—and presumably would—argue that the imposition of two taxes on interstate transactions subjects interstate commerce "'to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.'" *See Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1822 (2015) (quoting *J. D. Adams Mfg. Co. v. Storen*, 304 U.S.

liability is grossly overstated—and, in any event, the concern is one that this Court can squelch by making its holding prospective only.

Fourth and finally, *stare decisis* is at its weakest when the relevant area of law is explicitly based on changing competitive circumstances and evolving economic understandings. As the Court in *Kimble* explained, *stare decisis* operates with diminished force in the context of the Sherman Antitrust Act because

> Congress . . . intended that law's reference to "restraint of trade" to have changing content, and authorized courts to oversee the term's dynamic potential. We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences. Moreover, because the question in those cases

---

307, 311 (1938)). Relieving this burden by allowing remote retailers to claim an exemption in cases where the consumer has already paid use tax would—as a practical matter—be impossible, as consumers who pay use taxes often do not report the name of the retailer from whom goods were purchased. *See, e.g.*, S.D. Dep't of Rev., Use Tax Form, https://perma.cc/U9RR-VHZV (June 2016). And even if retroactive enforcement against remote retailers is not invalidated as discriminatory against interstate commerce, a state's attempt to collect sales taxes on transactions several years in the past might well place burdens on those retailers which would be deemed "excessive in relation to the putative local benefits," and thus the effort could fail on those grounds. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); Adam Thimmesch, *Undue Burdens and the Retroactivity Issue in* Wayfair, The Surly Subgroup (Feb. 28, 2018), https://perma.cc/A6GV-CDTG.

> was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them on their own terms.

Kimble, 135 S.Ct. at 2412-13 (alterations, citations, and internal quotation marks omitted).

The central question in dormant Commerce Clause tax cases is not far from the question in the Sherman Act context: whether a challenged tax "is, in effect, a regulation in restraint of commerce among the States." *Walling v. Michigan*, 116 U.S. 446, 455 (1886). The Court often relies on economic analysis to answer that question. *See, e.g.*, *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1803-04 (2015); *W. Lynn Creamery v. Healy*, 512 U.S. 186, 195 n.10 (1994). *Quill* itself is an example. There, the Court explained that "the Commerce Clause and its nexus requirement are informed . . . by structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312. In particular, the Court suggested that the physical presence requirement had supported the growth of the mail-order retail industry, and that maintaining the rule would "foster[] investment by businesses and individuals." *See id.* at 316. The Court was especially concerned about the cost to small vendors of complying with sales tax obligations imposed by each of "the Nation's 6,000–plus taxing jurisdictions." *See id.* at 313 n.6. Its decision to reaffirm the physical presence requirement rested on its understanding of the rule's economic effects. Thus, to overturn *Quill* "in light of sounder economic reasoning" would be to take the

decision "on [its] own terms." *Cf. Kimble*, 135 S. Ct. at 2413.[6]

II. THE COURT SHOULD OVERRULE *QUILL* IN LIGHT OF CHANGED COMPETITIVE CONDITIONS AND EVOLVING ECONOMIC UNDERSTANDINGS

While *Quill* was largely based on "structural concerns" about the effect of state taxation on the "national economy," those same concerns now cut against the physical presence rule. Four negative effects of the physical presence requirement merit emphasis. *First*, the physical presence rule poses a much more serious threat to the fiscal stability of state and local governments than the *Quill* Court could have anticipated. *Second*, the rule results in economically inefficient consumption choices to an extent that the *Quill* Court could not have foreseen. *Third*, the physical presence rule distorts firms'

---

[6] Overruling *Quill*'s dormant Commerce Clause holding would still leave in place the limits on state taxing power imposed by this Court's *Complete Auto* test and by the Fourteenth Amendment's Due Process Clause. *See Complete Auto*, 430 U.S. at 279 (holding that a state tax will survive dormant Commerce Clause scrutiny only if it (1) "is applied to an activity with a substantial nexus with the taxing State," (2) "is fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided by the State"); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (opinion of Kennedy, J.) (recognizing that "[a]s a general rule," the Due Process Clause prohibits a state from exercising jurisdiction over an individual or entity unless that party "'purposefully avails itself of the privilege of conducting activities within the forum State'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

decisions about production, distribution, and corporate structure in ways that perversely discourage businesses from expanding across state lines. *Fourth* and finally, the physical presence rule likely *raises* the aggregate cost to consumers and businesses of complying with state sales and use tax laws.

A. Revenue Losses Resulting from the Physical Presence Rule Have Skyrocketed Since *Quill*

The revenue losses to state and local governments as a result of the physical presence rule far exceed anything that the *Quill* Court could have imagined—most notably because the *Quill* Court could not and did not foresee the rise of Internet retail. The Court in *Quill* was confronted with revenue-loss estimates of up to $3.27 billion per year across all 50 states.[7] Nearly 30 years later, the best available estimate pegs the revenue loss to state and local governments as a result of the physical presence requirement at $33.9 billion in 2018, rising to $51.9 billion by 2022.[8]

---

[7] Br. of Amici Curiae Nat'l Gov'rs Ass'n et al. in Supp. of Resp. 24 n.13, 1991 U.S. S. Ct. Briefs LEXIS 666 (reporting $3.27 billion estimate for 1992 (citing Advisory Comm'n on Intergovernmental Relations, State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992, at 2 (1991))); *see also* Br. of Amici Curiae Ariz. Mail Order Co. et al. in Supp. of Pet'r 34 & n.40, *Quill v. North Dakota*, No. 91-194, 1991 U.S. S. Ct. Briefs LEXIS 537 (filed Nov. 21, 1991) ("Recent estimates of revenue loss range from $694 million to $3 billion per year.").

[8] Marketplace Fairness Coalition, *$221 Billion in Lost Revenue Over the Next 5 Years*, https://perma.cc/5YDL-WAZW (last visited Oct. 30, 2017).

Accounting for inflation, the revenue impact of *Quill* has jumped roughly six-fold since the time that *Quill* was argued and decided, with further increases yet to come.[9]

States effectively have two ways to make up for that revenue loss.[10] One is to cut spending on public goods and services. The other is to raise taxes on income, property, and sales made by retailers who maintain a physical presence within the state. Yet higher taxes on a narrower base generally reduce economic growth more than lower taxes on a broader base. For this reason, excluding online and other remote transactions from the sales tax base likely decreases the overall efficiency of state tax systems. *See* William F. Fox, *Retail Sales and Use Taxation*, *in* The Oxford Handbook of State and Local Government Finance 406, 415-16, 422-23 (Robert D. Ebel & John E. Petersen eds., 2012).

The fiscal cost of the physical presence requirement is especially significant given that *Quill* itself rested on the premise that interstate commerce generally "may be required to pay its fair share of state taxes." *Quill*, 504 U.S. at 301 n.5. Online retailers unquestionably benefit from state and local government investment in transportation and broadband infrastructure. Allowing these vendors to

---

[9] *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 25, 2018).

[10] Forty-six states are subject to constitutional or statutory balanced budget requirements of varying force. *See* Nat'l Ass'n of State Budget Officers, Budget Processes in the States 52 tbl.9 (2015).

avoid state and local sales taxes is at odds with the "fair share" principles underlying the Court's dormant Commerce Clause tax cases. *See Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 102 (1994) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens." (alteration and internal quotation marks omitted)); *Complete Auto*, 430 U.S. at 281 ("[T]he Court consistently has indicated that interstate commerce may be made to pay its way . . . ." (internal quotation marks omitted)).

Thus, what at the time of *Quill* looked like a relatively narrow exemption for a mail-order industry of modest size has grown to be a gaping hole in state and local sales and use tax bases. As Justice Kennedy has noted, "*Quill* now harms States to a degree far greater than could have been anticipated earlier." *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). These revenue consequences are one—though not the only—reason that the Court should jettison the physical presence rule.

B. The Physical Presence Rule Leads to Economically Inefficient Consumption Choices

In the age of online retail, the physical presence rule reduces economic efficiency in ways that were not apparent at the time of *Quill*. When that case was decided, there was little evidence to suggest that consumers were changing their purchasing decisions in order to circumvent state and local sales taxes. *See* Michael L. Klassen, Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer*

Purchasing Decisions, 8 J. Direct Marketing 21, 22 (1994) (noting "a paucity of research on the subject of state sales tax effects on consumer behavior in mail order purchasing decisions"). Thus, there was little reason to believe that the differential taxation of in-state and out-of-state retailers distorted consumer decisionmaking to an economically significant degree.

Now, however, peer-reviewed economic research has demonstrated that a significant share of online shoppers alter their purchasing patterns so that they can evade state and local sales and use taxes. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q. J. Econ. 561, 568 (2000) (estimating that as many as 24 percent of online shoppers would purchase offline if not for the opportunity to circumvent state and local sales taxes); James Alm & Mikhail I. Melnik, *Sales Taxes and the Decision to Purchase Online*, 33 Pub. Fin. Rev. 184, 186 (2005) (putting that figure at 6 percent); Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1, 3 (2014) (estimating that "on average, the application of a 10 percent sales tax reduces purchases by 15 percent among buyers who clicked on an item" on eBay). If online retailers had collected sales taxes on those transactions, a large number of consumers would have switched to brick-and-mortar stores instead. Moreover, consumers are much more likely to alter their online purchasing patterns than to change their mail-order purchasing decisions in response to sales tax collection. *See* Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 239 (2010) (finding that after a retailer begins

collecting state sales taxes, "Internet orders decrease by 11.6%" but "there is no apparent effect on catalog orders"). In other words, the physical presence rule appears to distort the decisions of online shoppers much more than it distorted the decisions of mail-order customers—a phenomenon that can be attributed to the fact that comparison-shopping is much easier online than via catalog. *See id.* at 236.

The distortion of consumer purchasing patterns resulting from the physical presence rule has negative consequences for economic efficiency. *See* Austan Goolsbee, *The Implications of Electronic Commerce for Fiscal Policy (and Vice Versa)*, 15 J. Econ. Perspectives 13, 19 (2001). The Congressional Budget Office offers the following example to illustrate the negative economic consequences that result from consumers altering their purchasing patterns in order to circumvent state and local sales taxes:

> For example, a consumer might choose to purchase books over the Internet for $100 inclusive of the shipping cost, pay no sales tax, and fail to comply with the use tax rather than purchase the same books at a local bookstore for $102 inclusive of a local $5 sales tax. The real resource cost of the books . . . purchased from the Internet seller is $100 . . . . The real resource cost of the same books . . . available for sale from the local bookseller is $97 . . . . Thus, the tax differential that results from the consumer's noncompliance with the use tax causes this consumer to make a choice that increases the production costs of books by $3. That money represents a loss of economic well-being to society because those $3 worth of

> resources could have been used to produce $3 worth of other goods or services.

Cong. Budget Office, Economic Issues in Taxing Internet and Mail-Order Sales, at 8 (Oct. 2003).

In sum, the physical presence rule leads consumers to make purchasing decisions that increase overall production costs—and those extra costs are, from society's perspective, pure waste. The result is that a doctrine motivated by "structural concerns about the effects of state regulation on the national economy" instead undermines economic well-being. *Cf. Quill*, 504 U.S. at 312. The *Quill* Court could not have perceived the full economic-efficiency costs of the physical presence rule because it could not have foreseen that the rule would distort the behavior of online shoppers so much more than it affected the purchasing patterns of catalog customers. *Cf. Kimble*, 135 S.Ct. at 2413 (Court "relatively free" to reverse precedent "that misperceived a practice's competitive consequences"). *Stare decisis* does not prevent the Court from correcting that error.

C. The Physical Presence Rule Discourages Vendors from Expanding Across State Lines

Beyond the distortion of consumers' purchasing decisions, the physical presence rule leads vendors to make inefficient decisions regarding production, distribution, and corporate structure. More specifically, the physical presence rule discourages vendors from expanding their operations into new states when doing so would trigger sales tax collection obligations in additional jurisdictions. *See* Anderson et al., *supra*, at 238-39 (analyzing store

expansion decisions of 14 retailers over 3 years and finding strong evidence that physical presence rule causes retailers to avoid opening stores in new states with sales taxes). This not only has negative effects on economic well-being but also undermines the dormant Commerce Clause's objective of promoting interstate economic activity.

The early years of Amazon.com provide a particularly vivid illustration of the "extreme measures" some companies take to avoid collecting state sales taxes. *See* Stu Woo, *Amazon Battles States Over Sales Taxes*, Wall St. J. (Aug. 3, 2011). The company reportedly distributed color-coded maps and spreadsheets to employees highlighting states that employees should avoid on business travel for fear that a physical presence—even if temporary—might trigger sales tax collection obligations. The company stopped recruiting at business schools in some states, and employees reportedly refrained from sending work-related e-mails if they ended up in a state where the company did not collect sales taxes. *See id.*[11]

Retailers have taken a number of further steps to avoid sales tax collection obligations in additional jurisdictions. In some cases, they have shut down warehouses for fear that a physical presence in a state might trigger sales tax liability. *See, e.g.*, Jay Greene, *Amid Rapid Expansion, Amazon to Shutter Kansas Warehouse*, Seattle Times (Oct. 1, 2014). In

---

[11] Amazon now collects sales taxes in all states that have one, but it does not require third-party sellers on its site to collect state sales taxes. *See* Linda Qiu, *Does Amazon Pay Taxes? Contrary to Trump Tweet, Yes*, N.Y. Times (Aug. 16, 2017).

other cases, companies have split off their Internet businesses so that ownership of brick-and-mortar stores would not force the firm to collect sales taxes online. *See* Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 Mgmt. Sci. 563, 570 (2000). In many of these instances, firms are adopting inefficient distribution strategies and corporate structures solely for tax avoidance purposes. The resources that they devote to these efforts rather than to more productive ends constitute a deadweight loss to the national economy.

Worse yet, by discouraging firms from expanding across state lines, the physical presence rule undermines the dormant Commerce Clause's goal of promoting "economic union." *See Dennis v. Higgins*, 498 U.S. 439, 453 (1991) (Kennedy, J., dissenting). When the physical presence rule causes a company to split off its operations in another state or to shutter its operations across state lines, it contributes to the very "economic Balkanization" that dormant Commerce Clause doctrine strives to avoid. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997). This marks one more way in which the *Quill* Court misperceived—or failed to foresee—the economic consequences of its holding, and one more reason why the Court should depart from that holding today.

D. The Physical Presence Rule Likely Raises the Aggregate Cost of Complying with State Sales and Use Tax Laws

Finally, the physical presence rule—which the *Quill* Court thought would reduce the cost of

complying with state tax laws—likely has the exact opposite effect. The *Quill* Court expressed concern about the "administrative and record-keeping requirements [that] could entangle a mail-order house" if it were subject to sales tax obligations in every jurisdiction. *Quill*, 504 U.S. at 313 n.6 (alterations omitted). But what the *Quill* Court failed to appreciate is that the physical presence rule does not make those administrative and recordkeeping burdens go away. It merely shifts those burdens from vendors to consumers, who are then left to comply with use tax obligations on their own.

In the years since *Quill*, vendors have gained access to sophisticated tax automation software that dramatically reduces the cost of complying with sales tax obligations in multiple jurisdictions. *See* Joe Crosby & Diane Yetter, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571, 575, 580 (Aug. 7, 2017) (concluding that in light of technological advances that post-date *Quill*, "even if a sales tax applied to every individual sale in every jurisdiction . . . , robust sales tax compliance would still be reasonably possible for all businesses at prices commensurate with their other regulatory obligations"); PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate—Volume One: Main Report* 18 (2006) (finding in survey of retailers nationwide that "having more nexus states did not necessarily result in higher sales tax compliance costs"). For $20 per month or less, small businesses can automate their sales tax preparation for every state. *See* Avalara, *Avalara TrustFile: Pricing*, https://perma.cc/S65G-2WRP (last visited Oct. 30, 2017); TaxJar, *Pricing*,

https://perma.cc/VR3V-J9N4 (last visited Oct. 30, 2017). Amazon also offers to calculate and remit sales taxes for sellers on its Marketplace platform for a small fee. Amazon.com, *Selling at Amazon.com: Tax Calculation Service Terms*, https://perma.cc/A654-H9NR (last visited Oct. 30, 2017).[12]

There has been no comparable technological transformation that has slashed compliance costs for consumers seeking to comply with their use tax obligations. Consumers still must track all of their purchases over the course of the year, determine when the vendor has collected sales tax and when it has not, and then calculate the use tax due on each item. Even the most fastidious personal recordkeepers will face difficult challenges in interpreting and applying state and local use tax laws that impose different rates on different products.

It is safe to assume, then, that the cost of complying with state sales and use tax obligations will be lower if the compliance burden is borne by vendors instead of consumers. Vendors generally enjoy scale economies and access to technologies that most consumers cannot match. To be sure, many consumers will incur no compliance costs because they will simply disregard their jurisdiction's use tax laws. *See* Nina Manzi, *Use Tax Collection on Income*

---

[12] In addition, a majority of states now allow vendors to retain a small percentage of the sales taxes they collect in order to partially offset compliance costs. *See* Fed'n of Tax Adm'rs, *State Sales Tax Rates and Vendor Discounts* (Jan. 2017), https://perma.cc/K4TH-A3JQ.

Tax Returns 10 (Minn. House of Representatives, Research Dep't, Policy Brief, Apr. 2015) (noting that fewer than 2 percent of taxpayers reported use tax on state income tax returns in 2012). But insofar as the Court's concern is to make it easier for individuals and firms to comply with the law, that concern weighs against the physical presence rule's retention. By overruling *Quill*, the Court would reallocate the compliance burden from consumers who are ill-equipped to handle it to the vendors that are generally in a much better position to calculate and pay state sales taxes.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

DEBRA L. GREENBERGER
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000
dgreenberger@ecbalaw.com

Attorney for Amici Curiae

MARCH 5, 2018

APPENDIX A

Amici are listed below in alphabetical order. Their institutional affiliations are provided for identification purposes only.

Alice G. Abreu, Professor of Law, Temple University Beasley School of Law

Ellen P. Aprill, Professor of Law and John E. Anderson Chair in Tax Law, Loyola Law School Los Angeles

Reuven S. Avi-Yonah, Irwin I. Cohn Professor of Law, University of Michigan Law School

Joseph Bankman, Ralph M. Parsons Professor of Law and Business, Stanford Law School

Jordan M. Barry, Professor of Law, University of San Diego School of Law

Lily Batchelder, Frederick I. and Grace Stokes Professor of Law, New York University School of Law

Linda M. Beale, Professor of Law and Director of Graduate Studies, Wayne State University Law School

Jennifer Bird-Pollan, James and Mary Lassiter Associate Professor of Law, University of Kentucky College of Law

John R. Brooks, Professor of Law, Georgetown University Law Center

Samuel Brunson, Professor of Law, Loyola University Chicago School of Law

Neil H. Buchanan, Professor of Law, George Washington University Law School

Patricia A. Cain, Professor of Law, Santa Clara University School of Law, and Aliber Family Chair in Law Emerita, University of Iowa College of Law

Howard A. Chernick, Professor Emeritus, Hunter College, City University of New York

Bridget J. Crawford, James D. Hopkins Professor of Law, Elisabeth Haub School of Law at Pace University

Mirit Eyal-Cohen, Professor of Law and Irving Silver and Frances Grodsky Silver Faculty Scholar, University of Alabama School of Law

Victor Fleischer, Professor of Law, University of San Diego School of Law

J. Clifton Fleming, Ernest L. Wilkinson Chair and Professor of Law, J. Reuben Clark Law School, Brigham Young University

Brian Galle, Professor of Law, Georgetown University Law Center

David Gamage, Professor of Law, Indiana University Maurer School of Law

Ari Glogower, Assistant Professor of Law, The Ohio State University Moritz College of Law

Jacob Goldin, Assistant Professor of Law, Stanford Law School

Philip Hackney, James E. and Betty M. Phillips Professor of Law, Paul M. Hebert Law Center, Louisiana State University

Daniel Hemel, Assistant Professor of Law, University of Chicago Law School

David Herzig, Professor of Law and Michael and Dianne Swygert Research Fellow, Valparaiso University Law School

Hayes R. Holderness, Assistant Professor, University of Richmond School of Law

Calvin H. Johnson, John T. Kipp Chair in Corporate and Business Law, University of Texas School of Law

David Kamin, Professor of Law, New York University School of Law

Mitchell Kane, Gerald L. Wallace Professor of Taxation, New York University School of Law

Richard L. Kaplan, Guy Raymond Jones Chair in Law, University of Illinois at Urbana-Champaign College of Law

Rebecca Kysar, Professor of Law, Brooklyn Law School

Zachary Liscow, Associate Professor of Law, Yale Law School

Charlene D. Luke, UF Research Foundation Professor, University of Florida Levin College of Law

Omri Marian, Professor of Law, University of California, Irvine School of Law

Goldburn P. Maynard Jr., Assistant Professor of Law, University of Louisville Brandeis School of Law

Orly Mazur, Assistant Professor of Law, Southern Methodist University Dedman School of Law

Ann Murphy, Professor of Law, Gonzaga University School of Law

Leigh Osofsky, Professor of Law, University of Miami School of Law

Richard Pomp, Alva P. Loiselle Professor of Law, University of Connecticut School of Law

Katherine Pratt, Professor of Law and Sayre Macneil Fellow, Loyola Law School Los Angeles

James R. Repetti, William J. Kenealy, S.J. Professor of Law, Boston College Law School

Kerry A. Ryan, Associate Professor of Law, Saint Louis University School of Law

Daniel Schaffa, Assistant Professor, University of Richmond School of Law

Erin Scharff, Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University

Theodore P. Seto, Hon. Frederick J. Lower, Jr. Chair and Professor of Law, Loyola Law School Los Angeles

Gladriel Shobe, Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University

Michael Simkovic, Professor of Law and Accounting, University of Southern California Gould School of Law

Jay A. Soled, Professor of Taxation, Rutgers Business School

Sloan Speck, Associate Professor of Law, University of Colorado Law School

Kirk J. Stark, Barrall Family Professor of Tax Law and Policy, University of California, Los Angeles School of Law

John A. Swain, Chester H. Smith Professor of Law, James E. Rogers College of Law, University of Arizona

Phyllis Taite, Professor of Law, Florida Agricultural and Mechanical University College of Law

Adam Thimmesch, Associate Professor of Law, University of Nebraska College of Law

Ann F. Thomas, Otto L. Walter Distinguished Professor of Tax Law and Director, Graduate Tax Program, New York Law School

Kathleen DeLaney Thomas, Assistant Professor of Law, University of North Carolina School of Law

Dennis J. Ventry, Jr., Professor of Law, University of California Davis School of Law

Manoj Viswanathan, Associate Professor of Law, University of California, Hastings College of the Law

Clint Wallace, Assistant Professor of Law, University of South Carolina School of Law

Elaine Waterhouse Wilson, Professor of Law, West Virginia University College of Law

Lawrence A. Zelenak, Pamela B. Gann Professor of Law, Duke University School of Law

Edward A. Zelinsky, Morris and Annie Trachman Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University

No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF THE CITY OF LITTLE ROCK, ARKANSAS, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

THOMAS M. CARPENTER
Counsel of Record
OFFICE OF THE CITY ATTORNEY
500 West Markham, Ste. 310
Little Rock, Arkansas 72201
(501) 371-6875
tcarpenter@littlerock.gov

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether this Court should overrule the dormant Commerce Clause holding of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

INTEREST OF THE *AMICUS*

Amicus Curiae – Little Rock, Arkansas – is a municipal corporation and the capital city of the State of Arkansas. It has suffered consequences from this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), while at the same time being burdened with duties created because of internet sales from out-of-state companies to its residents. Ironically, if the City had been able to collect the estimated sales tax revenues barred by the *Quill* decision, it could have paid for various public safety initiatives without the need for credit and interest payments. The large economic impact of companies able virtually to enter a residence and bank account of a City citizen is a presence for which sales taxes should be collected. The rationale for *Quill* should be overturned.

SUMMARY OF THE ARGUMENT

The purpose of an *amicus curiae* brief is to bring "to the attention of the Court relevant matter not already brought to its attention by the parties. . . ." Supreme Court Rule. 37.1. To that end, the legal arguments as to whether the *Quill* rationale should be overturned are not addressed in this *amicus curiae* brief. This presentation is to demonstrate the impact of *Quill* on local governments, like the City of Little Rock, Arkansas, that rely on sales and compensating use taxes to finance daily operations. While macro-figures have been provided to this Court already (Pet.

at 13-14), and rebutted (Opp. at 28-29), just what the current practice does to an actual local government is not mentioned.

ARGUMENT

With the passage of Act 1273 of 2003 Arkansas adopted the Streamlined Sales and Use Tax Agreement. Ark. Code Ann. §§ 26-53-301 to -303 (West 2010 and West Supp. 2018). This was done:

> *. . . in order to stop the loss of sales tax revenue due to the rapid growth of internet sales, to level the playing field between local businesses and out-of-state businesses, and to negate the undue burden on interstate commerce. . . .*

2007 Ark. Acts 180, § 1 [emphasis added]. South Dakota similarly streamlined its sales tax statutes to facilitate such collection. *See South Dakota v. Wayfair, Inc.*, 2017 S.D. 56 * ¶ 17.

According to the most recent estimates of the U.S. Census Bureau, internet sales comprise 8.9% of all sales in the United States. The 2016 sales and compensating use tax figures for the City of Little Rock was $115,125,614.00. An additional 8.9% of this figure for internet sales is $10,010,923.00. However, this $10 million figure would be reduced by state statutory caps on compensating use tax receipts, and by the exemption of certain purchases from any sales or use tax.

In 2017, however, Amazon decided to voluntarily collect sales tax on some of its sales.[1] The State of Arkansas created a special code[2] to capture these sales. For nine months the City of Little Rock collected approximately $500,000.00 for only its 1.5% compensating use tax. When the City's approximately 50% of the 1% Pulaski County compensating use tax is added, and the amount is annualized, the figure is essentially $1 million a year in additional revenues. Yet, as already pointed out to this Court, Amazon represents at most 60% of this internet sales market. Opp. at 31. Conservatively, then, the City of Little Rock should collect at least $1.4 million in additional sales tax revenues that it does not because of *Quill*.

While these revenues were not being collected, the needs of the City of Little Rock, especially in the area of emergency services, continued to grow. During this period of time the City had to use a short time financing note to purchase: (1) a $585,000.00 rescue pumper; (2) a $960,000.00 fire ladder truck; (3) $1.9 million of self-contained breathing apparatus for firefighters;

---

[1] Amazon notes that what and how much sales tax is collected depends upon several factors:

> The amount of tax charged on your order depends on many factors including the identity of the seller, type of item or service purchased, the time and location of fulfillment, and the shipment or delivery address of your order.

www.amazon.com/gp/help/customer/342-377display.html@modeled=468512 (last accessed February 22, 2018).

[2] NAICS Code 4541 – Electronic Shopping & Mail Order House.

and (4) $3 million for replacement police patrol vehicles. The citizens were burdened with interest payments, and the City's overall credit rating could have been impacted, to make necessary emergency services purchases which, if *Quill* had already been overruled, would have been unnecessary.

Equally important to the City of Little Rock are its prevention, intervention, and treatment (PIT) programs designed to help youth avoid being the perpetrators or victims of juvenile crime. The City spends approximately $3 million per year on these programs. This commitment is imposed at the expense of other worthwhile and needed City programs.

The City of Little Rock is not unique in this regard. While it is true that the larger the municipality the greater tax revenues will probably be collected, even extremely small communities have constant needs to fulfill. These tax revenues are crucial.

Further, the nature of internet sales is nothing like the mail order businesses in *Quill*. Serious attempts for on-line sales emerged in the mid-1990s. While there were predictions of a virtual business world, there were also major concerns. Even so the technological advances that have led to today's practices were totally unforeseen. Now, customers are introduced to changing website pages and formats. They are allowed to "chat" with a customer representative if desired before making a purchase. Once the item is selected, the customer arranges through a few key strokes where to send the item, whether to gift wrap it,

and physically to pay for it. *See* Neil F. Doherty & Fiona Ellis-Chadwick, *Internet retailing: the past, the present and the future*, http://oro.open.ac.uk/24815/e (last accessed February 22, 2018). In addition to the use of desktop or laptop computers, internet sales are now securely made and paid for on devices such as smartphones. It is estimated that 125 million Americans own smartphones, and 50 million Americans (which may totally overlap the other number) own tablets. Almost 62% (77,500,000) of the smartphones users made internet purchases in 2015. *See* Justin Smith, *Mobile eCommerce States in 2018 and the Future Trends of mCommerce*, www.outerboxdesign.com/web-design-articles/mobile-ecommerce-statistics (last accessed February 22, 2018).

To be sure, these references do not establish as scientific fact these particular statistics. Yet, as pointed out by the State of South Dakota, the purpose of this case is to overturn *Quill* so this evidence, and other relevant evidence, can make an appropriate record for the South Dakota Courts. *See* Reply at 3-4. As noted above, if *Quill* is overturned then appropriate records can be made to establish that the collection of internet taxes because of the economic presence in a particular state is not a burden on interstate commerce.[3]

---

[3] It is somewhat ironic to consider the Respondent's complaint that the complexity of sales tax laws in different states would make it impossible for compliance (Opp. at 26), while at the same time lauding Amazon for being able to deal with such issues while currently controlling 50% of the internet sales market. Opp. at 31.

Finally, internet sales are placing new demands on local governments. For example, the modern method of delivery of an internet sale has led to a new type of criminal violation when packages left at addresses are stolen when merely left at addresses. "Porch Piracy," is increasing as a result of the packages from internet sales being left unsecured. *See Had a package stolen off your doorstep? How people are combating 'porch piracy'*, www.mercurynews.com/2017/12/09/had-a-package-stolen-off-your-doorstep-how-people-are-combating (last accessed February 21, 2018); Mike Grabham, *Epidemic: Growing Rate of Package Theft*, www.thepackageguard.com/ups/epidemic-growing-rate-package-theft/ (last accessed February 21, 2018). In the City of Little Rock, over $18 million of property was stolen in 2016 alone. *See* "Stolen and Recovered Property: 2016, *Arkansas Crime Information Center*, www.acic.org/crime-statistics (last accessed February 21, 2018). Yet, none of the revenues the City would receive from its sales taxes for internet sales were available to deal with the reports, the investigations, and the demands on the criminal justice system such internet sales create.

CONCLUSION

There is no attempt by the City of Little Rock to argue in depth the legal merits of this matter. Instead, this *amicus curiae* brief is merely to demonstrate the significant impact that the tremendous economic presence of internet sales has on one local community. Such

an economic presence should be a sufficient basis to determine that *Quill* is antiquated law and should be overturned.

Respectfully submitted,

THOMAS M. CARPENTER
Counsel of Record
OFFICE OF THE CITY ATTORNEY
500 West Markham, Ste. 310
Little Rock, Arkansas 72201
(501) 371-6875
tcarpenter@littlerock.gov

Counsel for Amicus Curiae

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR MONTANA AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

Timothy C. Fox
Montana Attorney General
Jon Bennion
Chief Deputy Attorney General
Dale Schowengerdt
Solicitor General
Counsel of Record
J. Stuart Segrest
Assistant Attorney General
Montana Department of Justice
215 N. Sanders St.
Helena, MT 59601
DaleS@mt.gov
(406) 444-2026

Counsel for Amicus Curiae

April 4, 2018

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Small and Medium Sized Businesses, Especially In States Like Montana That Do Not Have Sales Tax, Depend On *Quill's* Bright Line Physical-Presence Rule 4

II. Due Process Concerns Also Support Retaining *Quill's* Physical-Presence Rule .. 10

III. Even If Not A Complete Bar, The Lack Of Physical Presence Should Continue To Be A Factor Under The *Complete Auto* Test 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Arizona Dep't of Revenue v. Blaze Constr. Co.,
526 U.S. 32 (1999) 9

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 11

C&A Carbone v. Town of Clarkstown,
511 U.S. 383 (1994) 6

Commonwealth Edison v. Montana,
453 U.S. 609 (1981) 4, 15

Complete Auto Transit v. Brady,
430 U.S. 274 (1977) 13, 14, 15

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993) 3, 8

International Harvester v. Dep't of Treasury,
322 U.S. 340 (1944) 14

International Shoe v. Washington,
326 U.S. 310 (1945) 10

J. McIntyre Mach., Ltd. v. Nicastro,
564 U.S. 873 (2011) 10, 11, 12

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 8, 9

Keeton v. Hustler Magazine,
465 U.S. 770 (1984) 10

MeadWestvaco Corp. v. Ill. Dep't of Revenue,
553 U.S. 16 (2008) 13

Michigan v. Bay Mills Indian Community,
134 S. Ct. 2024 (2014) 4

National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967) 1, 5

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Raymond Motor Transp. v. Rice,
434 U.S. 429 (1978) 14, 15

Robinson v. Neil,
409 U.S. 505, 93 S. Ct. 876,
35 L. Ed. 2d 29 (1973) 8

Travis v. Yale & Town,
22 U.S. 60 (1920) 12, 13

Vasquez v. Hillery,
474 U.S. 254 (1986) 4

Wagnon v. Prairie Band Potawatomi Nation,
546 U.S. 95 (2005) 9

STATUTES

SDCL § 10-64-1 8

SDCL § 10-64-2 11

SDCL § 10-64-6 8

OTHER AUTHORITIES

Connecticut DRS Media Release, *available at* http://www.ct.gov/drs/cwp/view.asp?Q=591496&A=1436 9

Government Accountability Office, *SALES TAXES: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (November 2017), *available at* https://www.gao.gov/assets/690/688437.pdf. 7

INTEREST OF *AMICUS CURIAE*

This Court held over 50 years ago that allowing every state, municipality, school district, or other political subdivision to impose sales tax burdens on remote sellers without a physical presence in the taxing jurisdiction would entangle business in "a virtual welter of complicated obligations." *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 760 (1967). "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements," including "the many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements." *Id.* at 759-60. The Court reaffirmed that holding in *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992), recognizing that "a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals." Those animating principles of *Bellas Hess* and *Quill* remain every bit as valid today.

The State of Montana has a compelling interest in supporting *Quill's* physical-presence rule, and the precedent that has evolved around it. Montana has never had a sales tax.[1] If the Court abrogates *Quill*, small businesses in states that do not impose a sales tax, such as Montana, will face significant burdens, in part because of past reliance on *Quill*. The sovereignty of the State is also threatened by the due process

---

[1] Montana voters twice rejected proposals for a sales tax, once in 1971 by 70 percent of the vote, and again in 1993 by 75 percent of the vote.

implications of foreign jurisdictions increasing the reach of their sales-tax authority. Additionally, the State will be adversely affected should this Court abrogate the physical-presence rule without addressing what level of contact is sufficient under both the Commerce and Due Process Clauses.

SUMMARY OF THE ARGUMENT

1. This Court should retain Quill under *stare decisis*. The reliance interest in *Quill's* physical-presence rule is most important to small or medium-sized "brick and click" businesses engaged in remote commerce. The burden is even more acute in non-sales tax states where businesses do not have experience collecting sales tax. Were this Court to strike the physical-presence rule, many of these businesses likely will no longer be able to offer online sales. South Dakota's assumption that advances in technology have eliminated these burdens may apply to internet staples like Amazon.com, which likely tracks the necessary information anyway, or to companies within Streamlined Sales and Use Tax Agreement (SST) jurisdictions, but it is not the case with small to medium-sized businesses in non-sales tax states.

Even if an e-commerce retailer is presumed to be able to handle the burden of deciphering rules and collecting sales tax in various jurisdictions once it has a sufficient amount of sales, there is no way to determine whether a retailer has met the threshold amount of commerce in a taxing state without tracking all sales. All businesses that engage in e-commerce, therefore, will have to invest in software and staffing to track sales and tax regulations in all taxing jurisdictions just to determine whether they even

qualify to collect tax. Worse they will have to collect tax all along in case they do quality. In other words, the burden will necessarily apply to *all* businesses that conduct e-commerce in *all* taxing jurisdictions, regardless of size or sales or whether they meet a jurisdiction's threshold.

There is also a real risk of taxing jurisdictions retroactively applying a decision overruling *Quill*. Ordinarily a constitutional ruling is retroactive, *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993), and at least one jurisdiction has already sent notice that it intends to apply their use tax retroactively. In addition, there is no guarantee that other jurisdictions will implement any thresholds prior to imposing a sales tax. The difficulty in assessing what 12,000 or so jurisdictions will do is why this question is best left to Congress.

2. The failure of South Dakota to show, or even litigate, whether its law meets due process concerns counsels against overruling *Quill's* physical-presence rule in this case. As *Quill* made clear, the constraints of the Due Process Clause and the Commerce Clause are different and should be addressed separately. Due process is a bulwark for state sovereignty, and should be considered in tandem with the Commerce Clause requirements, as this Court did in *Quill*. To address the physical-presence aspect of the Commerce Clause in isolation, without also addressing due process, risks undercutting the very fairness that due process protects.

Here, for many small businesses engaged in remote commerce, due process is unlikely to be met due to the lack of a minimum connection resulting from isolated

online sales. In contrast, though ignored by Petitioner, the contacts found sufficient for due process in *Quill* were substantial.

3. Likewise, even if *Quill's* physical-presence rule is abandoned, this Court should not presume South Dakota's law meets the "substantial nexus" test. First, it is not within the question presented. Second, even if not required, the lack of a physical presence should necessitate a greater showing of other contacts for a substantial nexus to be met. On the other side of the ledger, the burden on commerce is likely to be significant. Finally, the isolated, random nature of many online sales means that a sales tax will often not be "fairly related to the services provided by the State," because the tax is out of "proportion" to the activities "within the State." *Commonwealth Edison v. Montana*, 453 U.S. 609, 625-26 (1981).

ARGUMENT

I. Small and Medium Sized Businesses, Especially In States Like Montana That Do Not Have Sales Tax, Depend On *Quill's* Bright Line Physical-Presence Rule.

Stare decisis is critical to fostering respect for this Court's decisions and for "the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). That is why the Court has described *stare decisis* as "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014). Consequently, there must be some "special justification" for this Court to abrogate its precedent. *Id.* The bar is even higher in this case

because it involves well-settled principles in a delicate balance of economic forces that do not react well to unpredictability. The national economy has developed around the physical-presence rule over the past 51 years, and that rule has served as a workable and predictable bright-line test that has been consistently relied upon.

These reliance interests are most important to, and most relied on by, small and medium-sized businesses, especially those that reside in non-sales tax states where the businesses have no experience collecting sales tax, like Montana. Contrary to South Dakota's assumptions, *see* Pet. Br. at 44-47, tracking and remitting sales tax will impose a significant, and ongoing, burden on small and medium-sized businesses.

No small business, by itself, can keep up with the multitude of tax requirements for 12,000 or so taxing jurisdictions.[2] Instead these businesses must use sophisticated tax software to disentangle the "virtual welter of complicated obligations." *Bellas Hess*, 386 U.S. at 760 (recognizing that "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements" would have a significantly adverse impact on interstate business); *see* Pet. Br. at 14-15 (discussing software). This software may be provided for free to businesses that choose to

---

[2] https://www1.avalara.com/us/en/community/small-business/sales-tax-calculator-smb.html (Software provider Avalara touting sales-tax calculator as a tool to help with determining tax "for over 12,000 jurisdictions in the U.S. alone" and explaining that a "single ZIP code can have multiple sales tax rates").

register with the SST, but many states are not members of the SST, including the six largest states.[3] Even assuming the software is free and usable for all jurisdictions, it is estimated that setup and integration will cost a mid-sized business $80,000 to $290,000, along with a cost of $57,500 to $260,000 each following year for maintenance, updates, and audits.[4] These are significant costs for small and medium-sized businesses and may force these businesses to abandon their online sales, which would undercut the Commerce Clause's goal of a "national market." *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). What is more, many of these small and medium-sized businesses are primarily brick-and-mortar stores. They engage in internet sales to make ends meet; in other words to address the challenges to local stores discussed by Petitioner and amici. *See, e.g.*, Br. of Colorado, *et al.* at 9.

South Dakota is correct that internet giants, like Amazon, already track more than enough information, and have sufficiently sophisticated software to easily collect and remit taxes. Pet. Br. at 39, 44 (focusing on "large-scale internet retailers" with a "nationwide scale."). But it is far from true of most businesses that have a more limited internet presence. Small and medium-sized businesses will face significant economic burdens should the physical-presence rule be abandoned. Though Petitioner focuses on what it

---

[3] http://www.streamlinedsalestax.org/ (nonmembers include California, Texas, New York, Florida, Illinois, and Pennsylvania).

[4] http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

perceives as an unfair tax advantage, *id.* at 5, the true burden is not the tax, or the price difference, but the difficulty and expense of tracking and collecting the tax in far-flung jurisdictions.

As a recent GAO report confirmed, small to medium-sized businesses often lack the technology and infrastructure to comply with the manifold requirements of thousands of taxing jurisdictions that remote sales tax burdens would entail. United States Government Accountability Office, *SALES TAXES: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* 17-19 (November 2017) ("GAO Report").[5] For many businesses, the significant costs of building and maintaining systems for complicated multi-jurisdictional tax collection, and the risks associated with making mistakes, will simply not be worth continuing to make online sales.

Although South Dakota ignores the GAO report entirely, it argues that they bear the extent of the burden because of lost tax revenue. Pet. Br. at 34-35. It estimates, for example, that in 2012 state and local governments lost "$23 billion in sales-tax revenues" due to *Quill*. *Id.* This estimate appears to be greatly exaggerated. The GAO Report estimated a total loss for 2017 of only $8.5 to $13.4 billion for state and local governments, or about 2 to 4 percent of total 2016 general sales and gross receipts tax revenues. GAO Report at 11-12.

---

[5] Available at https://www.gao.gov/assets/690/688437.pdf.

Petitioner's focus on tax revenue also ignores that the burdens of collection will fall on each business, no matter how small and no matter the size of its internet presence. Even assuming each taxing jurisdiction imposes a threshold similar to South Dakota's (and there is no guarantee they will), each retailer with an internet presence will have to track and record all of its sales by taxing jurisdiction from day one, just to determine whether they meet the threshold of a particular jurisdiction in the first place. And from day one each retailer will have to collect tax from each sale in case they ultimately do meet a jurisdiction's threshold. This means that all internet retailers, in all taxing jurisdictions, regardless of size or sales, will have to invest in software and staffing to track sales and tax regulations in all taxing jurisdictions should the physical-presence test be overruled.

This burden, moreover, is prospective only. Though South Dakota dismisses it, Pet. Br. at 48-50, taxing jurisdictions may well apply an opinion overruling *Quill* retroactively. South Dakota enacted its law specifically to challenge *Quill*. SDCL § 10-64-1. As part of the test case, the State declared that it would not seek to collect taxes retroactively. SDCL § 10-64-6. But if this Court abrogates the physical-presence rule, there is no reason to believe other states will do the same. The "general rule" is one "of retrospective effect for the constitutional decisions of this Court." *Harper*, 509 U.S. at 94 (quoting *Robinson v. Neil*, 409 U.S. 505, 507, 35 L. Ed. 2d 29, 93 S. Ct. 876 (1973)). The Court thus resists "selective application of new rules" according to a claim of "actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id.* at 97 (citing *James B. Beam Distilling Co. v.*

Georgia, 501 U.S. 529, 543 (1991)). In fact, one state has already notified businesses of its intent to apply sales tax to prior sales, on the theory that they should have been collecting taxes as a use tax. *See* Connecticut DRS Media Release.[6] As Colorado and other states admit, "certain States" may choose "to apply their laws retroactively" should this Court abrogate the physical-presence rule. Br. of Colorado, *et al.* at 19.

The inability of this Court to dictate whether states will attempt to apply sales taxes retroactively, and the possibility that many taxing jurisdictions may impose low, or no, economic thresholds, are reasons to uphold the physical-presence rule and leave it to Congress to address the issue. It is Congress, acting within the restraints imposed by due process, that is in the best position to balance the burdens of tax collection for remote businesses without a physical-presence with the desire for sales-tax revenue.

Upholding the physical-presence rule would also further this Court's goal of maintaining "bright line standards in the context of tax administration." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113-14 (2005) (quoting *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999)); *see also Quill*, 504 U.S. at 315-16 ("Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes."). For all these reasons, the principles of *stare decisis* strongly favor maintaining the physical-presence rule.

---

[6] http://www.ct.gov/drs/cwp/view.asp?Q=591496&A=1436.

II. Due Process Concerns Also Support Retaining *Quill's* Physical-Presence Rule.

Abandoning *Quill*'s physical-presence rule will create another layer of uncertainty because it will trigger a whole new set of questions about what level of activity satisfies the Due Process Clause. South Dakota has only focused on the Commerce Clause, but this Court in *Quill* conscientiously analyzed due process prior to addressing the Commerce Clause. *Quill*, 504 U.S. at 306-08. This is because each clause reflects "different constitutional concerns" and thus the Court considered "each constitutional limit in turn." *Id.* at 305. It is doubtful that South Dakota's threshold of $100,000 or 200 sales meets due process concerns because that threshold lacks any requirement that the seller actually target the State in any regard.

This Court has made clear that for due process to be met, a defendant must "be said to have targeted the forum." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881-82 (2011). "[I]t is not enough that the defendant might have predicted that its goods will reach the forum state." *Id; Quill*, 504 U.S. at 307. (a seller must "purposely avail[] itself of the benefits of an economic market in the forum State" with contacts sufficiently strong that a state's exercise of jurisdiction comports with "traditional notions of fair play and substantial justice.") *Id.* at 307 (quoting *International Shoe v. Washington*, 326 U.S. 310, 316 (1945)). "[R]andom, isolated, or fortuitous" contacts will not suffice. *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984). For that reason, neither the mere formation of a contract, without continuing relationships and obligations, nor "a single sale of a product in a State"

constitutes "an adequate basis" for regulation under due process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985); *J. McIntyre*, 564 U.S. at 888 (Breyer, J., concurring). And importantly, it is not just the quantity, but also "the nature and quality" of the affiliation that controls. *Burger King*, 471 U.S. at 475 n.18.

Quill determined that due process was met due to Quill's "continuous and widespread *solicitation* of business" in North Dakota, including "almost $1 million" in annual sales (equivalent to $1.79 million in today's dollars) "to about 3,000 customers" in the State, making Quill the sixth largest vendor of office supplies in North Dakota. *Id.*, 504 U.S. at 302, 308 (emphasis added). While the Court in *Quill* overruled previous holdings requiring a physical presence in the forum state under the Due Process Clause, it held that the business must have "purposefully directed its activities" at the forum state to such an extent that it had fair warning that it could be subject to its jurisdiction. *Id.* at 308. Nothing in South Dakota's trigger of $100,000 or 200 sales requires that a Montana business that happens to sell products on the internet do anything whatsoever to target consumers in South Dakota or otherwise purposefully direct its activities toward the State.

The South Dakota threshold may be met, for example, without any solicitation by an internet retailer, other than creating a website. A retailer thus may make 200 sales "for delivery into South Dakota"[7]

---

[7] Under South Dakota's law, neither the purchaser nor the recipient need be a South Dakota resident. SDCL § 10-64-2.

by "random, isolated, or fortuitous" contacts. As an example, a person in South Dakota may, after searching for "huckleberry products" online, order a huckleberry lollipop for $1 from The Huckleberry Patch, a small business located in Hungry Horse, Montana.[8] If this process is repeated 200 times (or if a single buyer, or a few, purchases multiple lollipops) the threshold would be met with no solicitation, much less "continuous and widespread solicitation."

South Dakota's trigger goes well beyond *Quill* or anything else this Court has approved as sufficient "purposeful availment" to satisfy due process. And there is no guarantee other states will impose even these low limits before taxing nonresident companies. At the least, more facts are needed prior to a decision from the Court as to whether due process is met. And without sufficient contacts to meet due process, the Commerce Clause analysis is a moot point.

The Due Process Clause, and indeed our constitutional system, ensures that "each State has a sovereignty that is not subject to unlawful intrusion by other States." *J. McIntyre Mach. v. Nicastro*, 564 U.S. 873, 884 (2011). When a state acts outside its territory, it potentially "upset[s] the federal balance" by intruding upon the sovereignty of other states. *Id.* Beyond due process, one of the central purposes of the Privileges and Immunities Clause is to guard against the possibility that states might exploit nonresidents' lack of representation to pass laws that specifically disadvantage them. *See, e.g., Travis v. Yale & Town*,

---

[8] https://the-huckleberry-patch.myshopify.com/collections/sweetshop.

22 U.S. 60, 80 (1920). Whether a state may tax a nonresident, then, turns on a "broad inquiry" into "whether the state has given anything for which it can ask return." *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24-25 (2008). To that end, Congress "may authorize state actions that burden interstate commerce," but it "does not similarly have the power to authorize violations of the Due Process Clause." *Quill*, 504 U.S. at 305.

In contrast to *Quill*'s careful analysis of contacts with the state, Petitioner urges this Court to simply assume due process is met and proceed to consider the physical-presence rule absent a factual record. To do so, however, would sacrifice the "traditional notions of fair play and substantial justice" protected by due process.

III. Even If Not A Complete Bar, The Lack Of Physical Presence Should Continue To Be A Factor Under The *Complete Auto* Test.

Petitioner asks this Court to "bless" South Dakota's law and "affirm South Dakota's economic-nexus approach." Pet. Br. at 48, 58. But that is beyond the question presented, which only asks whether *Quill's* physical-presence requirement should be abrogated. As pointed out in detail by Respondents, and several *amici*, there were no facts, or very limited facts, developed below in this strict legal-question case. Indeed, the South Dakota Supreme Court was reviewing the grant of summary judgment for Respondents based on *Quill's* prohibition; a motion in which South Dakota *agreed* its law was unconstitutional under *Quill*. App. 14a to Pet. for Cert. The state Supreme Court merely affirmed this ruling,

recognizing it is required to follow this Court's precedent where directly applicable. *Id.*

If the Court were to reverse course and overrule *Quill*'s physical-presence rule, the question remains as to what level of contact would be sufficient to impose a tax on a nonresident seller. Under *Complete Auto Transit v. Brady*, a tax may only be applied to an activity with "a substantial nexus with the taxing State," and where the tax "is fairly related to the services provided by the State." 430 U.S. 274, 279 (1977). A tax may even have "sufficient factual connections," to meet due process, but fail under the Commerce Clause "because of its burdening effect upon the commerce." *Quill*, 504 U.S. at 305-06 (quoting *International Harvester v. Dep't of Treasury*, 322 U.S. 340, 353 (1944)).

The lack of physical presence should require a heightened amount of other contacts under this test. Because of the *Quill* rule, however, this Court has not had the chance to determine what quantity and quality of contacts are sufficient as to a nonresident seller.[9] The Court should not do so on this bare record, but should remand with suggestions as to what level of contact is sufficient and other factors to consider.

The "burdening effect upon the commerce" of medium and small retailers, especially those in non-sales tax states like Montana, is likely to be significant, as discussed above. *See Raymond Motor Transp. v.*

---

[9] This Court has concluded that licensing of software in a state is insufficient to meet the "substantial nexus" requirement. *Quill*, 504 U.S. at 315 n.8.

Rice, 434 U.S. 429, 441 (1978) (inquiry involves "consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."). These retailers are not equipped to collect tax, are not able to direct who sees their website, and do not have the staffing or funding to keep up with changes in tax law in 12,000 plus jurisdictions. Those factors should be considered before imposing taxing obligations on businesses without a physical presence in the taxing jurisdiction.

Moreover, any tax of a nonresident business must be "fairly related to the services provided by the State." *Complete Auto Transit*, 430 U.S. at 279. Under this additional requirement "the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded." *Commonwealth Edison*, 453 U.S. at 625-26.

The "fairly related" prong is clearly met when a business has an on-the-ground presence in a state. *Id.* at 626 (noting "little difficulty concluding that the Montana tax satisfies" this prong where the "operating incidence" of the tax is mining coal in Montana). But the "operating incidence" of one sale over the internet, or even 200, does not meet this threshold, especially where the nonresident retailer does not target the taxing state. What, or where, the "operating incidence" would be with an online sale is also unclear. Where is it, for example, if an online sale is completed on a website hosted on a server in state A, by a customer residing in state B but logged on in state C, for delivery

to an address in state D? It is patently unfair to require the retailer to determine where the taxing nexus lies on pain of a tax penalty with interest for a wrong decision.

In short, even if this Court were to overrule *Quill*, it should remand the case for full consideration of the substantial questions that remain and are unresolved by the bare factual record in this case.

CONCLUSION

This Court should affirm the South Dakota Supreme Court's decision.

Respectfully submitted,

Timothy C. Fox
Montana Attorney General
Jon Bennion
Chief Deputy Attorney General
Dale Schowengerdt
Solicitor General
Counsel of Record
J. Stuart Segrest
Assistant Attorney General
Montana Department of Justice
215 N. Sanders St.
Helena, MT 59601
DaleS@mt.gov
(406) 444-2026

Counsel for Amicus Curiae

No. 17-494

In the
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,
v.
WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,
Respondents.

On Writ of Certiorari to the
Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* MULTISTATE TAX COMMISSION AND FEDERATION OF TAX ADMINISTRATORS IN SUPPORT OF PETITIONER

Gregory S. Matson
Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001

Gale Garriott
Federation of Tax Administrators
444 North Capitol St., N.W.
Suite 348
Washington, D.C. 20001

Helen Hecht
Counsel of Record
Lila Disque
Bruce Fort
Richard Cram
Counsel
Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300
hhecht@mtc.gov

Counsel for *Amici Curiae*

March 5, 2018

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Fundamental dormant commerce clause doctrines evolve when necessary; so too should a test meant to serve those doctrines. 5

A. Under the modern dormant commerce clause doctrine, the role of the physical presence nexus standard in *Quill* is to serve as a test for undue burdens. 5

B. As a bright-line test for undue burdens, sales volume thresholds are much more workable than physical presence. 7

II. Physical presence, as a test for sales and use tax nexus, not only produces irrational results, but is increasingly incapable of providing a predictable bright line. 12

III. Collateral concerns do not justify retaining physical presence as a nexus standard. 16

A. The reliance interests of sellers need not be disturbed if the Court determines that the physical presence test has become unworkable as a test for undue burdens. 16

B. This Court cannot justify retaining a dormant commerce clause standard that unreasonably restricts state authority because Congress may have unexpressed intent regarding that standard..... 19

C. Revision of the sales tax nexus standard can be accomplished without the states imposing undue burdens, nor do they have any interest in imposing such burdens on interstate commerce..... 25

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

A&F Trademark, Inc. v. Tolson,
605 S.E.2d 187 (N.C. Ct. App. 2004) 7

Am. Trucking Associations, Inc. v. Smith,
496 U.S. 167 (1990) 17

In re Appeal of Scholastic Book Clubs, Inc.,
920 P.2d 947 (Kan. 1996) 12

Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue,
567 A.2d 773 (Pa. Commw. Ct. 1989) 13

Borders Online, LLC v. State Bd. of Equalization,
129 Cal.App.4th 1179 (Cal. Ct. App. 2005) 13

Brown v. State of Maryland,
25 U.S. 419 (1827) 5

Capital One Bank v. Comm'r of Revenue,
899 N.E.2d 76 (Mass. 2009) 7

Cleveland v. United States,
329 U.S. 14 (1946) 22

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 3, 5, 18, 20

Couchot v. State Lottery Comm'n,
659 N.E.2d 1225 (Ohio 1996) 6

Crutchfield Corp. v. Testa,
88 N.E.3d 900 (Ohio 2016) 7, 21

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 21

ETC Mktg., Ltd. v. Harris Cty. Appraisal Dist.,
528 S.W.3d 70 (Tex. 2017) 7

General Motors Corp. v. City of Seattle,
25 P.3d 1022 (Wash. Ct. App. 2001) 7

Geoffrey, Inc. v. South Carolina Tax Comm'n,
437 S.E.2d 13 (S.C. 1993) 6

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993) 16

In re Intercard, Inc.,
14 P.3d 1111 (Kan. 2000) 12

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 16

KFC Corp. v. Iowa Dep't of Revenue,
792 N.W.2d 308 (Iowa 2010) 7

Kmart Corp. v. Taxation & Revenue Dep't,
131 P.3d 22 (N.M. 2005) 7

Lamtec Corp. v. Dep't of Revenue,
246 P.3d 788 (Wash. 2011) 7

Lanco, Inc. v. Director, Div. of Taxation,
908 A.2d 176 (N.J. 2006) 7

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.,
386 U.S. 753 (1967) ..... *passim*

Nat'l Geographic Society v. California Bd. of Equalization,
430 U.S. 551 (1977) 8

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 20

New Mexico Taxation & Revenue Dep't v. Barnesandnoble.com LLC,
303 P.3d 824 (N.M. 2013) 13

Northwestern States Portland Cement Co. v. Minnesota,
358 U.S. 450 (1959) 3, 23

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 5

Orvis Co. v. Tax Appeals Tribunal,
654 N.E.2d 954 (N.Y. 1995) 12

Payne v. Tennessee,
501 U.S. 808 (1991) 17, 18

Pledger v. Troll Books, Inc.,
871 S.W.2d 389 (Ark. 1994) 13

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Scholastic Book Clubs, Inc. v. Farr,
373 S.W.3d 558 (Tenn. Ct. App. 2012) 12

Scholastic Book Clubs, Inc. v. State Bd. of Equalization,
255 Cal. Rptr. 77 (Cal. Ct. App. 1989) 12

Scholastic Book Clubs, Inc. v. State, Dep't of Treasury, Revenue Div.,
567 N.W.2d 692 (Mich. Ct. App. 1997) 13

Scripto, Inc. v. Carson,
362 U.S. 207 (1960) 7

SFA Folio Collections, Inc. v. Bannon,
585 A.2d 666 (Conn. 1991) 13

SFA Folio Collections, Inc. v. Tracy,
652 N.E.2d 693 (Ohio 1995) 13

Spector Motor Service v. O'Connor,
340 U.S. 602 (1951) 5

Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226 (W. Va. 2007) 7

U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) 3

Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 8

Statutes

47 U.S.C. § 151 22

Other Authorities

Bloomberg BNA 2017 Survey of State Tax Departments, Special Multistate Tax Report, Vol. 24, No. 4, Bureau of Nat'l Affairs, Inc..... 13, 14, 15

Edward A. Zelinsky, *The Political Argument for Overruling Quill*, 82 Brook. L. Rev. 1177 (2017), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1551&context=blr 24

Federation of Tax Administrators Resolution 2017-1: Remote Seller Collection Authority, https://www.taxadmin.org/assets/docs/AssocDocs/2017-1.pdf..... 25

Multistate Tax Compact,
http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Original-Model-Multistate-Tax-Compact.pdf.aspx 2

INTEREST OF THE *AMICI CURIAE*

The Multistate Tax Commission (Commission) and the Federation of Tax Administrators (Federation) respectfully submit this brief as *amici curiae* in support of South Dakota, urging the Court to overturn *Quill* and permit states to adopt workable nexus standards for imposing sales and use tax collection requirements.[1]

The Commission is an intergovernmental state tax agency created by the Multistate Tax Compact and composed of the state tax agency heads of the states that are a party to the Compact. Other states participate in Commission activities as Sovereignty or Associate members.[2] The Commission's purposes include facilitating the determination of

---

[1] No counsel for any party authored this brief in whole or in part. Only *amici curiae* Multistate Tax Commission and Federation of Tax Administrators and their member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission and the Federation, not on behalf of any particular member state other than South Dakota. Counsel of record for the parties have filed blanket consents to the filing of *amicus* briefs.

[2] *Compact members* are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. *Sovereignty members* are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. *Associate Members* are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

tax liabilities of multistate businesses, promoting uniformity or compatibility in state tax systems, fostering taxpayer convenience and compliance, and avoiding duplicative taxation.[3] The Commission's principal activities include drafting model state tax laws, conducting joint state tax audits, and providing a "one-stop" program for multistate businesses to voluntarily disclose and settle unreported state tax liabilities.[4]

The Federation is the membership organization for state revenue agencies. Previously known as the National Association of Tax Administrators, the Federation has been operating since 1937. The members of the Federation are all 50 states, the District of Columbia, and the cities of New York and Philadelphia. The primary purpose of the Federation is to promote best practices in state tax administration and tax enforcement. The Federation accomplishes this purpose primarily through educational, information-sharing, and other cooperative programs.[5]

The Federation and the Commission have overlapping membership and similar goals. Moreo-

---

[3] *See* Art. I of the model Multistate Tax Compact, *available at*: http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Original-Model-Multistate-Tax-Compact.pdf.aspx (last visited March 1, 2018).

[4] Information on the Commission's programs and committees is at http://www.mtc.gov/.

[5] Information on the Federation and its activities is available on its website, at https://www.taxadmin.org/.

ver, the Commission's history is bound up with the Court's shifting dormant commerce clause and state tax nexus jurisprudence.[6] In 1959, after this Court held in *Northwestern States Portland Cement Co.*[7] that states could impose apportioned state income taxes on out-of-state businesses soliciting sales in those states, various groups urged Congress to step in. States responded by simplifying aspects of their tax systems and by forming the Commission. Eventually, this Court decided *Complete Auto*,[8] affirming *Northwestern States*, and rejecting, once and for all, the idea that interstate commerce is immune from its just share of fairly imposed state taxes.

Arguably, no organizations have a greater focus on the fair, effective administration and enforcement of state taxes than the Commission and the Federation. Therefore, this case is of the utmost interest to your *amici*.

SUMMARY OF ARGUMENT

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill., 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) adopted a physical-presence test as a bright-line nexus standard for imposing state sales and use tax collection obligations. Today, physical presence, as a test, no longer

---

[6] *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 555-556 (1978).

[7] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[8] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

creates a very bright line, but more troublingly, it bears so little relationship to the relative burdens of state tax collection that it leads to irrational results.

The *Quill* Court acknowledged that the physical presence standard was out of step with the modern dormant commerce clause doctrine. It nevertheless declined to change the standard, citing two collateral concerns—that overturning *Bellas Hess* would subject sellers to retroactive liabilities, and that the Court's due process analysis in *Bellas Hess* might have prevented Congress from changing the standard prospectively. The respondents here raise a third concern—that states will abuse any authority they are given to adopt alternative nexus standards. But if physical presence has become unworkable as a test for substantial nexus, it can be discarded without disturbing sellers' reliance interests, or altering Congress's ability or authority to act. Nor will this give the states any power other than to implement reasonable, workable alternative standards.

ARGUMENT

I. Fundamental dormant commerce clause doctrines evolve when necessary; so too should a test meant to serve those doctrines.

A. Under the modern dormant commerce clause doctrine, the role of the physical presence nexus standard in *Quill* is to serve as a test for undue burdens.

Interpretations of the dormant commerce clause doctrine and its restrictions on state taxes, have, in the words of the *Quill* Court, "evolved substantially." *Quill Corp. v. N. Dakota*, 504 U.S. 298, 309 (1992). Under the doctrine's original interpretation, the Court struck down nondiscriminatory state taxes imposing only insubstantial, incidental burdens on interstate commerce. *See Brown v. State of Maryland*, 25 U.S. 419 (1827)(striking Maryland's even-handed license tax as applied to out-of-state wholesalers bringing their wares into the state), and *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)(describing other early restrictive interpretations). But under the doctrine's modern interpretation, the same sorts of taxes are regularly upheld, even when the burdens imposed on interstate commerce are direct and substantial, as long as they are not "undue." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)(overruling *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)). This evolution in the interpretation of the dormant com-

merce clause undoubtedly kept the states from becoming mere vestiges of our federal system. It also proved that interstate commerce can bear the burdens of fairly imposed state taxes and still thrive.

The physical presence test was adopted as a nexus standard in this area "in the middle of [the Court's] latest rally between formalism and pragmatism," and is not necessarily dictated by "contemporary Commerce Clause jurisprudence." *Quill* at 310–11. The test was derived from the Court's observations, in 1967 and 1992, of the "sharp distinction" between the burdens that tax collection imposed on two business models used in the mail-order industry—one employing "retail outlets, solicitors, or property within a State," and one "do[ing] no more than communicat[ing] with customers in the State by mail or common carrier." *Quill* at 307. Physical presence was intended to function as a "bright-line" test and, critically, to substitute for case-by-case "evaluation of the actual burdens" that sales tax collection might impose on particular sellers. *Quill* at 314. The test has not been adopted as a nexus standard for other types of taxes, *Quill* at 317, nor do the states generally apply it as a standard for other taxes.[9]

---

[9] See cases rejecting the physical presence test as applying outside of the sales tax collection context which include, among others: *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993)(*cert. denied*, 510 U.S. 992 (1993)); *Couchot v. State Lottery Comm'n*, 659 N.E.2d 1225 (Ohio 1996)(*cert. denied*, 519 U.S. 810 (1996)); *General Motors Corp.*

B. As a bright-line test for undue burdens, sales volume thresholds are much more workable than physical presence.

This Court's modern interpretation of the dormant commerce clause no longer treats interstate commerce as immune from state tax burdens generally, including state sales and use tax collection requirements. So, for example, a seller operating almost entirely outside the state, with only a small contract sales force in the state, can be subjected to tax collection obligations on sales made into the state. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)(where the Court reasoned that the sales force's "effectiveness in securing a substantial flow of goods" into the state also demonstrated that the nexus was substantial). And, a state may tax sales made by the mail-order division of a business where that business's only physical presence in the state is

---

v. City of Seattle, 25 P.3d 1022 (Wash. Ct. App. 2001)(*cert. denied*, 535 U.S. 1056 (2002)); *A&F Trademark, Inc. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004)(*cert. denied*, 546 U.S. 821 (2005)); *Kmart Corp. v. Taxation & Revenue Dep't*, 131 P.3d 22 (N.M. 2005); *Tax Comm'r v. MBNA Am. Bank, NA*, 640 S.E.2d 226 (W. Va. 2007)(*cert. denied*, 551 U.S. 1141 (2007)); *Lanco, Inc. v. Director, Div. of Taxation*, 908 A.2d 176 (N.J. 2006)(*cert. denied*, 551 U.S. 1131 (2007)); *Capital One Bank v. Comm'r of Revenue*, 899 N.E.2d 76 (Mass. 2009)(*cert. denied*, 557 U.S. 919 (2009)); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010)(*cert. denied*, 565 U.S. 817 (2011)); *Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788 (Wash. 2011)(*cert. denied*, 565 U.S. 816 (2011); *Crutchfield Corp. v. Testa*, 88 N.E.3d 900 (Ohio 2016); *ETC Mktg., Ltd. v. Harris Cty. Appraisal Dist.*, 528 S.W.3d 70 (Tex. 2017)(*cert. denied*, 138 S. Ct. 557 (2017)).

unrelated to the mail-order division. *Nat'l Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977). In short, the Court has long held that sales and use tax collection requirements do not impose "undue" burdens on interstate commerce generally.

The *Quill* Court, however, made this statement, which has plagued those who seek to understand the rationale for its holding: "Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens . . . but also, in some situations, by the demarcation of *a discrete realm of commercial activity* that is free from interstate taxation." *Quill* 314–15 (emphasis added). This statement could be read to mean that any bright-line rule will suffice, so long as the "discrete realm" that it carves out for protection is sufficiently large enough to adequately reduce the *total* burden on interstate commerce. But even if such an indiscriminate rule might have a positive effect on commerce, there is no reasonable interpretation of the dormant commerce clause that would support it. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their *just share* of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)(emphasis added). It is impossible to impose a "just share" of state tax burdens on interstate commerce if a "discrete realm of commercial activity" is arbitrarily excluded. "Undue" burdens cannot, therefore, refer to some excess quantity of the total bur-

den imposed on interstate commerce. Rather, if burdens that are otherwise generally permissible may become "undue," it must be because, under the particular circumstances, they significantly exceed, in relative terms, the normal burdens.

The parties in this case and their *amici* dispute whether the overall burden of sales tax collection has gone up or gone down since 1992. We believe there are significant reasons to conclude that the overall burden has gone down. But whether it has gone up, or down, or stayed the same, there is no justification for granting an indiscriminate exemption from that burden.

As for the relative burden of tax collection, it is most closely related to the seller's volume of sales. In large part, this is because there are certain "fixed" costs of tax collection and remittance, that is, costs that must be incurred regardless of the volume of sales. Spreading these fixed costs across a higher volume effectively reduces the relative cost per sale. For very small sellers, these fixed costs alone may be prohibitive. For larger sellers, however, they simply become a very minor cost that can be covered by the price charged for goods sold.

The volume of sales in a state is also an indicator of the overall size of the seller, which also affects a seller's ability to undertake certain compliance-related tasks. For example, a small seller may have too few employees to take on the additional tasks of handling a tax audit, and might therefore

have to hire additional staff. A larger seller, by contrast, may have more flexibility to handle such tasks because it has more employees whose duties can be shifted, as necessary.

Of course, no single standard, whether it is sales volume or physical presence, will be a perfect substitute for a case-by-case, factual analysis of the actual burdens imposed on particular sellers. Smaller sellers might actually have relatively low burdens in some cases. For example, the relative burden of determining the taxability of sales might be lower for a small seller with a much narrower product line compared to a somewhat larger seller that has a much more diverse product line. Similarly, the relative burden on a small seller making sales within a limited region would be lower than the burden on a somewhat larger seller making sales nationally. A nexus standard that uses a sales threshold, therefore, might tend to protect a number of smaller sellers whose overall tax collection burdens would actually be relatively low in comparison to somewhat larger sellers. But today, using physical presence as a test for nexus creates the opposite problem. Rather than overprotecting smaller sellers, it overprotects very large ones.

There was a time when physical presence was a more accurate predictor of whether a seller might have significant sales (and therefore a lower relative burden) in a particular state. Indeed, throughout most of our history, it was virtually impossible for sellers to contact potential customers, transact sales,

or deliver products without some physical presence in a state. And even as late as 1992, when mail-order was the business model for remote sales, the burdens imposed could be qualitatively different because the calculation of the tax generally had to be done by the mail-order customer, paying by check, rather than by the seller, as would be the case in a face-to-face transaction.

But today, physical presence does not dictate or even accurately predict a seller's volume of sales in a state. Nor do the same qualitative differences in burdens exist today due to the technology that facilitates calculating, charging, and collecting tax on orders made remotely. As amply demonstrated by the respondents in this case, it is possible for sellers to have millions of dollars of sales into a state, even a small state, without having any physical presence there. Exempting such sellers from any sales tax collection obligations, while imposing the same obligations on much smaller sellers operating by more traditional means, does not result in the imposition of a "just share" of those tax collection burdens on interstate commerce. The physical presence standard may very well reduce the total burden of state tax collection on interstate commerce, but it does so in an increasingly indiscriminate fashion. In sum, the physical presence standard must evolve.

II. Physical presence, as a test for sales and use tax nexus, not only produces irrational results, but is increasingly incapable of providing a predictable bright line.

Not only does physical presence fail to yield rational results, as noted above, but numerous examples demonstrate that the physical presence standard fails to produce consistent results, especially where the type of presence at issue is something other than the "retail outlets, solicitors, or property" that marked the difference between traditional mail-order sellers' primary business models. For example, courts have reached conflicting judgments as to when intermittent contacts are sufficient to create nexus. *Compare Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954 (N.Y. 1995), *cert. denied*, 516 U.S. 989 (1995)(nexus established by 19 customer visits on an average of four times a year), *with In re Intercard, Inc.*, 14 P.3d 1111 (Kan. 2000)(nexus not established by 11 in-state installation visits to the company's largest in-state customer over three month period). Courts have also differed on the extent to which third parties can create nexus for sellers, even in virtually identical circumstances. For example, some courts have held that teachers taking orders for a book club seller can create nexus for that seller. *See In re Appeal of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996), *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 255 Cal. Rptr. 77 (Cal. Ct. App. 1989), and *Scholastic Book Clubs, Inc. v. Farr*, 373 S.W.3d 558 (Tenn. Ct. App. 2012), *cert. denied*, 133 S.Ct. 663 (2012). But other courts have held that

teachers taking orders for a book club do not create nexus. *See Scholastic Book Clubs, Inc. v. State, Dep't of Treasury, Revenue Div.*, 567 N.W.2d 692 (Mich. Ct. App. 1997), *appeal denied* 586 N.W.2d 923 (Mich. 1998), *Pledger v. Troll Books, Inc.*, 871 S.W.2d 389 (Ark. 1994). Courts have also differed on whether affiliated entities can create nexus for each other. *Compare New Mexico Taxation & Revenue Dep't v. Barnesandnoble.com LLC*, 303 P.3d 824 (N.M. 2013); and *Borders Online, LLC v. State Bd. of Equalization*, 129 Cal.App.4th 1179 (Cal. Ct. App. 2005) (in-state affiliate created nexus for remote seller); *with SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995); and *Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989). So if the physical presence standard has, indeed, minimized the need for case-by-case analysis of actual burdens, it has substituted a similarly difficult case-by-case analysis of the exact type of physical presence a seller has in a state.

Every year, Bloomberg BNA publishes a multi-state report surveying state revenue agencies on their administrative policies with respect to sales tax nexus and other matters. 2017 Survey of State Tax Departments, Special Multistate Tax Report, Vol. 24, No. 4, Bureau of Nat'l Affairs, Inc. The most recent report listed the following instances where states substantially diverged in their answers to whether an out-of-state company had created sales

and use tax nexus based solely on a particular circumstance, including:

- Seller uses returnable containers to deliver products, *id.* at S-386-88;
- Seller attends trade shows, *id.* at S-390-93;
- Seller meets with instate suppliers, *id.*;
- Seller uses third-party warranty servicers, *id.* at S-394-97;
- Seller uses an in-state company to make drop-shipments of goods, *id.*;
- Seller maintains an Internet link with an in-state third-party which has a website and is paid each time the seller's ad is displayed ("per impression" agreements), *id.* at S-410-12;
- Seller uses a paid web-hosting provider with an instate server, *id.* at S-414-16;
- Seller sells software licenses, *id.* at S-418-20;
- Seller sells data that is located on a server within the state, *id.* at S-422-24;
- Seller picks up raw materials in the state, *id.* at S-426-28;
- Seller travels into the state between 6-12 times, or more than 12 times, other than to pick up or deliver goods, *id.*;
- Seller holds title to electricity or natural gas flowing through the state, *id.* at S-430-32;
- Seller hires a third party in the state to distribute physical or electronic promotional materials to potential customers, *id.* at S-434-36;

- Seller hires a third party in the state to solicit sales by telephone, *id.*;
- Seller hires a third party in the state to negotiate to buy products in the state, *id.* at S-438-40;
- Seller has agreement with instate third party with a website that refers customers to the seller through a link on that website, *id.*;
- Seller has franchise agreement with third party in the state and makes between 1-6 inspection visits per year, *id.* at S-442-44;
- Seller is out-of-state manufacturer that uses a distributor with nexus in the state to take orders which are then delivered by common carrier, *id.* at S-462-63; and
- Seller is an out-of-state distributor that uses its instate manufacturer to deliver products to customers, *id.*

These examples demonstrate how little definitive guidance the physical presence standard provides in today's marketplace.

Nevertheless, despite its questionable pedigree, growing deficiencies, and the existence of at least one superior alternative, the physical presence standard persists, while more fundamental dormant commerce clause precedents have become extinct. This appears to be due to three collateral concerns, not related to the standard itself, but to the possible effects that overturning *Quill* and *Bellas Hess* might have. We address these concerns in Section III.

III. Collateral concerns do not justify retaining physical presence as a nexus standard.

A. The reliance interests of sellers need not be disturbed if the Court determines that the physical presence test has become unworkable as a test for undue burdens.

In *Quill*, the North Dakota Supreme Court, citing "wholesale changes" in the economy and the law, declined to apply *Bellas Hess*. *Quill* at 303. Accordingly, before this Court, the state argued that *Bellas Hess* had been, or should be, overruled. This Court, however, noted that the two cases were "indistinguishable" *Id.* apparently referring to the relevant aspects of the mail-order businesses involved. It is not surprising, therefore, that the physical presence test, derived from the facts in *Bellas Hess*, was still considered workable when applied to the facts in *Quill*. *Id.* at 320 (Scalia, J. concurring). Nor is it surprising that the Court, in considering what it would mean to overrule *Bellas Hess*, might struggle to reconcile the reliance interests of the mail-order industry, *id.* at 317, with the general principle that its rulings are to be given retroactive effect. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

The *Quill* Court characterized the "substantial reliance" on the physical presence rule as having become part of the "basic framework of a sizable industry." *Quill* at 317. Of course, a bright-line test, the

very purpose of which is to substitute for the case-by-case determination of actual burdens, will naturally engender much stronger reliance interests than a more contextual inquiry into the particular facts of a given case. Such bright-line tests may, therefore, not be susceptible to incremental adaptation, even as they become obsolete. This is their inherent weakness.

It has been said that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law *is*, not to prescribe what it *shall be*." *Am. Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 201 (1990)(Scalia, J. concurring)(emphasis added). But we believe the physical presence standard not only represents what the *law* is, but acts as a substitute for a determination of what the *facts* are ("actual burdens"). If so, then the Court may simply remove the physical presence standard and allow the weighing of actual burdens, as a factual matter, to proceed in all cases. That weighing, of course, can occur not only in the courts, but through administrative and legislative processes. And to the extent those administrative and legislative processes arrive at a reasonable assessment of the relative burdens, and provide reasonable standards to avoid undue burdens, those standards can be applied as well.

It has also been said: "If governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827

(1991)(internal citations omitted). This oft-cited passage from *Payne* clearly contemplates two different rationales for overturning precedent. We have not argued that *Complete Auto's* substantial nexus requirement was badly reasoned, or even that its purpose of reducing undue burdens cannot be served by an appropriate bright-line test. We have simply argued that *Quill's* specific bright-line test, still considered workable in 1992, no longer bears any clear relationship to the burdens it is meant to address, so as to be able to discern between allowable and undue burdens. In essence, the physical presence test has become a poor standard, or stand-in, for a necessary factual determination. If the Court agrees that the standard can no longer serve as a reliable test for undue burdens on out-of-state Internet sellers or other businesses engaging in electronic commerce, then it would simply be irrational to make such a holding retroactive unless the Court can determine at what point in time the physical presence test ceased to work.

Nevertheless, if the Court determines that the physical presence standard can be altered only by retroactively overruling *Quill*, then we respectfully submit that the Court must retroactively overrule *Quill*. As we discuss further below, the Court may not retain a standard that unreasonably limits state sovereign authority to impose tax collection obligations simply because of reliance interests engendered by that standard. Of course, by declining to make its ruling prospective, the Court would not necessarily subject remote sellers to past tax liabili-

ties. That will be a matter for the states to determine. And we expect that many states cannot or will not impose such retroactive liabilities.

B. This Court cannot justify retaining a dormant commerce clause standard that unreasonably restricts state authority because Congress may have unexpressed intent regarding that standard.

The *Quill* Court removed any doubt as to Congress's power to change the physical presence standard, saying: "[Congress's] decision not to take action in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest." *Quill* at 318 (1992). The Court's interest in putting "that problem to rest" is no mystery. Not only did the Court hope Congress might be able to better weigh the relevant burdens, but its enactments, unlike the Court's rulings, are generally given prospective effect. Thus, Congress could change the nexus standard without disturbing mail-order sellers' reliance interests. *Id.* But as we have argued, a ruling that the physical presence standard has become unworkable as a substitute for a factual determination is the type of ruling that inherently requires it be given prospective effect.

As for Congress being better able to weigh the burdens of state tax collection on interstate commerce, nothing the Court does in this case will

change the fact that "Congress remains free to disagree with [the Court's] conclusions." *Quill* at 318.

But this does not absolve the Court. If the physical presence standard restricts state authority in a way not supported by a reasonable interpretation of the dormant commerce clause, the Court cannot simply leave it in place, waiting for Congress to remove that restriction.

> What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 647 (2012)(Scalia, J., dissenting). The Court it is no less constrained by these structural limits upon federal power when it interprets the dormant commerce clause. While it is generally true that Congress can restore, by statute, any constitutional right unreasonably restricted by this Court's precedent, few would find that comforting.

Moreover, the requirements of the dormant commerce clause, and the substantial nexus prong of *Complete Auto*, which only this Court can speak to,

are issues that have ongoing application beyond this case. For years after *Quill*, states were uncertain whether the physical presence standard applied outside the sales tax collection context. The Court never addressed that issue, despite many opportunities, but state courts have had to grapple with it.[10] In fact, in the 25 years since *Quill*, this Court has not issued another opinion on what constitutes a substantial nexus with a state for any type of tax imposition. State lawmakers are currently considering whether to impose other obligations related to sales tax enforcement, such as information reporting, *see Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 593 (2016)), which involve questions of substantial nexus. Also, state courts are continuing to grapple with how substantial nexus applies to other taxes. See *Crutchfield Corp. v. Testa*, 88 N.E.3d 900 (Ohio 2016). In these and other areas, questions concerning the general requirements of substantial nexus would benefit from the Court's guidance.

Some may also argue that Congress's silence itself indicates its intent to leave the physical presence standard untouched. Silence, however, provides no reliable clue as to Congress's intent, as Justice Rutledge explained:

> There are vast differences between legislating by doing nothing and legislating by positive enactment, both in

---

[10] See fn. 6 *supra*.

> the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will. ... The danger of imputing to Congress, as a result of its failure to take positive or affirmative action ... is illustrated most dramatically perhaps by the vacillating and contradictory courses pursued in the long line of decisions imputing to 'the silence of Congress' varied effects in commerce clause cases.

Cleveland v. United States, 329 U.S. 14, 22–24 (1946)(Rutledge, J. concurring).

We must, however, address one specific action Congress *has* taken—the Internet Tax Freedom Act (ITFA).[11] One of the respondents' *amici* argues that ITFA's anti-discrimination provision was intended to, and can be interpreted to, preempt the action taken by South Dakota in this case. *See Brief of Chris Cox, Former Member of Congress and Co-Author of the Internet Tax Freedom Act, As* Amicus Curiae *in Support of Respondents.*[12] We do not credit this argument, nor do we agree that the interpreta-

---

[11] ITFA was made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note).

[12] *Available at* https://www.supremecourt.gov/DocketPDF/17/17-494/23030/20171207151532703_Amicus%20Brief.pdf (last visited Feb. 25, 2018)

tion is a reasonable reading of the statutory text. The anti-discrimination provision prohibits differential tax treatment of transactions that are essentially identical except that one is made over the Internet. The asserted interpretation, in contrast, compares transactions that are factually different in other ways. *Id.* at 11–12. Indeed, this same interpretation, if applied to existing state law, would preempt sales taxes currently imposed, yet we are not aware of any case that has argued for or any court that has held that the anti-discrimination provision may be interpreted in this way. We also note that Wayfair does not assert that ITFA preempts South Dakota's action here.

Finally, we must respond to the *Quill* Court's assertion that the issue in this case is one that Congress "may be better qualified to resolve," *Quill* at 318. That Congress is the proper institution to address this issue was also the chief argument made by the respondents in their Brief in Opposition to Writ of Certiorari (see p. 9). It was also, notably, a sentiment expressed by those who long opposed the evolution of the Court's dormant commerce clause doctrines and the loosening of its perceived restrictions on the states. As Justice Frankfurter, a chief opponent of the modern dormant commerce clause, expressed in his dissent in *Northwestern States Portland Cement*: "The question is not whether a fair share of the profits derived from the carrying on of exclusively interstate commerce should contribute to the cost of the state governments. The question is whether the answer to this problem rests *with this*

Court or with Congress." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 475 (1959)(Frankfurter, J. dissenting)(emphasis added).

Conspicuously missing from this formulation of the question is any mention of the role of the states. Nor is that surprising. Those who oppose the imposition of state tax requirements naturally cast the states as a problem to be solved by the federal government, rather than important participants in our federal system. But relegating the states to petitioning Congress for relief, and assuming that this resolves any interests they may have, simply ignores "the tactical advantage *Quill* bestows in the political process upon the Internet and mail-order industries," and "the unique disadvantages of the states in the federal legislative process."[13]

The states cannot be faulted if they view the lack of congressional action as an indication that they simply lack the clout to obtain any change. The Federation, which had a long-standing resolution advocating for a Congressional solution, has recently recognized this reality and, in 2017, it resolved as follows:

> Decades of good-faith effort has generated no meaningful progress by Con-

---

[13] Edward A. Zelinsky, *The Political Argument for Overruling* Quill, 82 Brook. L. Rev. 1177, 1178 (2017), *available at* https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1551&context=blr (last visited Feb. 27, 2018).

> gress toward the goal of developing a workable solution for all stakeholders related to the issue of remote seller collection authority. At this time, it appears that any federal legislation could contain unacceptable language that limits state taxing authority. Therefore, FTA supports the right of any state to enact fair and reasonable laws related to remote seller collection authority and to test the limits of, or seek to overturn, the *Quill* decision.

Federation of Tax Administrators Resolution 2017-1: Remote Seller Collection Authority, *available at* https://www.taxadmin.org/assets/docs/AssocDocs/2017-1.pdf (last visited March 1, 2018).

C. Revision of the sales tax nexus standard can be accomplished without the states imposing undue burdens, nor do they have any interest in imposing such burdens on interstate commerce.

Respondents and their *amici* also speculate about a parade of horribles that will come to pass if states are given the authority to replace the physical presence standard. We address certain specific concerns below.

1. *Adoption of unreasonably low thresholds.* Taking into account South Dakota's small population, its sales-threshold standard of $100,000 (or 200 sales)

will exempt most small and even some medium-sized sellers from having to collect sales tax. Even small states have reasons to refrain from imposing an unduly low threshold standard. First, a substantial portion of total sales made will be exempt, either as sales for resale or for some other reason, so that a substantial percentage of total sales will not generate any tax. Second, states will, themselves, incur costs to register, track, process returns, and provide notices to small sellers, that, like the fixed costs of compliance, make imposing tax collection obligations on small sellers inefficient from the states' standpoint. In addition, small start-up businesses cease operations with greater frequency and, when this happens, it is generally incumbent on a state administrator to follow up to determine why the seller has stopped filing reports and then cancel the seller's registration and annotate any agency files. Other enforcement and collection actions are even more costly, especially when the business has no physical presence in the state, and resources for such actions are limited.

2. *Adoption of different state thresholds.* Not only is it preferable to allow states to vary the amount of the sales-threshold standard, it might actually increase overall burdens to impose a national standard. States may vary their standard based, in part, on their population or other relevant factors such as whether or not the state provides simplified methods of compliance or allows "vendor collection discounts"

to offset the sellers' costs.[14] Based on these factors, states may determine that they wish to have a standard that would be higher than an equivalent national standard would be. Nor is it possible for a national standard to reflect all the state-specific factors that may be relevant. Moreover, even an effectively equivalent national standard would not impose a lower burden since, presumably, a seller that exceeded that national standard would be required to collect and remit tax in every state into which it had sales, even in states where its total sales are minimal.

3. *The administrative rules to implement sales thresholds do not exist.* Administrative rules are necessary to implement sales thresholds, just as they have been necessary to implement the physical presence standard. But in comparison to physical presence, sales thresholds would be simpler to administer. Moreover, most of the necessary rules, including rules for sourcing of sales to particular states, already exist. Indeed, these sourcing rules, that generally look to the destination to where the goods are shipped or services are performed, are necessary to impose the tax. Sales-threshold standards offer another advantage over physical presence, in terms of practical application. A seller's physical contacts

---

[14] 30 states currently provide these discounts to vendors to compensate them for the time and expense incurred in collecting the tax on behalf of state and local jurisdictions. The discount is usually provided by allowing the vendor to retain a percentage of the amount collected that is to be remitted for tax payment.

may change from *de minimis* to substantial in a matter of days, causing the seller to become subject to tax in a current reporting period, whereas a seller will have more notice that its sales have exceeded (or may exceed) sales-threshold standards in some earlier measuring period.

4. *Smaller sellers will be subjected to audits.* Audits serve an important administrative function. Their purpose is not to harass taxpayers, but to ensure a level of compliance with a system that is otherwise entirely voluntary. But the chance of a small seller being subjected to regular audit is extremely small. State audit resources are limited, and any audit that is likely to be unduly expensive for the taxpayer, given its size and amount of sales, will also be unduly expensive for the state. If, on average, taxes are underreported by ten percent, then assuming the tax rate is eight percent, an audit of a seller making $1 million in sales into the state will generate, on average, only $8,000. Of course, some taxpayers may underreport by much more than the average rate. Where a state has information that taxpayer has underreported by 50 percent, for example, this would likely increase that taxpayer's chance of being audited, as it should. But, it is also true that states have other ways of dealing with apparent underreporting, besides full-fledged audits, which reduce the administrative costs for both the state and the taxpayer. Moreover, even the low rate of audits of in-state sellers is likely to overstate the chance that an out-of-state seller will be audited since in-state sellers are sometimes audited for additional purposes, in-

cluding to determine if they have paid use tax on equipment used in the state or have properly withheld taxes on employees working in the state.

5. *Sales thresholds will generate litigation and will burden the courts.* While we believe the implementation of sales-threshold nexus standards should be fairly straightforward, it is possible that there may be challenges to those standards or their application in particular circumstances. But the physical presence standard generated substantial litigation over the last 25 years, although none of those cases ever reached this Court. There is no reason to expect that litigation over sales thresholds will be any greater burden on state courts, or on this Court.

CONCLUSION

The physical presence nexus standard for state sales and use tax collection is no longer suited to the purpose of distinguishing undue burdens on interstate commerce. That nexus standard must, therefore, evolve. Your *amici* submit that this evolution can be accomplished by holding that the standard has become unworkable and granting states the authority, through their legislative and regulatory processes, to adopt more appropriate standards. This need not disturb sellers' reliance interests, nor will it affect the ability of the courts or Congress to ensure that states do not abuse that authority.

Respectfully submitted,

Gregory S. Matson
Multistate Tax Commission
444 North Capitol St., N.W., Suite 425
Washington, D.C. 20001

Gale Garriott
Federation of Tax Administrators
444 North Capitol St., N.W., Suite 348
Washington, D.C. 20001

Helen Hecht
Counsel of Record
Lila Disque
Bruce Fort
Richard Cram
Counsel

Multistate Tax Commission
444 North Capitol St., N.W., Suite 425
Washington, D.C. 20001
(202) 650-0300
hhecht@mtc.gov

March 5, 2018

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL ASSOCIATION OF CERTIFIED SERVICE PROVIDERS AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
rdeutsch@deutschhunt.com

QUESTION PRESENTED

Should this Court abrogate *Quill's* sales-tax-only, physical-presence requirement?

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

A VIBRANT MARKET PROVIDES REMOTE RETAILERS WITH AN ARRAY OF EASY AND AFFORDABLE SOFTWARE OPTIONS FOR AUTOMATICALLY CALCULATING AND REMITTING SALES TAX. 6

A. Modern Software Tools Make It Just as Easy—or Easier—for Internet Retailers to Collect Sales Tax as It Is for Them to Calculate Shipping or Process Payments. 7

B. Automated Sales Tax Collection and Administration Software Is Not Costly and Provides Important Benefits to Retailers 22

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967) 5, 17-18
Ohio v. Am. Express Co., 138 S. Ct. 355 (2017) 26
Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 4, 5, 6
United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016) 26

Statutes

72 Pa. Cons. Stat. § 7227 27
N.Y. Tax Law, § 1137(f) 27
S.D. Codified Laws § 10-45-27.2 27
Tex. Tax Code Ann. § 151.423 27

Other Authorities

Anne Helmond, *The Platformization of the Web: Making Web Data Platform Ready*, SOC. MEDIA & SOC'Y, Jul.-Dec. 2015 (2017) 11
Ben Dwyer, *Average Credit Card Processing Fees* 26
BigCommerce, Search Apps and Extensions 12
Chris Apollo Lynn, *Ecommerce Trends: What the history of selling online means to your store today*, Bigcommerce Blog (Sept. 15, 2014) 8, 10
Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 STATE TAX NOTES 571 (Aug. 7, 2017) ..... *passim*
Ecommerce Usage Statistics, Built With, Feb. 2018 12

Exploring Alternative Solutions on the Internet Sales Tax Issue: Hearing Before the H. Comm. on Judiciary, 113th Cong. (Mar. 12, 2014) 12-13, 23-24
James Fields, *Business applications outgrow 'walled gardens'*, TENNESSEAN, Sept. 15, 2013 ... 8, 9
Jessica Adamiak, *America's Strangest Taxes*, Travel & Leisure (Apr. 17, 2013) 17
Mark Boyd, *10 Ways Your eCommerce Businesses Can Use APIs*, eCommerce Insiders, Aug. 30, 2017 12
Michael Carroll, *Business-to-business e-commerce*, WEB TECHNIQUES, Nov. 1998 9
N.Y. State Dep't of Tax'n & Fin., Publication 718-C, Sales and Use Tax Rates On Clothing and Footwear (effective Dec. 1, 2015) 18
Peter H. Lewis, *Attention Shoppers: Internet Is Open*, N.Y. TIMES, Aug. 12, 1994 9
Ryan Holmes, *From Inside Walled Gardens, Social Networks Are Suffocating The Internet As We Know It*, Fast Company, Aug. 9, 2013 11
Seth Benzell et al., *The Impact of APIs on Firm Performance*, Boston University Questrom School of Business Research Paper No. 2843326 (May 21, 2017) 11
Software & Info. Industry Ass'n, *Software as a Service: Strategic Backgrounder* (Feb. 2001) 10
Streamlined Sales Tax Governing Board, Total Active Registered Accounts 22
Sung-Chi Chu et al., *Evolution of e-commerce Web sites: A conceptual framework and a longitudinal study*, 44 INFO. & MGMT. 154 (2007) 9-10
TaxCloud Developer Center 20

TaxCloud Developer Center, Getting Oriented With TaxCloud 21
TaxCloud, Taxability Information Codes 15
Taxify by Sovos: Features 21
WooCommerce UPS Shipping Plugin Setup Guide 15

Demonstration Videos

AccurateTax, Integrating with eCommerce Platform, https://go.nacsp.tax/plugin 15
TaxCloud, Assigning Taxability Information Codes, https://go.nacsp.tax/set_tic 16
TaxCloud, Finding Taxability Information Codes, https://go.nacsp.tax/find_tic 16
TaxCloud, Processing Exemptions, https://go.nacsp.tax/exempt 17
TaxCloud, Sales Transaction Processing, https://go.nacsp.tax/transaction 19
TaxCloud, Selecting States, https://go.nacsp.tax/states 14
Taxify by Sovos, Integrating with eCommerce Platform, https://go.nacsp.tax/ecommerce 15

No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari
to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL ASSOCIATION OF CERTIFIED SERVICE PROVIDERS AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICI CURIAE*[1]

Certified Service Providers serve as trusted intermediaries, providing software solutions for the

[1] This brief is filed with the written consent of all parties through blanket letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

real-time calculation and automated processing of sales tax for e-commerce retailers, in all States chosen by the retailer, regardless of a retailer's physical presence. Members of *Amicus* National Association of Certified Service Providers are certified by the 24 States that are signatories to the Streamlined Sales and Use Tax Agreement, and provide full services in all 50 States.

Working with state governments, Certified Service Providers provide a range of automated sales tax solutions, including cloud-based software that integrates with commonly used e-commerce platforms and customized software for bespoke websites. This software automatically calculates and collects taxes for retailers—with all local rates, tax holidays, and specific exemptions instantaneously factored-in. Certified Service Providers also work with retailers to assist in filing taxes, whether by processing returns directly, or by providing detailed returns and reports so that retailers can self-file.

The National Association of Certified Service Providers is committed to facilitating modern sales tax administration in the modern economy. NACSP was founded to advance automated sales tax collection and administration: promote the use of Certified Service Providers, certified by the States; educate the public and the retail industry about the role and benefits provided by Certified Service Providers; facilitate training, education, and research in computerized multistate sales tax compliance; and assist the States in maintaining and enforcing appropriate standards for Certified Service Providers and in obtaining and enforcing appropriate certification marks.

NACSP members include Federal Tax Authority LLC, doing business as TaxCloud, which provides cloud-based software that currently integrates with over 85 e-commerce platforms[2]; Taxometry, founded in 2013, providing a state-of-the-art software system that calculates sales tax automatically for online purchases and remits the tax to the appropriate State on behalf of retailers[3]; AccurateTax, offering an e-commerce sales tax software designed to perform real-time accurate sales tax calculations within shopping carts during the checkout process[4]; and Taxify by Sovos and Sovos Global Tax Determinations, both certified solutions provided by Sovos, a company founded in 1979 which provides comprehensive tax calculation, filing, remittance, and certificate management solutions for all business, ranging from Fortune 500 companies to small and medium enterprises.[5]

The multiple different cloud-based technology providers represented by NACSP are led by former state tax officials, experienced tax professionals, and e-commerce innovators. They provide compliance solutions for hundreds of thousands of small and mid-size business owners, as well as Fortune 500 companies.

Amicus Software & Information Industry Association ("SIIA") is the principal trade association

---

[2] *See* https://taxcloud.net.

[3] *See* www.taxometry.com.

[4] *See* https://www.accuratetax.com.

[5] *See* https://sovos.com *and* https://taxify.co.

for the software and digital information industries. The 700-plus software companies, search engine providers, data and analytics firms, information service companies, and digital publishers that constitute SIIA's membership serve nearly every segment of society, including business, education, government, healthcare, and consumers. SIAA's membership includes tax software providers and countless other companies that have fueled the growth of e-commerce.

Amici write to provide the Court with practical information about how sales tax collection across multiple jurisdictions presently works in e-commerce, and to explain that the very technologies that allow retailers to instantaneously process payments, or calculate shipping options, also make the calculation of such sales tax straightforward for retailers to manage.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1992, when the internet was predominantly a tool for government and scientists, not consumers; no one owned a smartphone; and e-commerce largely did not exist, the Court considered whether a State could "require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992). Adhering to a rule announced yet more decades earlier (in 1967), the Court declined to overrule *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and held—as a

matter of *stare decisis*, although "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today"—that under the dormant Commerce Clause, sellers with no physical presence in a State "are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 311, 315, 317-18.

Underpinning these rulings was a practical concern that, in 1967, "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [retailers'] interstate business in a virtual welter of complicated obligations in local jurisdictions." *Bellas Hess*, 386 U.S. at 759-760. And when *Quill* left the *Bellas Hess* ruling intact in 1992, the Court again expressed concern about those administrative burdens, 504 U.S. at 313 n.6 (citation omitted).

But the world has changed. Although state tax regulations might have placed "[u]ndue burdens on interstate commerce" in 1967, thereby violating the dormant Commerce Clause, *see Quill*, 504 U.S. at 314-315, out-of-state retailers do not live in the same world as in 1967, when *Bellas Hess* was decided, or even as in 1992, when *Quill* reaffirmed that ruling. *Quill*, decided a quarter-century ago, occurred before the first graphical browser was invented, before most homes had internet connections, and before e-commerce forever changed the retail landscape.

As Petitioner explains (Pet. Br. II.C), the *Quill* rule no longer alleviates special burdens on interstate sellers. Whatever the Court decides, it should be aware that the very technologies that have allowed the explosion of e-commerce since *Bellas Hess* and *Quill*

have also made it practically effortless for e-commerce retailers to calculate and collect sales tax in additional jurisdictions where they make sales beyond their home States. Given the often-free—and generally low-cost—automated solutions available, online sellers often can benefit when they opt to collect and remit state and local sales taxes, particularly in the streamlined States where Certified Service Providers provide no-cost automated solutions, and in States which often offer vendor discounts for prompt payments. In all events, the notion that out-of-state retailers would find it overly burdensome to keep track of every State's sales tax rules is simply no longer true.

ARGUMENT

A VIBRANT MARKET PROVIDES REMOTE RETAILERS WITH AN ARRAY OF EASY AND AFFORDABLE SOFTWARE OPTIONS FOR AUTOMATICALLY CALCULATING AND REMITTING SALES TAX.

To assist in "evaluation of the actual burdens imposed by particular regulations or taxes," *Quill*, 504 U.S. at 314-315, *amici* write to inform the Court of the many changes in technology and the marketplace that make it substantially easier for online retailers to collect sales and use tax in multiple—even thousands—of jurisdictions. Simply put: no retailer needs to manually calculate or file sales tax, or to keep track of the peculiarities in any jurisdiction's tax laws. Software that integrates easily within an online store can do it, on an automated, real-time basis (just as software instantaneously processes credit card

payments or calculates multiple shipping options). Retailers can opt for tax software solutions that automate the filing of tax returns and remittance of tax as well, or choose to download automatically generated, fully complete tax returns to self-file.

Retailers can choose from a wide array of market options for such software tools, ranging from low cost—or even for free, if they choose to file in all of the streamlined States (in which case the streamlined States cover the cost of the software)—applications that integrate with e-commerce shopping platforms, to affordable enterprise software solutions that are tailor-made to fit the needs of larger companies with bespoke platforms. And—in the case of Certified Service Providers—using such software absolves the retailers of the risk of calculation errors in the certifying States.

A. Modern Software Tools Make It Just as Easy—or Easier—for Internet Retailers to Collect Sales Tax as It Is for Them to Calculate Shipping or Process Payments.

Today, 51 years after *Bellas Hess* and 26 years after *Quill*, online retailers easily manage hundreds of millions of items for sale throughout the nation at any given moment, instantaneously meeting consumers' demands, processing payments, arranging for delivery, and calculating shipping costs. The same software and computing advances that have made it possible for a consumer to click once in an app on her smartphone and have a pair of running shoes charged

to her credit card and delivered to her door in two days have made it just as easy, if not easier, for the shoe store to collect and remit the sales tax on that transaction, no matter where the consumer lives in the United States or where that store is located.

1. Advances in E-Commerce Technology Since *Quill*

By one estimate, in 1999 it cost about $100,000 to build an online storefront—apart from the physical merchandise costs. Today, a retailer can set up an online store for less than $30 per month, and can do so over a weekend. Chris Apollo Lynn, *Ecommerce Trends: What the history of selling online means to your store today*, Bigcommerce Blog (Sept. 15, 2014).[6] A brief overview of the history of e-commerce and accompanying technological advances shows why it has become so easy for retailers to market their goods online, including completing routine tasks like collecting sales tax.

Before *Quill* was decided, in the 1980s, retailers (including those engaging in mail-order or other remote sales) used software applications described as "walled gardens." *See, e.g.*, James Fields, *Business applications outgrow 'walled gardens'*, TENNESSEAN, Sept. 15, 2013. These software applications, such as inventory-management, invoicing, or accounting programs, were installed locally on the retailer's own computers, and each system operated as a closed ecosystem siloed from other datasets and applications. *See id.* Sharing information between software

---

[6] *Available at* https://goo.gl/aXhP6q.

programs or between businesses required teams of computer programmers and/or expensive services that were out of reach for most small and medium-sized businesses. *Id.*; Michael Carroll, *Business-to-business e-commerce*, WEB TECHNIQUES, Nov. 1998, at 46.

Software for calculating sales tax was similarly closed-off from other systems. Data files listing tax rates were available in the market (on paper or tape) beginning in the 1970s, and a sales tax calculation program was launched in 1989, but there was no easy method to integrate sales tax software with any other system (like invoicing), nor to obtain updates to sales tax-related data. Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 STATE TAX NOTES 571, 574-575 (Aug. 7, 2017).

Fast forward to 1994 (two years after *Quill*), when a man in Philadelphia purchased an album by Sting from Noteworthy Music, a store based in Nashua, New Hampshire. Peter H. Lewis, *Attention Shoppers: Internet Is Open*, N.Y. TIMES, Aug. 12, 1994.[7] This transaction was the first to use technology that enabled the secure (encrypted) transmission of payment information over the internet. *Id.* The era of interactive e-commerce had begun. *See* Sung-Chi Chu et al., *Evolution of e-commerce Web sites: A conceptual framework and a longitudinal study*, 44 INFO. & MGMT. 154, 158 (2007) (describing the "Interactive Web era" in e-commerce).

---

[7] *Available at* https://goo.gl/fkx1qJ.

Despite having the capacity to make sales to consumers through the internet, retailers' back-office functions—including sales tax calculation—were still largely conducted using software programs installed on a retailer's own computers, and the software for different back-office functions was not easily integrated. *See* Yetter & Crosby, *supra*, at 575. What's more, setting up an online storefront required creating a bespoke system from the ground up, demanding significant programming skills or funds—recall the $100,000 estimate from 1999. Lynn, *Ecommerce Trends*, *supra*.

The 2000s, however, brought a significant advance, in the form of user-friendly, web-based software that retailers could use to set up and run online stores (including managing inventory, shipping, payments, etc.), without technical skills or teams of software developers. *See* Yetter & Crosby, *supra*, at 576. Web-based (or "cloud") software is hosted on the servers of a service provider, enabling multiple users to share the costs of developing, maintaining, and operating the software and reducing the up-front investment required from the user. *See* Software & Info. Industry Ass'n, *Software as a Service: Strategic Backgrounder* (Feb. 2001), at 9-11.[8]

The transformation of the internet from "a medium for publishing information" to "a distributed operating system that could deliver software services" rests in large part on an innovation known as application programming interfaces or "API"s. *See*

---

[8] *Available at* https://goo.gl/jV3L9F.

Anne Helmond, *The Platformization of the Web: Making Web Data Platform Ready*, SOC. MEDIA & SOC'Y, Jul.-Dec. 2015, at 3-4 (2017).[9] An API allows one software platform to share data with other applications, operating as "the gate[] in the walled garden." Ryan Holmes, *From Inside Walled Gardens, Social Networks Are Suffocating The Internet As We Know It*, Fast Company, Aug. 9, 2013[10]; Seth Benzell et al., *The Impact of APIs on Firm Performance*, Boston University Questrom School of Business Research Paper No. 2843326, at 3 (May 21, 2017).[11] For example, a retailer that has brick-and-mortar stores might want to display maps of its locations and provide users the ability to generate driving directions. Rather than developing its own mapping software and database, the retailer could use the Google Maps API for that purpose. *See* Holmes, *supra*.

There are now over 10,000 APIs offered in the marketplace, up from only a few hundred in 2005. Benzell, *supra*, at 4. For e-commerce retailers, that means there's an API (or, more likely, several choices of API) for every function necessary to run an online store. Need to process payments? There are many APIs for that. Manage shipping? Ditto. Automatically populate your online store with information about the products you carry? Another API. *See* Mark Boyd, *10 Ways Your eCommerce*

---

[9] *Available at* https://goo.gl/hQ5B1V.

[10] *Available at* https://goo.gl/pMFbyR.

[11] *Available at* https://goo.gl/W8octY.

Businesses Can Use APIs, eCommerce Insiders, Aug. 30, 2017.[12]

Retailers can also take advantage of pre-built cloud-based e-commerce platforms that integrate with large numbers of APIs, providing a ready-made packaged solution that allows an online retailer to easily manage shopping carts, checkout, payment, shipping, and everything in between—including sales tax calculation—in a plug-and-play fashion by simply selecting particular service providers for those functions. *See, e.g.*, BigCommerce, Search Apps and Extensions (listing hundreds of service providers that can be integrated into one e-commerce platform across fourteen categories, including shipping, payments, and accounting and tax).[13] Last year, the top ten platforms of this kind covered nearly half of the market. *Ecommerce Usage Statistics*, Built With, Feb. 2018.[14] One such platform called WooCommerce, which is free, was used by about a tenth of e-commerce sites in the United States. *Id.*

Generally, all but the very largest retailers (that have the resources and opt to develop a bespoke e-commerce system) use such platforms. *Exploring Alternative Solutions on the Internet Sales Tax Issue: Hearing Before the H. Comm. on Judiciary*, 113th Cong., at 2-3 (Mar. 12, 2014) (statement of R. David L.

---

[12] *Available at* https://goo.gl/iifMAk.

[13] *Available at* https://www.bigcommerce.com/apps/.

[14] *Available at* https://trends.builtwith.com/shop.

Campbell, CEO of TaxCloud).[15] Because of these platforms and APIs, tasks that used to require a substantial investment in hardware, software, and personnel with computer skills have now become tasks that a single shop owner with basic internet skills can complete in a few hours with a few clicks.

2. Modern Sales Tax Automation

These same advances in cloud computing and web-based software have made it very easy for online retailers to calculate, collect, and remit sales tax in multiple jurisdictions. This may be best illustrated by imagining yourself as an online retailer, following the steps you would likely take to start collecting sales tax in your home State, or possibly multiple States.

The process has four basic steps: (1) fill out some basic information about the business, (2) choose the States in which to collect tax, (3) connect the tax software to your e-commerce platform, and (4) tag your products with category labels. Whether you sell in one State or in many, the steps are identical (and only need be done once for each type of item sold). Every retailer tags products anyway, and after the tagged products are linked with tax software (which will likely need to be done for the State in which you have physical nexus) all it takes to collect and remit tax in additional States is the click of a button.

After this one-time set-up, everything else, from calculating and collecting sales tax on each

---

[15] *Available at* https://taxcloud.files.wordpress.com/2014/03/fedtax-judiciary-committee-statement-031214.pdf.

transaction, to filing returns is (or can be) accomplished by the software automatically.

Imagine you have just set up an online clothing store using an e-commerce platform, featuring accessories and T-shirts with witty sayings. You know you need to collect sales tax in at least your home State, so you go to the website of a sales tax software provider and register by filling out some basic information, like your business name and website. Step one is done.

Next, you choose the locations where you want to collect sales tax. This may involve clicking on a map or clicking on a State name from a list. You may also be asked to enter addresses where you have physical locations, which will automatically turn tax collection on in those States. If you wish to have the software file tax returns for you, you simply need to provide your sales tax license number and bank account information. To see a video of this process, visit https://go.nacsp.tax/states (showing software from NACSP member TaxCloud). Step two is done.[16]

Step three is to link your sales tax software with your online store. This may require installing a software "plug-in" or entering login or API credentials. To see a video of this process with NACSP member

---

[16] Your sales tax license number must be obtained from the States, but there are some automated options for that in some States, as well. For example, for Certified Service Providers, you may have the option to turn on all of the streamlined States in one click. And if you have opted to collect tax in all of the streamlined States, you need register for a license only once for all of the States, and a CSP will complete the registration for you. *See* https://goo.gl/2s32w2.

AccurateTax, visit https://go.nacsp.tax/plugin, and to see a video using Taxify, from NACSP member Sovos, visit https://go.nacsp.tax/ecommerce. This is the same basic process a retailer uses to install a payment processing plug-in to accept credit cards, or a shipping plug-in. The latter, which any online retailer that ships physical merchandise is likely to do, can be substantially more complicated and require many more advanced settings, like how to handle difficult-to-pack items and multiple different shipping options. *See, e.g.*, WooCommerce UPS Shipping Plugin Setup Guide.[17] For the more straightforward tax plug-in, the whole process has taken less than 10 minutes thus far, and you're nearly done.

Your next (and final) step is to tag the products in your online store so the software can assign Taxability Information Codes. *See, e.g.*, TaxCloud, Taxability Information Codes.[18] Each category of items that is treated differently by some jurisdiction in the United States has its own code. The software is provided by a team of tax professionals who continually update the programs to keep abreast of changing tax codes, and in the case of Certified Service Providers, those updates are certified by participating States. And the software, not the retailer, does the work of keeping track of whether an item is taxable or not in any particular jurisdiction. All the seller needs to know is what they sell. Videos showing how this

---

[17] https://www.youtube.com/watch?v=Yyb7aNkgMZ4.

[18] *Available at* https://taxcloud.com/tic/.

works can be seen at https://go.nacsp.tax/find_tic and https://go.nacsp.tax/set_tic.

Accordingly, all you need to do is assign your items to well-described categories, by scanning the list of categories provided in drop-down menus. For example, you would quickly see that your T-shirts fall into the general "clothing" category and do not meet any of the specialty clothing categories, so you tag all of your T-shirts as "clothing" by clicking a box.

You then work through the rest of your items. When you get to the belts that you sell, you see an entry for belt buckles, which informs you that belt-and-buckle combinations sold together should be assigned the "clothing accessories" code, whereas belt buckles sold independently of any belt should be assigned a distinct "belt buckle" code. *Id.* You categorize your belts and buckles accordingly. You are now done, and your e-commerce store will calculate and collect sales taxes in as many jurisdictions across the United States as you choose.[19]

Time spent tagging your inventory varies based on how many different types of things you sell, but is typically done only once for any item, and it has to be done for all of your items, anyway, to collect sales tax in your home State. The process is also made easier by the fact that you already categorize your T-shirts and other items so that customers can browse by

---

[19] For larger e-commerce sellers with varying inventories, the process might be more complex, and Certified Service Providers like Sovos provide software solutions and tailored services to assist businesses in managing this process.

category in your online store, allowing you to tag entire categories at once. And after all your merchandise is tagged and categorized, the software works automatically to calculate the correct amount of tax from any jurisdiction, in a way that is completely seamless to you and your customers. You don't need to know, for example, that belt buckles have their own Taxability Information Code because belt buckles are taxed differently in Texas than belts. *See* Jessica Adamiak, *America's Strangest Taxes*, Travel & Leisure (Apr. 17, 2013).[20] As an e-commerce operator, all you need to know is that the drop-down menu asked you to tag that item separately, and the software takes care of the rest.

Exemptions can also be handled without retailers needing to know the differing rules for exemptions in various States. Many software options can determine which buyers are tax-exempt in which States by automatically asking for (and checking) tax-exemption certificates for the most common exemptions as part of the sales transaction process (so long as you enable that option). A video displaying this can be viewed at https://go.nacsp.tax/exempt. Allowing the software to use exemption certificates to process exemptions means you, as the retailer, don't need to know either "remote and uncertain" facts about your buyers, *Bellas*

---

[20] *Available at* https://goo.gl/RBaevt. If you are aware, however, of an item-specific tax or exemption in a jurisdiction you do business in, and don't see that item singled out in the drop-down menu, you can contact the software provider, who will verify the information and modify the software accordingly, benefiting all users.

Hess, 386 U.S. at 759 n.14, or the categories of buyers that are tax-exempt in a particular State.

Likewise, you don't need to know when any particular jurisdiction has a tax holiday; the software provider keeps track of tax holidays, and any changes to those dates, and it calculates no tax on sales going to that jurisdiction on those days. The same goes for special rules that govern specific items, such as price thresholds. For example, some clothing below a certain price is not taxed in New York, even though clothing is generally a taxable category. *See* N.Y. State Dep't of Tax'n & Fin., Publication 718-C, Sales and Use Tax Rates On Clothing and Footwear (effective Dec. 1, 2015).[21] The merchant need not track what the taxability threshold is, or changes to that rule. The software provider will know when an item is under the threshold (and calculate no tax accordingly) and will update its systems with any rule changes. These updates—whether for tax holidays or tax thresholds or any other type of rule—will propagate immediately for the benefit of all merchants.

Here's how it works: at various points in the sales transaction (when the buyer clicks "checkout" or "buy," for example), an e-commerce website will automatically send requests with information (known as "calls") to the sales tax software API and then receive information back (like the amount of tax). The sales tax software uses the information the website is already collecting (shipping address, product type, quantity and price of items purchased) to accurately

---

[21] *Available at* https://goo.gl/KgbPYc.

calculate sales tax. And, for Certified Service Providers, the software is certified on an ongoing basis by the streamlined States, and retailers face no audit risk in the certified States from erroneous calculations. *See infra* at 24. To view a video of this with one software option, visit https://go.nacsp.tax/transaction. All of these software processes happen automatically, without any action by the retailer or customer, other than the actions necessary to make a purchase, such as entering a shipping address and clicking "buy."

Because the software is automatically calculating sales tax and logging each transaction as it is completed, the process of filing sales tax returns is largely automated as well. An e-commerce retailer can choose to have a service provider automatically file the return and remit the tax in any State. And where automated filing service is not available, or a retailer chooses not to use it, the software will generate the forms that need to be filed with all required information; all a retailer need do is submit them along with the tax. Adding additional States—even all of them—simply means that more automated reports are generated by the software, with no additional time required to set up the system or maintain records.

The use of user-friendly drop-down menus through the point-and-click process described above applies for online retailers using common e-commerce platforms. But the same automated calculation and record-keeping for sales tax collection can be delivered in different ways for different types of retailers. For customized online stores, built and run using unique software rather than e-commerce platforms, sales tax

service providers make it easy for developers to integrate their APIs by providing free, ready-made blocks of software source code in a variety of programming languages that can be cut-and-paste into an e-commerce site. *See, e.g.*, TaxCloud Developer Center. [22] As custom-built online storefronts are ordinarily created by developers or tech-savvy owners, integrating this sort of ready-made code is a straightforward task.

And beyond the web-hosted solutions, there remain many robust "on-premises" software options for businesses to choose from that provide as much or as little automation as the client chooses. For example, in addition to fully cloud-based offerings, NACSP member Sovos offers calculation software that can be installed locally and paired with a return-filing service or return-filing software, at the retailer's option, as well as a number of other combinations of services with hosted or on-premises software. *See also* Yetter & Crosby, *supra*, at 576.

Whether hosted online or at a retailer's location, the central premise of sales tax calculation software remains the same: it keeps track of every jurisdiction's rates and taxability classifications (including local tax holidays and jurisdiction-specific exemptions); it automatically calculates the sales tax owed based on information that the online seller already collects to complete every transaction (item sold and where it goes to); and it keeps the records and prepares the relevant returns.

---

[22] *Available at* https://dev.taxcloud.com/.

And all of this is continuously updated to respond to changing sales tax laws. *See, e.g.*, TaxCloud Developer Center, Getting Oriented With TaxCloud (describing automatically updated "feeds" that TaxCloud provides for tax categories so that an online store is automatically updated with the most current taxability information). [23] Sales tax software providers monitor changing state laws (and respond to user questions, as described above) so that online retailers do not have to do that work. *See* Taxify by Sovos: Features (describing 20 tax attorneys on staff for this purpose). [24] And with Certified Service Providers, the accuracy of these taxability determinations is continually certified by the States, so that retailers who accurately tag their inventory bear no risk of getting it wrong in the certifying States. *See* p. 24, *infra*.

With these automated tools available, it is no more burdensome to collect and remit tax in 50 (or 50,000) jurisdictions than it is to collect and remit sales tax to your home State—and easier, in fact, than handling shipping to all those disparate locations, where variations in fragility or perishability of product, and changing weather conditions, can further complicate the capacity to provide real-time calculations. Tens of thousands of e-commerce merchants are using software from Certified Software Providers, including nearly four thousand sellers that

---

[23] *Available at* https://dev.taxcloud.com/guides/getting-oriented-with-taxcloud.

[24] *Available at* https://taxify.co/features/.

have voluntarily registered to collect taxes in all of the streamlined States regardless of physical nexus, *see* Streamlined Sales Tax Governing Board, Total Active Registered Accounts.[25] This widespread adoption of sales tax software demonstrates how easy it is for retailers to calculate and remit sales tax in many jurisdictions. Together, and considering only the cloud-based options, software provided by Certified Service Providers calculated sales tax for more than 600 million transactions in 2017, representing more than $25 billion in online sales—and more than $2 billion in sales tax revenue to state governments.

B. Automated Sales Tax Collection and Administration Software Is Not Costly and Provides Important Benefits to Retailers

Technological developments have not only made it easy to handle sales tax collection in multiple jurisdictions, they have made it affordable. Certified Service Providers provide automated sales tax solutions in a variety of low-cost pricing models that scale up as a retailer's business does, and if e-commerce retailers volunteer to collect and remit taxes in streamlined States, they receive certified tax calculation and remittance services at no cost.

1. Because NACSP members' software and tax calculations are continually certified as accurate by the streamlined States, retailers using those services receive many benefits: free software (paid for by the States); no audit liability in certain States if there are

---

[25] *Available at* https://goo.gl/rtvJJe.

any inaccuracies in the calculations made by the software; the ability to use a single identification number to file and remit taxes for certain member States; and free filing of tax returns by the Certified Services Provider.[26]

In the 24 streamlined States, retailers who collect and remit taxes receive CSP services at no cost whatsoever, as the streamlined States finance this initiative. Under Section D.1 of the CSP contract, streamlined States pay CSPs for services provided to retailers that qualify as Volunteer Sellers (meaning, in broad brush terms, that they lack physical nexus).[27]

Under sections 501 and 502 of the SSUTA, moreover, each member of the Agreement (including not only full members, but also contingent members and associate States) certifies the accuracy of the software and must provide liability relief to retailers for incorrect tax calculation based on that certification. And when retailers have Certified Service Providers file their taxes directly, CSPs assume the primary responsibility for any jurisdictional audit inquiries. *See Exploring Alternative Solutions on the Internet Sales Tax Issue: Hearing Before the H. Comm. on Judiciary*, *supra*, at

---

[26] The Streamlined Sales and Use Tax Agreement ("SSUTA") may be found at https://goo.gl/ygPbB3 and is generally described in the brief of Amicus Curiae Streamlined Sales Tax Governing Board, Inc., filed in support of the Petition for Certiorari. The business immunity provisions are found in §§ 501 & 502 of the SSUTA.

[27] The CSP Contract may be found at http://tinyurl.com/CSPContract.

3-4. Retailers working with Certified Service Providers in the streamlined States thus not only receive no-cost, certified sales tax services, but also benefit from liability protections.

But not only retailers and streamlined States benefit from working with automated tax software solutions. Certified Service Providers and others provide automated solutions for the real-time collection and practically effortless remittance of sales tax in every State across the country, offering soup-to-nut services to retailers to ease any burden of tax compliance, which every State has a strong interest in securing. Beyond the States that have joined the SSUTA, the National Association of Certified Service Providers is also working with States outside of the SSUTA—including States that perhaps will never join because they want to retain their own unique tax structure—to set up similar certifications and liability protections for online retailers. Several States have expressed interest in certifying tax service providers outside of the SSUTA framework, and at least one has begun the process, recognizing the role and proficiency of Certified Service Providers in facilitating higher compliance rates and more accurate tax calculations. Such certifications will extend the benefits to retailers even further.

2. Some retailers volunteer to collect and remit taxes even when not required to do so under *Quill's* physical-nexus regime because it's inexpensive and easy to remit sales tax, and costly to get nexus wrong. The lack of certainty regarding physical-nexus rules and the high costs of non-compliance, the low-cost of tax calculation services, and prompt payment

discounts in various States, all contribute to making it easier for retailers to file in multiple jurisdictions.

Given the ever-changing definitions of what constitutes physical nexus across jurisdictions, retailers face tremendous costs and challenges to keep track of their physical activities (and depending on jurisdiction, those of their agents) across localities, and to monitor state nexus legislation, regulations, and case law. *See* Yetter & Crosby, *supra*, at 572-573; *accord* Pet. Br. II.A. The business risks associated with a nexus mistake can be "significant." Yetter & Crosby, *supra*, at 573. If collected at the time of sale, any sales tax amount should be a passthrough from the customer, not a cost to the seller. But if a seller fails to tax at time of sale, and later faces liability, the sales tax amount (on average 7 percent of sales price) will be paid directly by the seller, after the fact. And "penalties and interest on the uncollected tax can easily add another 30 percent to 40 percent to the tax bill over a three-year audit period." *Id.*

To the extent that retailers are nonetheless deciding not to collect sales tax—and gambling on being right about lacking physical nexus—it is not because of the cost of collecting and remitting sales tax, which is minimal when using software like that offered by Certified Service Providers. For retailers working with CSPs in the streamlined States, the costs of collecting sales tax are, of course, nil. And for the non-streamlined States, automated tax solutions are always affordable—often far below what retailers routinely pay for other e-commerce services—and readily tailored to the needs of diverse retailers.

Pricing models vary tremendously across service providers, including monthly flat fees and low transaction-based or sales-volume-based percentages. Pricing is often scaled to the size of the retailers' business and adjusted for the type of transaction (e.g. low-volume high-value transactions might be subject to different pricing than high-volume low-price transactions). Across the board, a retailer's out-of-pocket costs associated with automated real-time tax calculation and collection, and, if desired, automated reporting and remittance, are well within the range, if not below, other transaction costs that e-commerce retailers regularly incur when doing business, such as merchant interchange fees, or the provision of free shipping to customers.[28]

What's more, because the automated sales tax software market is vibrant and increasingly competitive, costs are continuing to decline as technology advances and new entrants join the market. As of August 2017 there were at least 33 providers of general sales and use tax automated solutions, including certified and non-certified providers, most of which are integrated with existing

---

[28] Merchant interchange fees for credit card payments, described in *United States v. Am. Express Co.*, 838 F.3d 179, 188 (2d Cir. 2016), *cert. granted sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017), vary across credit cards, and can range from 1 to 4% of transactions, *see, e.g.*, Ben Dwyer, *Average Credit Card Processing Fees*, *available at* https://goo.gl/LCmdax. For Amazon.com Marketplace retailers, transaction fees are 2.9% plus a per-transaction authorization fee. *See* https://goo.gl/Yd5jNp.

e-commerce shopping cart platforms. *See* Yetter and Crosby, *supra*, Appendix.

There is also some potential financial benefit for e-commerce retailers that routinely collect and timely remit sales tax.

Retailers that collect sales taxes in real time and promptly pay according to the varying payment schedules across jurisdictions (which Certified Service Providers track for the retailer, and make payments if authorized) can benefit from "vendor discount" laws that compensate for the costs of collecting the tax, ranging from 0.5% to 5% of tax received.[29] More than half of States provide such discounts, meaning that retailers who use software to collect taxes in real time at the moment of sale, and then promptly file, receive money in the form of a prompt-payment discount, perhaps even enough to more than cover any software costs (if there are any). That is all-the-more likely if they are a small retailer, depending on the amounts at issue and the size of the State's discount. And particularly so because, if they collect in the streamlined States, they may have little to no software costs at all.

---

[29] More than half of States currently provide prompt payment or vendor discounts at varying rates, including Texas (0.5%, Tex. Tax Code Ann. § 151.423) and New York (5% up to $200 per quarter, N.Y. Tax Law, § 1137(f)). Pennsylvania's discount is 1% or $25 per return for a monthly filer; $75 per return for a quarterly filer; or $150 per return for a semiannual filer. 72 Pa. Cons. Stat. § 7227. South Dakota, too, provides a prompt payment discount of 1 1/2% of the gross amount of tax due up to $70 per month. S.D. Codified Laws § 10-45-27.2.

The bottom line is that there is little or no cost to using certified automated tax software to collect sales tax in multiple jurisdictions, particularly for smaller retailers able to make use of off-the-shelf solutions. And whatever the retailer's size or unique demands, Certified Service Providers offer affordable software solutions that, like other e-commerce tools, scale to the business needs at hand. Retailers that use such solutions not only avoid potential liability for non-collection but may sometimes even come out financially ahead. Certified Service Providers' experience as trusted intermediaries helping to facilitate the prompt and accurate collection and payment of sales tax across countless retailers and jurisdictions demonstrates that it can be easy and affordable for retailers to calculate and remit sales taxes.

CONCLUSION

Cost-effective technology solutions are readily available that resolve the difficulty of calculating and remitting taxes across all jurisdictions.

Respectfully submitted.

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
Deutsch Hunt PLLC

March 1, 2018

No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

–v–

WAYFAIR, INC., OVERSTOCK.COM, INC., and NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF AMICUS CURIAE NATIONAL AUCTIONEERS ASSOCIATION AND 38 STATE AUCTIONEER ASSOCIATIONS IN SUPPORT OF THE RESPONDENTS

JONATHAN M. DUNITZ
COUNSEL OF RECORD
DAVID E. WARREN
BRIAN T. MARSHALL
VERRILL DANA, LLP
ONE PORTLAND SQUARE
PORTLAND, ME 04101
(207) 774-4000
JDUNITZ@VERRILLDANA.COM

APRIL 4, 2018 *COUNSEL FOR AMICUS CURIAE*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. OVERRULING THE PHYSICAL PRESENCE RULE WILL ADVERSELY IMPACT AUCTIONEERS AND OTHER SMALL BUSINESSES TO THE BENEFIT OF AMAZON AND OTHER LARGE E-COMMERCE COMPANIES 6

A. If this Court Overturns *Quill*, Small Businesses Will Be Forced to Collect Sales Tax on Even Minimal Interstate Sales 9

B. Contrary to Petitioner's Arguments, Complying with Different State and Local Tax Regimes Will Substantially Burden Small Businesses 13

II. OVERTURNING THE PHYSICAL PRESENCE RULE ANNOUNCED IN *BELLAS HESS* AND AFFIRMED IN *QUILL* WOULD BE CONTRARY TO *STARE DECISIS* AND UPSET THE SETTLED EXPECTATIONS OF ENTIRE INDUSTRIES 23

A. Auction Companies and Similar Small Businesses Have Relied on the *Quill* Rule for Decades 25

TABLE OF CONTENTS – Continued

Page

B. The Physical Presence Rule Provides Clarity; Overturning It Would Invite Greater Uncertainty and Further Litigation 28

C. Overturning *Quill* Would Invite Retroactive State Tax Collection That Would Create Chaos for Small Businesses . 33

CONCLUSION 35

APPENDIX: LIST OF STATE AUCTIONEER ASSOCIATIONS 37

TABLE OF AUTHORITIES

Page

CASES

Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520 (1959) 29

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 30, 31

Direct Mktg. Ass'n v. Brohl,
575 U.S. ___, 135 S.Ct. 1124 (2015) 12

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993) 33

Miller Bros. Co. v. Maryland,
347 U.S. 340 (1954) 26

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967) ..... passim

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551 (1977) 28

Payne v. Tennessee,
501 U.S. 808 (1991) 25

Pearson v. Callahan,
555 U.S. 223 (2009) 25

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 31

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... passim

Roberts v. Mars Petcare US, Inc.,
874 F.3d 953 (6th Cir. 2017) 22

TABLE OF AUTHORITIES—Continued

Page

United States v. Carlton,
512 U.S. 26 (1994) 33, 34

STATUTES

28 U.S.C. § 1341 22

S.D. Codified Laws § 10-45-2 10

S.D. Codified Laws § 10-45-5.2 32

S.D. Codified Laws § 10-64-2 ..... 9, 10, 32

S.D. Codified Laws § 10-64-9 8

JUDICIAL RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Arthur R. Rosen and Richard C. Call,
What is Minimal Substantial Nexus?,
State Tax Notes, Vol. 85 No. 1 (July 3,
2017), https://www.mwe.com/~/media/
files/press-room/2017/07/rosencall-7317.
pdf?la=eng 29

*AuctionTime.com Reports Over $623 Million
In Equipment Sold In 2017*, OpenSource
Magazine (Jan. 4, 2018), http://
opensource.sys-con.com/node/4216044 19

Chris Isidore,
*Amazon to Start Collecting State Sales
Taxes Everywhere*, CNN (Mar. 29, 2017)

TABLE OF AUTHORITIES—Continued

Page

http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html 7

Cloud Commerce and Sales Tax Compliance, Avalara Whitepaper, https://www1.avalara.com/us/en/learn/whitepapers/cloudcommercesalestax.html 4

David Brunori, *Don't Be Fooled – Services Should Be Subject to Sales Tax*, Forbes (Sept. 24, 2015), https://www.forbes.com/sites/taxanalysts/2015/09/24/dont-be-fooled-services-should-be-subject-to-sales-tax/#3c17d03450e7 32

David Gamage and Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. Rev. 483 (2012), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2700&context=facpubs 23

Definition of Lot, Merriam-Webster, https://www.merriam-webster.com/dictionary/lot 15

Diane Yetter, *What Online Retail Clients Can Expect in the Near Future*, AccountingWeb (Mar. 15, 2018), https://www.accountingweb.com/tax/sales-tax/what-online-retail-clients-can-expect-in-the-near-future 34

Donald Bruce and William F. Fox, *An Analysis of Internet Sales Taxation*

TABLE OF AUTHORITIES—Continued

Page

and the Small Seller Exemption, University of Tennessee Center for Business and Economic Research for the Small Business Association (Nov. 2013) 6

Illinois Department of Revenue, Sales Tax Issues for Auctioneers (April 1991), http://www.revenue.state.il.us/publications/bulletins/1991/FY91-49.PDF 20

Jared Walczak and Scott Drenkard, *State and Local Sales Tax Rates in 2018*, Tax Foundation (Feb. 13, 2018), https://taxfoundation.org/state-and-local-sales-tax-rates-2018/..... 26

Jennifer Dunn, *Which States Charge a Fee to Register for a Sales Tax Permit*, TaxJar (June 14, 2016), https://blog.taxjar.com/fee-register-for-a-sales-tax-permit/..... 21

Joseph Bishop-Henchman, *Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction*, Tax Foundation (Nov. 5, 2007), https://taxfoundation.org/why-quill-physical-presence-rule-shouldnt-go-way-personal-jurisdiction/ 30

Larry Kavanagh and Al Bessin, *The Real-World Challenges In Collecting Multi-State Sales Tax*, TruST (Sept. 2013), http://truesimplification.org/wp-

TABLE OF AUTHORITIES—Continued

Page

content/uploads/Final_TruST-COI-Paper-.pdf 16, 27, 28

Minnesota Department of Revenue, Sales Tax Fact Sheet 106, Farm Machinery (Aug. 2016), http://www.revenue.state.mn.us/businesses/sut/factsheets/fs106.pdf 18

Minnesota Department of Revenue, Sales Tax Fact Sheet 132, Isolated and Occasional Sales (Aug. 2017), http://www.revenue.state.mn.us/businesses/sut/factsheets/fs132.pdf 20

New York State Department of Taxation and Finance, TB-ST-275, Filing Requirements for Sales and Use Tax Returns (November 20, 2015), https://www.tax.ny.gov/pdf/tg_bulletins/sales/b15_275s.pdf 20

Nick Castellina, *The Roadmap to Sales and Use Tax Compliance*, Aberdeen Group (Mar. 30, 2016), http://www.aberdeenessentials.com/cfo-essentials/the-roadmap-to-sales-and-use-tax-compliance/ 14

South Dakota Department of Revenue, Agricultural Products (July 2017), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Ag%20Products.pdf 19

TABLE OF AUTHORITIES—Continued

Page

South Dakota Department of Revenue, Auctioneers, Auction Clerks and Auction Services (July 2013), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/auctions0713.pdf 19

South Dakota Department of Revenue, Farmers and Use Tax (July 2017), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Farmers%20Use%20Tax.pdf..... 18

South Dakota Department of Revenue, Sales and Use Tax Guide (July 2017), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/STGuide.pdf..... 10, 20

U.S. Government Accountability Office, GAO-18-114, *Sales Taxes: States Could Gain Revenue from Expanded Authority, But Businesses are Likely to Experience Compliance Costs* (Nov. 2017), https://www.gao.gov/assets/690/688437.pdf.....passim

U.S. Inflation Rate, 1989-2017 ($183,000,000,000), http://www.in2013dollars.com/1989-dollars-in-2017?amount=183000000000 24

INTEREST OF AMICUS[1]

The National Auctioneers Association (NAA) is the world's largest association of auction professionals. The NAA is a membership-based organization representing nearly 4,000 auctioneers serving a wide range of individuals, businesses, and industries. The 38 state auctioneer associations[2] joining NAA in this brief represent even more auctioneers, some of whom are also members of the NAA. Members and non-members alike recognize the NAA and their state associations as the voice of all auctioneers when laws or regulations threaten their livelihood.

Auctioneering is one of the world's oldest professions. Although a majority of auction companies are small, often family-owned businesses, auctioneers collectively facilitate commerce in America on a massive scale, selling a diverse variety of goods via live, online, and simulcast (concurrent live and online) auctions. It is common for an auctioneer to sell a $100,000 John Deere tractor and a $10 yellow pie plate at the same estate auction on a Saturday morning and, that evening, sell a table full of cakes at a charity auction

---

[1] Petitioner and Respondents have filed blanket consents to amicus briefs. Pursuant to Rule 37.6 no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any person other than the amicus curiae or their counsel, made a monetary contribution to fund the preparation or submission of this brief.

[2] A full list of the state auctioneer associations is included in the Appendix.

to support someone who is receiving cancer treatment in their local community.

While the chant of the auctioneer is familiar to many, the scale of the work auctioneers do to convert assets to cash is underappreciated. Auctioneers sell billions of dollars of idle assets each year, putting those assets back to work, and providing a valuable service to businesses, governments, individuals, communities, and the larger economy.

Auctioneers do not typically own the goods they sell at auctions, serving instead as agents of the sellers. In this capacity, auctioneers handle the marketing and logistics of auctions. As agents, auctioneers collect and remit sales taxes on the sale of goods sold and delivered in the jurisdiction of the auction.

One cannot overstate the adverse impact on auctioneers if this Court overrules the precedent it adopted more than 50 years ago in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and affirmed 25 years later in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Auctioneers have relied on this rule to determine when to collect and remit sales taxes, and the certainty afforded by the physical presence rule has allowed the auction profession to evolve and embrace online and other forms of interstate sales. If this Court overturns the physical presence rule, auction companies will face a complex web of state and local sales tax collection obligations and may become subject to retroactive sales tax liability for prior sales. While large retailers may be able to meet the burden of complying with multiple state and local taxation regimes, many auction companies and other small businesses will simply not

have the resources to absorb the costs of such compliance. The NAA and state auctioneer associations, on behalf of their members, have a vital interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner and its Amici cast their effort as a noble attempt to correct the "wrong" *Quill* decision and allow states to require internet retailers to pay their "fair share" of state sales taxes while purportedly imposing a "negligible burden" on interstate commerce. The burden is not negligible for thousands of small and medium-sized businesses that have relied—and continue to rely—on *Quill* to conduct interstate sales. For these businesses, including NAA's members, eliminating *Quill*'s physical presence requirement is not immaterial. It is an existential threat.

Auction companies are typical of small businesses throughout the country, and like many small businesses auction companies operate in a highly regulated environment.[3] More than 94% of NAA's member companies have twenty or fewer staff members and more than 80% have fewer than ten total employees.[4] Businesses this size simply cannot

---

[3] Many but not all states require that auctioneers be licensed to conduct auction sales in those states, while in other states licensure is required at the county or municipal level.

[4] National Auctioneers Association, Membership Database (March 12, 2018).

afford to hire tax compliance professionals or spend hours of staff time identifying, collecting, and remitting sales taxes in thousands of different taxing jurisdictions.

Petitioner argues that tax compliance software provides real time compliance support for little to no cost. Minimal investigation reveals that this sales pitch is vastly overstated. As one provider of tax compliance software put it, "compliance isn't easy or cheap."[5] Basic versions of tax software may be available for low monthly fees, but substantial additional fees apply for "premium" services including support for additional jurisdictions, ready-to-file return preparation, and actual remittance of sales taxes to each taxing authority. In addition, the Petitioner and its Amici ignore the substantial cost of staff time to integrate the software into existing accounting and payment management systems, including the staff time required to identify and enter product and purchaser information for the software to work. Such work is especially burdensome for auction companies because prices in every auction for every single item are different, established on an item-by-item basis by the successful bidders. In addition, unlike a large retailer that sells thousands or perhaps millions of identical products at identical prices, products offered by auction houses are often rare or unique and there is little overlap from auction to auction. All of these variables will make compliance by auctioneers expensive and cumbersome.

---

[5] *Cloud Commerce and Sales Tax Compliance*, Avalara Whitepaper, https://www1.avalara.com/us/en/learn/whitepapers/cloudcommercesalestax.html.

The *Quill* Court correctly determined that, although not a perfect standard, the physical presence requirement "foster[ed] investment by businesses and individuals" and had "become part of the basic framework of a sizable industry." *Quill*, 504 U.S. at 316-17. Significant growth of interstate commerce in the years since *Quill* makes that reasoning even stronger. Physical presence remains a straightforward, workable standard on which businesses can rely to know which state sales taxes they are responsible for collecting. As states increasingly test the limits of "physical presence," abrogating *Quill* will only exacerbate the uncertainty surrounding whether sellers must collect sales taxes, inviting endless litigation over the meaning of "substantial nexus" or "undue burden" instead of physical presence.

Finally, if this Court abrogates *Quill* states will be free to impose retroactive tax liability on businesses for prior sales. This will only compound the burdens on small businesses. Where such economic interests are at stake, this Court has recognized that *stare decisis* carries the most weight. Petitioner and its Amici have not made the compelling showing required for this Court to invalidate a 50-year precedent explicitly affirmed in 1992.

This Court should affirm the decision of the South Dakota Supreme Court and uphold the physical presence requirement this Court adopted in *Bellas Hess* and re-affirmed in *Quill*.

ARGUMENT

I. OVERRULING THE PHYSICAL PRESENCE RULE WILL ADVERSELY IMPACT AUCTIONEERS AND OTHER SMALL BUSINESSES TO THE BENEFIT OF AMAZON AND OTHER LARGE E-COMMERCE COMPANIES

Petitioner's focus on large internet retailers misses an important thread in this case: the incremental benefit to states is far outweighed by the significant damage to small businesses engaged in interstate commerce if this Court repeals *Quill*'s physical presence requirement. While Respondents may be easy targets for Petitioner and its Amici, a significant portion of interstate commerce is made up of small businesses engaged in consumer sales.[6] Unlike their larger competitors, most small businesses open up shop where they live. They do not strategically locate their operations to obtain a competitive advantage over brick-and-mortar competitors. These businesses are not clinging to an unfair tax advantage; they simply have limited resources to comply with a messy patchwork of obligations from thousands of different taxing jurisdictions. It is these small businesses that will bear the brunt of burdensome compliance in a post-*Quill* world.

---

[6] *See* Donald Bruce and William F. Fox, *An Analysis of Internet Sales Taxation and the Small Seller Exemption*, University of Tennessee Center for Business and Economic Research for the Small Business Association, at 31 (Nov. 2013) (finding that almost 43% of retail e-commerce is from companies with sales of less than $1 million annually).

South Dakota claims that imposing a sales tax on businesses without a physical presence in the state is simply "leveling the playing field" between physical and on-line retailers. Ironically, while Petitioner repeatedly cites Amazon as an example of the unfairness of the physical presence requirement, Amazon now collects sales taxes in every state that imposes state sales taxes.[7] Amazon is not an outlier in this regard but representative of a broader trend among large internet retailers. According to a November 2017 report of the United States Government Accountability Office, approximately 80 percent of the potential revenue from internet retail sales is already collected or collectible under current law.[8]

In fact, the actual impact of the physical presence rule on state revenues is much smaller than Petitioner and its Amici contend. Abrogation of the physical presence rule would only increase state and local sales tax receipts by an estimated two to four percent of their 2016 totals.[9] While this is not negligible, it is hardly a constitutional crisis. In South Dakota, the additional revenue derived from the collection of sales taxes by out-of-state businesses will not be used to fund essential services in the state but to reduce

---

[7] Chris Isidore, *Amazon to Start Collecting State Sales Taxes Everywhere*, CNN (Mar. 29, 2017) http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

[8] U.S. Government Accountability Office, GAO-18-114, *Sales Taxes States Could Gain Revenue from Expanded Authority, But Businesses are Likely to Experience Compliance Costs*, at 9 (Nov. 2017), https://www.gao.gov/assets/690/688437.pdf [hereinafter "U.S. GAO Report"].

[9] U.S. GAO Report, *supra* note 8, at 12.

other state taxes.[10] S.D. Codified Laws § 10-64-9 ("If the state is able to enforce the obligation to collect and remit sales tax on remote sellers . . . the additional net revenue from such obligation shall be used to reduce the rate of certain taxes."). Thus, under South Dakota law, the purported benefit of repealing the physical presence requirement for South Dakota is lower taxes for South Dakotans.[11] This benefit must be measured against the additional burden on interstate commerce if the physical presence requirement is eliminated.

Small businesses provide economic benefits to their communities and are a key component of interstate commerce. Auction companies in particular help state and local governments sell surplus property, help families liquidate estates, help businesses buy and sell highly specialized equipment, and connect individual buyers with individual sellers to facilitate

---

[10] South Dakota's proposal to reduce taxes in other areas undermines the argument made in the Amicus brief filed by Colorado, et al., that the explosion of internet sales robbed state treasuries of sales tax causing huge cuts in essential state programs. This argument rests on mere correlation, providing no evidence that the shortfalls necessitating the cuts were not brought on by other cracks in the states' taxing framework, like a greying workforce, reductions in federal funding, reduced property and income taxes, and the like.

[11] The claimed reduction of South Dakotans' taxes is an illusion because it is South Dakotans who will be paying the sales taxes that are ultimately collected under South Dakota's statute. In reality, South Dakota is essentially shifting how it taxes its residents rather than seeking a lost revenue stream. States are certainly within their right to choose a method or methods of taxation to impose on their residents, but these methods are subject to constitutional limitations, including the commerce clause.

transactions that would otherwise go unrealized. They pay taxes, including sales taxes when required in the jurisdictions in which they host auctions. They rely on *Quill* as an assurance that, merely by holding an auction in one state, they will not potentially become subject to many different state and local sales tax rules.

A. If this Court Overturns *Quill*, Small Businesses Will Be Forced to Collect Sales Tax on Even Minimal Interstate Sales

South Dakota argues that its statute is appropriately structured to exempt businesses that do not have significant sales in South Dakota. Specifically, South Dakota's statute applies to businesses that do more than $100,000 in sales or more than 200 transactions per year. S.D. Codified Laws § 10-64-2. Through this claimed *de minimis* exception, South Dakota may have intended to net only whales, but its bycatch will inevitably include many minnows.

Auctions are a perfect example of how South Dakota's statute will affect small businesses. Hundreds of items may be sold in a single auction, and often a single bidder will purchase dozens or more items. Under South Dakota's statute, if a handful of South Dakota residents become winning bidders on as few as 200 items in an out-of-state auction, whether live or online, South Dakota imposes a sales tax on the auctioneer. Each of those items would then need to be analyzed for exempt status, the appropriate sales tax rates would need to be calculated and collected for each item, and the total amount would need to be filed with South Dakota's Department of Revenue. This burdensome obligation could be triggered for as little as a few thousand dollars of purchases in a single auction.

Moreover, a small business cannot know if it will exceed the exemption thresholds in any given year. Under South Dakota's law, a seller is required to pay[12] sales taxes if it exceeds one of the thresholds "in the previous year or the current calendar year." S.D. Codified Laws § 10-64-2 (emphasis added). This standard requires a business to predict ahead of time whether it will later exceed the statute's thresholds in a calendar year. As a result, small businesses will likely feel forced to collect sales taxes, even if they are unlikely to exceed the statutory thresholds, since failing to do so and later exceeding one of the thresholds would result in the business absorbing the sales tax and facing possible non-compliance fines and penalties.

For example, if a business does not expect to exceed the revenue or transaction thresholds, it may choose not to collect sales taxes from South Dakota residents. If it then has a better than expected year and exceeds one of the thresholds, it will become responsible for taxes on sales made for the entire year. Unable to collect sales taxes from customers for

---

[12] The Brief for the United States proceeds from the false premise that South Dakota has imposed a mere collection requirement and not a tax on out-of-state sellers. Brief for the United States As Amicus Curiae Supporting Petitioner, at 11-23 (March 5, 2018). Under South Dakota law, however, the sales tax actually applies to the gross receipts of a business and the business is required to pay the tax regardless of whether it collects it from customers. S.D. Codified Laws § 10-45-2; South Dakota Department of Revenue, Sales and Use Tax Guide, at 3 (July 2017), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/STGuide.pdf ("[T]he seller is liable for the sales tax due, whether or not it is collected.").

sales made earlier in the year, it will be forced to pay the taxes itself. To avoid this scenario, the small business needs to charge sales tax on the very first sale it makes to a South Dakota resident. In short, from a practical standpoint, South Dakota's *de minimis* exemption is illusory.

Furthermore, other states will not be bound to South Dakota's exemption levels and will be free to impose sales tax on any and all sales. While Petitioner contends that states are unlikely to ensnare small businesses in minimal collection requirements, logic and experience suggest otherwise. A constitutional standard that depends on fifty states and thousands of taxing jurisdictions working together and agreeing on a single, streamlined collection process and exemption threshold is the height of folly. (Resp't's Br. at 16-19). States already have an interest in protecting their own businesses from burdensome taxation and streamlining sales taxation collection across state lines. Despite this incentive, states have adopted a wide variety of taxation schemes to generate additional sales tax revenue from out-of-state businesses.[13]

This strategy is unsurprising. Out-of-state sellers are an attractive target for states. Unlike their in-state counterparts, out-of-state sellers, especially small businesses, often lack political influence in the taxing state. Elected officials, wary of increasing other taxes on their constituents, will eagerly pursue sales tax revenue from out-of-state sellers.

---

[13] Brief of Tax Foundation as Amicus Curiae in Support of Neither Party, at 24-25 (Mar. 5, 2018) (collecting state statutes) [hereinafter "Tax Foundation Brief"].

In fact, some states have already adopted lower exemption thresholds in their expanded physical presence and reporting requirement statutes, as low as $10,000 (in 16 states), $5,000 (in Rhode Island), $2,000 (in Connecticut), and even no exemption whatsoever (in Pennsylvania).[14] These low exemption thresholds illustrate the impact on small businesses in a post-*Quill* world. As Justice Alito put it during oral argument in *Direct Marketing Association v. Brohl* (speaking only to the number of states, not the thousands of other taxing jurisdictions): "Now I will have to submit potentially 50 different forms to all of these States reporting that somebody in South Carolina purchased something from me that cost 23.99." Transcript of Record at 32:14-21, *Direct Mktg. Ass'n v. Brohl*, 575 U.S. ___, 135 S.Ct. 1124 (2015).

Petitioner and its Amici attempt to downplay the chaotic mess of state and local sales and use taxes by noting that "many" states have moved toward simplified collection processes. (Pet'r's Br. at 13). In reality, only 24 states accounting for one-third of the United States' population have joined the Streamlined Sales Tax Agreement.[15] Having a streamlined reporting procedure in a minority of states does nothing to simplify the compliance burden in the states that have not adopted such a procedure.

In fact, it is likely that some states are working together and using carrots to incentivize compliance precisely because of *Quill*. If *Quill* is overruled, states will not need carrots to induce compliance; they will

---

[14] Tax Foundation Brief, *supra* note 13, at 20-25.

[15] U.S. GAO Report, *supra* note 8, at 18.

have more effective sticks: the state's enforcement powers. Letters offering compliance assistance and reduced price software will quickly turn into demand letters, audits, and threats of litigation. States rarely offer compliance assistance and free software for their in-state businesses. It is unlikely they would do so for out-of-state businesses.

Under our constitutional government the only entity that can harmonize these inconsistent demands on interstate commerce is Congress. As this Court observed in *Quill*, Congress has the authority under the commerce clause to overturn the physical presence requirement. *Quill*, 504 U.S. at 318. Only Congress can ensure that the burden of inconsistent state and local sales tax regimes does not stifle interstate commerce by standardizing state sales tax collection and providing adequate and uniform exemptions for small businesses.

B. Contrary to Petitioner's Arguments, Complying with Different State and Local Tax Regimes Will Substantially Burden Small Businesses

As noted above, auction companies are small businesses, with 94% of NAA members having fewer than twenty employees and more than 80% having fewer than ten.[16] Businesses this size often operate on small margins. Most lack both the in-house expertise for multi-jurisdiction tax compliance and the resources to hire new staff to handle compliance issues. Like many small businesses, most auction companies have a bookkeeper or office manager or family member with

---

[16] NAA Membership Database (March 12, 2018).

a variety of job responsibilities handling state tax returns rather than a full-time accountant.

The cost of hiring new staff or outside experts to comply with expanded sales tax collection requirements is prohibitive for such small businesses. According to the Aberdeen Group, the average cost of employees dedicated to sales and use tax management is already over $63,000 per year for small businesses.[17] This will only increase if this Court abrogates *Quill*. Engaging outside accountants and tax attorneys for tax compliance assistance will be infeasible for the majority of small businesses including auctioneers.

As Petitioner and its Amici appear to acknowledge (Pet'r's Br. at 46), tax compliance software is the only realistic way to comply with the quagmire of inconsistent state and local sales tax rules. As an initial matter, this Court should be highly skeptical of the claim that an extremely complex service like multi-jurisdiction sales tax compliance is being offered by private companies for little or no cost. Much of the data cited by Petitioner comes from these tax compliance providers themselves. Obviously, these companies have a clear financial interest in making their products appear reasonably priced for potential clients. Tax compliance companies hire teams of tax attorneys and other professionals who constantly monitor changes in each of the more than 10,000 taxing jurisdictions in the country. The notion that these for-profit companies will essentially give away a

---

[17] Nick Castellina, *The Roadmap to Sales and Use Tax Compliance*, Aberdeen Group (Mar. 30, 2016), http://www.aberdeenessentials.com/cfo-essentials/the-roadmap-to-sales-and-use-tax-compliance/.

product that requires such extensive manpower and expertise is patently false.

While the costs to license tax compliance software may start at tens of dollars per month for a limited number of sales and taxing jurisdictions, unlimited access can cost up to $200,000 per year in licensing fees alone.[18] These costs are only for basic service. To access "premium" options, businesses must pay much higher monthly fees. These premium options include tasks such as providing ready-to-file returns and actually remitting sales taxes to the appropriate taxing authorities. If this court eliminates the physical presence rule, it is likely that surging demand would further drive up prices for software.

One NAA member company investigated the cost of tax compliance software in 2017. In that year, this auction company sold 92,105 lots[19] at auction across 12,078 invoices and remitted a total of $856,051 in sales tax to approximately 200 different taxing jurisdictions based on the location of the seller's assets.[20] For this company, the licensing cost for basic service was quoted as $945 per year plus $45 per return filed. Since many states require monthly filings, the cost to this company for filing returns was expected to be more than $2,200 per month. Thus, the total software cost was estimated to be approximately $25,000

---

[18] U.S. GAO Report, *supra* note 8, at 19.

[19] A "lot" is an article or articles offered as one item in an auction. Definition of Lot, Merriam-Webster, https://www.merriam-webster.com/dictionary/lot.

[20] These sales taxes are based on the total value of the sale, not the minimal commission the auction house made on each sale.

per year for this one auction company under current law. While these prices may no longer be current, this example demonstrates how software costs can be much higher than they initially appear.[21] If the physical presence rule is overturned, this company's software licensing costs would be significantly greater. Instead of applying sales tax based on the location of the seller's assets at each auction, the auction company would be required to look up and calculate sales tax based on where the buyer receives the purchased items, for over 12,000 invoices in the cited example. This would greatly increase the required number of tax returns and corresponding software fees.

Moreover, software fees are just the tip of the iceberg. Once purchased, the software must be integrated into a business's current payment processing and accounting systems. The type of seamless integration described by the National Association of Certified Service Providers[22] is generally limited to integration with a business's online shopping cart system. As the U.S. GAO Report found, "[b]usinesses would either have to incur additional costs to better integrate sales tax software with existing business

---

21 *See* Larry Kavanagh and Al Bessin, *The Real-World Challenges In Collecting Multi-State Sales Tax*, TruST, at 3 (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf (estimating annual software fees for mid-market retailers at between $25,000 to $50,000 annually) [hereinafter "Kavanagh Report"].

22 Brief of the National Association of Certified Service Providers and the Software & Information Industry Association as Amicus Curiae in Support of Neither Party, at 6 (Mar. 5, 2018).

information systems (such as general ledger accounting system), or regularly reconcile receipts and records manually to prepare sales tax returns for all states where it makes sense."[23] If a business uses custom or uncommon software, integration of the tax software into its operations will be even more expensive and future software changes will be limited to compatible products and require additional integration costs. Businesses may therefore feel "locked in" to a specific provider, unable to switch if they are unhappy with their products or service.

After the software is integrated into a business's existing systems, the tax compliance software is only as good as the information uploaded to it. Much of the compliance burden on businesses will be entering product information into the software, a process known as mapping. Mapping requires the coding of all of a business's products to the specific taxation categories listed in the software. This allows the software to determine whether the item is subject to sales tax in a given jurisdiction and the applicable tax rate. Product mapping must be done "with sufficient precision for the software to assign its tax status based on state laws."[24]

Because state and local tax rules are so varied, mapping requires a substantial amount of staff time and product knowledge to ensure that each product is correctly identified and categorized in the software. Otherwise, taxes may be collected on products that are exempt or vice versa. In the auction business, such

---

[23] U.S. GAO Report, *supra* note 8, at 19-20.

[24] U.S. GAO Report, *supra* note 8, at 17.

product mapping presents an enormous challenge, both because goods sold at auction are often unique or used items and because of the state-by-state differences in what is or is not subject to sales taxation. For example, farm equipment is generally subject to sales tax in South Dakota but there are exemptions for equipment used to raise certain types of animals and other agricultural products.[25] In Minnesota, farm equipment is generally exempt from sales tax, but the exemption does not apply to certain specific categories of equipment, including equipment used to raise horses and equipment used on hobby farms.[26] Thus, to complete the mapping process for farm equipment correctly, an auctioneer seller must enter detailed information about the product, including: (1) whether the product is farm equipment; (2) whether it is used for commercial purposes or hobby farming; (3) whether the equipment is used to raise animals; and, if so, (4) which specific animal or animals. This is only one example. Other states may apply taxes to new equipment but not used, apply different rates to different types of products, or apply finer distinctions between the type or volume of farm goods and equipment sold.[27] And this example does not even consider local sales tax rules.

---

[25] South Dakota Department of Revenue, Farmers and Use Tax (July 2017), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Farmers%20Use%20Tax.pdf.

[26] Minnesota Department of Revenue, Sales Tax Fact Sheet 106, Farm Machinery (Aug. 2016), http://www.revenue.state.mn.us/businesses/sut/factsheets/fs106.pdf.

[27] South Dakota Department of Revenue, Agricultural Products (July 2017), https://dor.sd.gov/Taxes/Business_Taxes/Publications/

Examples like this are common in the auction industry. One online auction platform that specializes in construction and agricultural equipment reported 2017 sales of more than $623 million, from more than 2,600 sellers.[28] This online platform allows qualified auctioneers to sell to registered bidders that are in the market for specialized equipment. Through platforms like these, small auction companies can reach a much wider audience, which is critical for selling these types of highly specialized equipment at auction. The result is good for both sellers who see more revenue and buyers who have access to more products, but such specialized equipment is often subject to detailed tax rules that vary widely state.

Auction companies that do not sell specialized industrial or agricultural equipment will also be heavily burdened by the mapping process. These companies sell a large and varied number of items at prices that are different and unknown until the sale is completed. Some states, including South Dakota, even have specific taxation rules that apply only to auctions,[29]

PDFs/Tax%20Facts/Ag%20Products.pdf (medicine for animals is subject to sales tax unless it is mixed with feed prior to being sold; commercial fertilizers are exempt if greater than 500 pounds per case; bedding for exempt animals is exempt but the exemption only applies to straw, corn stover, and bean straw).

28 *AuctionTime.com Reports Over $623 Million In Equipment Sold In 2017*, OpenSource Magazine (Jan. 4, 2018), http://opensource.sys-con.com/node/4216044.

29 *See, e.g.*, South Dakota Department of Revenue, Auctioneers, Auction Clerks and Auction Services (July 2013), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/auctions0713.pdf; Minnesota Department of Revenue, Sales Tax Fact Sheet 132, Isolated and Occasional Sales (Aug. 2017), http://www.revenue.

likely requiring both higher licensing fees for specialized tax software and greater effort to complete the mapping process. Unlike other businesses in which mapping will be most burdensome in the initial start-up phase, this expensive, time-consuming burden will be ongoing for auction companies because the specific items sold at each auction are different and the sale prices are unknown until the bidding closes.

Integration and mapping are mere precursors to collecting and remitting sales taxes. Businesses must collect and account for all sales tax collections, prepare tax returns for each state and local jurisdiction where they have qualifying sales, and remit payment to the appropriate taxing authority. The process of sales tax remittance varies greatly by state. Many states require monthly filings, others accept quarterly filings, and filing obligations may vary by sales volume.[30] South Dakota requires businesses to file a return for each reporting period, regardless of whether they made any sales during that period.[31] Each business will need to register and obtain a license from

---

state.mn.us/businesses/sut/factsheets/fs132.pdf; Illinois Department of Revenue, Sales Tax Issues for Auctioneers (April 1991), http://www.revenue.state.il.us/publications/bulletins/1991/FY91-49.PDF.

30 *See, e.g.*, New York State Department of Taxation and Finance, TB-ST-275, Filing Requirements for Sales and Use Tax Returns (November 20, 2015), https://www.tax.ny.gov/pdf/tg_bulletins/sales/b15_275s.pdf.

31 South Dakota Department of Revenue Sales and Use Tax Guide, at 11 (July 2017), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/STGuide.pdf ("Your business must file a tax return each reporting period even if you did not conduct business or receive income.").

applicable taxing jurisdictions, some of which require a registration fee,[32] and all of which require additional time and paperwork. Only after all of these resources in both time and money are expended can the business collect and remit sales taxes for out-of-state sales.

Remitting sales taxes does not mark the end of the compliance burden. Many small businesses will face even greater compliance costs in the form of assessments and audits from state and local taxing authorities. Unlike many large businesses, which often have entire compliance departments, small businesses are forced to do the best they can with limited resources. Indeed, the U.S. GAO Report found reason to believe small and medium-sized businesses will be audited because such audits often generate additional state revenue.[33] Audits can be extremely expensive and time consuming for even large businesses and outright disastrous for small ones. [34]

---

[32] Jennifer Dunn, *Which States Charge a Fee to Register for a Sales Tax Permit*, TaxJar (June 14, 2016), https://blog.taxjar.com/fee-register-for-a-sales-tax-permit/.

[33] U.S. GAO Report, *supra* note 8, at 21.

[34] In one example, an auctioneer without a physical presence in South Dakota opted to surrender its South Dakota sales tax permit due to limited sales in South Dakota. Thereafter, if the auctioneer held an auction in South Dakota it remitted the sales taxes. In 2015, South Dakota demanded that the auctioneer reacquire a sales tax number and within 60 days of it doing so, South Dakota issued a notice of Sales Tax Audit in which it demanded records for every auction for the previous three to five years regardless of its location. The audit took three weeks, disrupting the auctioneer's office and business, as auditors looked

Even if the risk of an audit is low, state taxing authorities have other enforcement tools, such as assessment letters. These letters are mailed to businesses that the state believes may owe sales taxes. The burden is then on each business to prove that the taxing authority is wrong. Small businesses are unlikely to have the wherewithal to challenge a state's assessment, even when they have good reason to conclude that it is incorrect. Challenging an incorrect assessment may require hiring counsel and accountants in the taxing state and traveling to the state to appear before the taxing authority. At a minimum, it will require staff time to investigate and respond to the assessment letter.

If an out-of-state business decides to challenge a state's assessment or tax law, it will be forced to litigate the issue in state court in the taxing state. Under the Tax Injunction Act, federal district courts may not entertain a challenge to the "assessment, levy or collection" of a state tax if there is an acceptable remedy in state court. 28 U.S.C. § 1341. Thus, not only will a business with little connection to a taxing state be forced to litigate in that state, it will be forced to do so in a forum that may be inherently biased in favor of the state's tax collectors. *See Roberts v. Mars Petcare US, Inc.*, 874 F.3d 953, 956 (6th Cir. 2017) (explaining purpose of diversity jurisdiction is to "protect out-of-state parties from the potential risk that local juries (or judges) would favor in-state parties").

---

for any transaction involving a South Dakota resident. This audit has become an annual event.

While there are ways to minimize the compliance burden on small businesses,[35] they require uniform, voluntary action from all states (which has not yet happened and is unlikely ever to occur). Absent voluntary action by all states, only Congress can mitigate or eliminate the burdens on interstate commerce that would result from the repeal of the physical presence requirement. Congress would be able to guarantee meaningful small business exemptions, guarantee simplified reporting requirements, or even require compensation for compliance. Without such Congressional action, the physical presence requirement is the only bulwark protecting small businesses from a burdensome deluge of tax collection requirements.

II. OVERTURNING THE PHYSICAL PRESENCE RULE ANNOUNCED IN *BELLAS HESS* AND AFFIRMED IN *QUILL* WOULD BE CONTRARY TO *STARE DECISIS* AND UPSET THE SETTLED EXPECTATIONS OF ENTIRE INDUSTRIES

The physical presence rule, announced in two of this Court's decisions, has been the law of the land for over 50 years. Abrogating the rule will create immediate compliance concerns for thousands of businesses that rely on this standard and could subject many of them to retroactive liability for prior sales. Given these considerations, there are likely few cases in which *stare decisis* should carry more weight.

---

35 *See, e.g.*, David Gamage and Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. Rev. 483 (2012), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2700&context=facpubs (arguing that states should compensate businesses without a physical presence for their costs to comply with sales tax collection requirements).

Petitioner's arguments are virtually identical to the arguments this Court rejected in *Quill*. The Court specifically noted the incredible growth and size of the mail-order industry, to an extent that could not have been imaginable at the time *Bellas Hess* was decided. Although Petitioner attempts to downplay the size and importance of the mail order industry when *Quill* was decided, at that time the North Dakota Supreme Court described the industry as a "'goliath' with annual sales that reached 'the staggering figure of $183.3 billion in 1989.'" *Quill*, 504 U.S. at 303. This was not some unimportant, fledgling industry but a massive part of the economy, generating over $360 billion in sales in today's dollars.[36] This is actually more than all business-to-consumer internet retail sales from the top 1,000 internet retailers in 2017.[37]

The *Quill* Court even considered the centerpiece of Petitioner's argument that "advances in computer technology greatly eased the burden of compliance with a 'welter of complicated obligations' imposed by state and local taxing authorities." *Id.* at 303. Since *Quill* was decided, the number of state and local sales tax jurisdictions has only increased and the rules have become even more complex.[38] The fact that businesses can pay for expensive tax compliance software is not a sufficient reason for this Court to overturn the physical presence standard. As explained above,

---

[36] U.S. Inflation Rate, 1989-2017 ($183,000,000,000), http://www.in2013dollars.com/1989-dollars-in-2017?amount=183000000000.

[37] U.S. GAO Report, *supra* note 8, at 9.

[38] Tax Foundation Brief, *supra* note 13, at 13.

software costs are only one portion of the burden that will result if the physical presence requirement is eliminated.

A. Auction Companies and Similar Small Businesses Have Relied on the *Quill* Rule for Decades

This Court approaches "with the utmost caution" reconsideration of any of its decisions, and "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved. . . ." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). None of this Court's justifications for overturning its precedent are present in this case. Overturning the physical presence requirement will upset settled expectations; the physical presence requirement is not a "recently adopted" judge-made rule; and, although this is not a case of statutory construction, "Congress is free to change this Court's" decision at any time. *Id.*; *see Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (explaining rationale for applying lower threshold for *stare decisis* in constitutional cases is because "correction through legislative action is practically impossible"). Even if this Court concludes that *Quill* is wrong, it should nevertheless uphold the physical presence rule because "it is more important that the applicable rule of law be settled than it be settled right." *Payne*, 501 U.S. at 827. This wise sentiment is particularly true in this case in which entire industries have grown in reliance on the physical presence requirement.

One obvious inequity that would result if this Court abrogates *Quill* is that it will effectively punish sellers in states that do not have a sales tax. Five

states—Alaska, Delaware, Montana, New Hampshire, and Oregon—have no state sales tax.[39] Small businesses in these states have no experience with collecting sales tax for either online or in-person sales. The physical presence rule shields these businesses from having to spend resources complying solely with other states' sales tax laws. Without *Quill*, these businesses will face higher costs of compliance simply because they happen to be located in a state without a sales tax.[40] The idea that South Dakota could adopt a tax that Oregon has rejected and subject Oregon's businesses to onerous tax collection requirements is exactly the type of extra-territorial reach that this Court's long-standing precedent seeks to prevent. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954) ("If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition.").

In addition to the inequities wrought upon sellers in certain states, some types of business will suffer more than others. Many businesses across the country have adjusted their sales strategies in reliance on *Quill*. Many remote sellers have business models that

---

[39] Jared Walczak and Scott Drenkard, *State and Local Sales Tax Rates in 2018*, Tax Foundation (Feb. 13, 2018), https://taxfoundation.org/state-and-local-sales-tax-rates-2018/. Many municipalities in Alaska have a local sales tax.

[40] U.S. GAO Report, *supra* note 8, at 20.

emphasize low margins and high sales volume.[41] Auction companies have embraced marketing strategies that target regional and national audiences. These businesses may not be able to absorb the additional burden of multi-jurisdiction tax compliance.[42] It would be extremely unfair for businesses that relied on *Quill* to expand into new markets or develop their business strategies to find themselves suddenly subject to sales tax collection requirements in possibly thousands of taxing jurisdictions.

One of the great benefits of the physical presence requirement in the modern economy is that it minimizes barriers to entry for new businesses. Anyone can create a business and sell products to individuals anywhere in the country without becoming subject to each state's tax rules. Auction companies are a perfect example of the type of dynamism that results from the "demarcation of a discrete realm of commercial activity that is free from interstate taxation." *Quill*, 504 U.S. at 315. Auctioneers increase economic efficiency by connecting willing buyers with willing sellers, facilitating sales that would not otherwise occur. Not only auction companies, but also the many other businesses that depend on auctions to sell or purchase important equipment, will suffer alike from abrogation of the physical presence rule.

The impact will not be limited to the auction industry. Smaller firms throughout the economy will struggle to expand into new markets since doing so will trigger onerous filing obligations. Such burdens

---

41 U.S. GAO Report, *supra* note 8, at 26.

42 Kavanagh Report, *supra* note 21, at 8.

will inure to the benefit of retail giants and large e-commerce companies that have grown under the protection of the physical presence requirement and now have the resources to survive in a post-*Quill* environment. Smaller competitors already disadvantaged by a company like Amazon's overwhelming economies of scale will be further disadvantaged by the sudden imposition of additional costs, in both time and money, spread over far fewer employees.[43] Thus, far from correcting an inequity, overturning the physical presence rule will create one.

B. The Physical Presence Rule Provides Clarity; Overturning It Would Invite Greater Uncertainty and Further Litigation

Petitioner and its Amici argue that *Quill*'s physical presence rule has become unworkable. They pose a series of seemingly difficult questions about how the physical presence rule is becoming more difficult to apply in the lower courts. (Pet'r's Br. at 31). Many of these scenarios have, however, already been answered, *Quill*, 504 U.S. at 315 n.8 ("Quill's licensing of software in this case does not meet the 'substantial nexus' requirement of the Commerce Clause."); *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977) (rejecting "slightest presence" standard for finding of substantial nexus), and the remaining questions are answerable.[44] To the extent these cases

---

[43] Kavanagh Report, *supra* note 21, at 7 ("Small to mid-market online and catalog merchants end up with virtually the same complexity without nearly the same revenue to cover the cost.").

[44] *See* Arthur R. Rosen and Richard C. Call, *What is Minimal Substantial Nexus?*, State Tax Notes, Vol. 85 No. 1, at 57-58

will be litigated, they present primarily legal questions that can be resolved through motion practice without the time and expense of preparing an extensive record. *Cf. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-28 (1959) (summarizing extensive evidence demonstrating that a nondiscriminatory regulation constituted a burden on interstate commerce). For small businesses, *Quill*'s bright line rule remains just as bright today.

At a more fundamental level, the fact that a constitutional tenet must be applied to modern technology is not a reasonable basis to abandon it wholesale. As with any constitutional rule, new technology requires courts to consider how to apply old doctrines. This Court's dormant commerce clause jurisprudence previously protected interstate sales via fax, phone, and common carrier; it now extends to sales through the internet. This is neither surprising nor a valid basis to abandon precedent.

Even if this Court agrees that the physical presence requirement is becoming increasingly difficult to apply, abrogating *Quill* will not add clarity to the "quagmire" of dormant commerce clause jurisprudence. To the contrary, it will open the door to more confusion and endless litigation. Instead of determining whether a business has a physical presence in a state (which despite Petitioner's examples of a few tricky cases remains a very straightforward analysis), lower courts will have to determine on a case-by-case basis whether a business has a "substantial nexus" to the taxing

---

(July 3, 2017), https://www.mwe.com/~/media/files/press-room/2017/07/rosencall-7317.pdf?la=eng (arguing for specific nexus requirement under physical presence rule).

state, or, even worse, whether the tax represents an "undue burden" on interstate commerce.

In *Complete Auto Transit, Inc. v. Brady*, this Court adopted a four-part test for evaluating state taxes under the commerce clause: (1) the tax must apply to an activity with a substantial nexus with the taxing state, (2) it must be fairly apportioned, (3) it must not discriminate against interstate commerce, and (4) it must be fairly related to the services provided by the state. 430 U.S. 274, 279 (1977). *Bellas Hess* and *Quill* address the first prong of the test: whether the activity has a substantial nexus with the taxing state. *Quill*, 504 U.S. at 311. Without the physical presence requirement as a bright line test, lower courts will struggle to define when a state can constitutionally impose a sales tax on an out-of-state business.

Would a finding of substantial nexus be based purely on the value of goods sold in the taxing state? If so, what is the threshold value and how will it be adjusted over time? Should it differ depending on the size of the state? Is the number of transactions relevant to a finding of substantial nexus? Would a business's marketing activity or lack thereof in the taxing state affect the analysis?[45] If South Dakota's law defines the parameters of the constitutional substantial nexus standard, 200 transactions at $10 per item would result

---

[45] *See* Joseph Bishop-Henchman, *Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction*, Tax Foundation (Nov. 5, 2007), https://taxfoundation.org/why-quill-physical-presence-rule-shouldnt-go-way-personal-jurisdiction/ (raising concerns about the workability of an economic nexus standard).

in a finding of substantial nexus with only $2,000 of sales, but one sale of a luxury item for $90,000 would be insufficient nexus regardless of the marketing activity of the business. This is true even though the revenue at stake in the latter case is 45 times greater and even though it would be much simpler for the seller of a single expensive item to collect and remit sales tax to the state.

Several Amici argue that the Court should not apply the *Complete Auto* test at all, arguing instead for the Court to adopt the undue burden or *Pike* test, which is generally applied to regulations that have an incidental impact on interstate commerce. Under the test set forth in *Pike v. Bruce Church, Inc.*, an even-handed statute that furthers a legitimate state policy "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142 (1970). Under this test, however, a statute might be found to be facially valid but unconstitutional as applied to specific parties. *Id.* at 143-44. It is thus conceivable that a sales tax collection requirement would present an unconstitutional burden for some businesses but not for others. Similar to the substantial nexus test, there are no obvious constitutional lines to provide much-needed certainty for businesses. Moreover, this test fails to account for the cumulative nature of different state and local tax rules, the combination of which creates a substantial burden on interstate commerce.

To make matters worse, some states, including South Dakota, impose a sales tax on services. *See* S.D. Codified Laws § 10-45-5.2. South Dakota's tax

on out-of-state businesses applies to both sales of tangible personal property and "services delivered into South Dakota." *Id.* § 10-64-2. If a business were to purchase from an out-of-state vendor consulting services that are performed entirely out of state but provided to a South Dakota resident, would that constitute sufficient nexus to require the consulting firm to collect and remit sales taxes? Many service-oriented businesses are not accustomed to collecting sales taxes, as professional services have traditionally not been subject to sales tax in most states.[46] The prospect of service taxes will make South Dakota's statute and similar state statutes that much more burdensome and difficult to apply.

If the *Quill* decision is incorrect or problematic, Congress has the power to alter the decision to ease or eliminate compliance burdens associated with such a significant rule change. *Quill*, 504 U.S. at 318. Congress can stop litigation in this area by clarifying the meaning of physical presence, clarifying the substantial nexus test, or adopting new requirements for state sales tax authority. Without Congressional action, the law will continue to develop on a case-by-case basis and each state law will contain different tests for nexus and different exemptions.

---

46 David Brunori, *Don't Be Fooled – Services Should Be Subject to Sales Tax*, Forbes (Sept. 24, 2015), https://www.forbes.com/sites/taxanalysts/2015/09/24/dont-be-fooled-services-should-be-subject-to-sales-tax/#3c17d03450e7 ("Most services aren't subject to sales tax in most states.").

C. Overturning *Quill* Would Invite Retroactive State Tax Collection That Would Create Chaos for Small Businesses

In *Harper v. Virginia Department of Taxation*, a tax case, this Court was very clear that its decisions "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. 86, 97 (1993). Thus, if this Court were to overturn *Quill*'s physical presence requirement, that decision would have immediate retroactive application. This would allow states that already have laws on the books that tax remote sales to assess businesses for prior sales made when the physical presence requirement was the law.

Furthermore, states are not limited to existing laws; they would likely be able to pass new laws with retroactive application specifically to collect sales taxes from out-of-state businesses for prior sales. In *United States v. Carlton*, another tax case, this Court affirmed that the retroactive application of an act of Congress was consistent with principles of due process. 512 U.S. 26, 32 (1994). This Court adopted a simple test for retroactive legislation: "provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means" it will be upheld. *Id.* at 30-31. As Justice Scalia observed, the Court's test "guarantees that all retroactive tax laws will henceforth be valid" since "[r]evenue raising is certainly a legitimate legislative purpose." *Id.* at 40 (Scalia, J., concurring). The Court noted that taxation is not a penalty or a contractual liability and, accordingly, specific and detrimental

reliance on a tax rule was "insufficient to establish a constitutional violation." *Id.* at 33. Thus, there will be no constitutional prohibition on state suits against out-of-state businesses for prior years' sales taxes.

Petitioner does not contest this point but argues that states are unlikely to pursue retroactive enforcement. (Pet'r's Br. at II. D). It essentially asks this Court to trust that the states will be fair and reasonable. The increasing use of "hardball tactic[s]" to collect state sales taxes belies such trust.[47] If states are as desperate for additional revenues as Petitioner and its Amici contend, they will look to any and all sources, especially out-of-state businesses. Even if only a handful of states initially seek such back taxes, other states will then have an incentive to respond in kind with their own reciprocal measures.

Such retroactive application of new tax rules to auctioneers and other small businesses will have devastating consequences. It will not be practical and perhaps not even legal for a business to collect sales taxes from customers for prior sales. As a result, the companies themselves would be liable for back taxes, having failed to collect the tax from purchasers at the time of sale.

These "thorny questions" of retroactive sales tax liability are "better resolved by Congress rather than this Court." *Quill*, 504 U.S. at 318 n.10. If it wishes to repeal or modify the physical presence rule,

---

47 Diane Yetter, *What Online Retail Clients Can Expect in the Near Future*, AccountingWeb (Mar. 15, 2018), https://www.accountingweb.com/tax/sales-tax/what-online-retail-clients-can-expect-in-the-near-future.

Congress has the authority to do so only for prospective sales, thereby protecting the reasonable expectations of thousands of businesses and fairly allocating sales tax burdens going forward. As this Court itself observed in *Quill*, "it may be that the better part of both wisdom and valor is to respect the judgment of the other branches of the Government." *Id.* at 318-19 (internal quotation marks omitted).

CONCLUSION

Twenty-five years ago, North Dakota argued that times had changed. It argued that the physical presence requirement was an anachronism due to advances in compliance software and the explosive growth of a new industry facilitating interstate commerce on a massive scale. Today, South Dakota advances the same arguments. Sometimes the more things change, the more they stay the same. The technology that facilitates interstate commerce has changed, but the physical presence rule remains just as important for small businesses, like auctioneers, that benefit from the certainty and simplicity provided by a bright line standard. This Court should continue to protect these small businesses by affirming the decision of the South Dakota Supreme Court.

Respectfully submitted,

JONATHAN M. DUNITZ
COUNSEL OF RECORD
DAVID E. WARREN
BRIAN T. MARSHALL
VERRILL DANA, LLP
ONE PORTLAND SQUARE
PORTLAND, ME 04101
(207) 774-4000
JDUNITZ@VERRILLDANA.COM

COUNSEL FOR AMICUS CURIAE

APRIL 4, 2018

APPENDIX:
LIST OF STATE AUCTIONEER ASSOCIATIONS

1. Alabama Auctioneers Association
2. Arkansas Auctioneers Association
3. Colorado Auctioneers Association
4. Florida Auctioneers Association
5. Georgia Auctioneers Association
6. Idaho Association of Professional Auctioneers
7. Illinois State Auctioneers Association
8. Indiana Auctioneers Association
9. Iowa Auctioneers Association
10. Kansas Auctioneers Association
11. Kentucky Auctioneers Association
12. Louisiana Auctioneers Association
13. Maine Auctioneers Association
14. Auctioneers Association of Maryland
15. Massachusetts Auctioneers Association
16. Michigan Auctioneers Association
17. Minnesota State Auctioneers Association
18. Mississippi Auctioneers Association
19. Missouri Professional Auctioneers Association
20. Montana Auctioneers Association
21. Nebraska Auctioneers Association
22. New Hampshire Auctioneers Association
23. New Jersey State Society of Auctioneers

24. New York State Auctioneers Association
25. Auctioneers Association of North Carolina
26. North Dakota Auctioneers Association
27. Ohio Auctioneers Association
28. Oklahoma State Auctioneers Association
29. Pennsylvania Auctioneers Association
30. South Carolina Auctioneers Association
31. South Dakota Auctioneers Association
32. Tennessee Auctioneers Association
33. Texas Auctioneers Association
34. Virginia Auctioneers Association
35. Washington Auctioneers Association
36. West Virginia Auctioneers Association
37. Wisconsin Auctioneers Association
38. Wyoming Auctioneers Association

No. 17–494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC.,
AND NEWEGG, INC.,
Respondents.

On Writ of Certiorari
to the Supreme Court of South Dakota

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AND INDIAN TRIBES IN SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

JOHN HAYDEN DOSSETT
DERRICK BEETSO
NCAI
1516 P Street, NW
Washington, DC 20005-1910
(202) 466-7767

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-9350

SAM HIRSCH
Counsel of Record
IAN HEATH GERSHENGORN
LEONARD R. POWELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001-4412
(202) 639-6000
shirsch@jenner.com
Counsel for Amicus Curiae
The National Congress of American Indians (NCAI)

Additional Counsel Listed on Inside Cover

SETH C. PEARMAN
Attorney
603 West Broad Avenue
Flandreau, SD 57028
(605) 573-4206
Counsel for the Flandreau Santee Sioux Tribe

THOMASINA REAL BIRD
General Counsel
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
(303) 673-9600
Counsel for the Yankton Sioux Tribe

TARA L. ADAMSKI
Attorney
1801 E. Wells Ave., Suite 3
P.O. Box 866
Pierre, SD 57501
(605) 945-0890
Counsel for the Lower Brule Sioux Tribe

ERIC ANTOINE
Attorney
P.O. Box 430
Rosebud, SD 57570
(605) 747-3188, ext. 247
Counsel for the Rosebud Sioux Tribe

DEBRA FLUTE
Senior Attorney
P.O. Box 509
Agency Village, SD 57262
(605) 698-3911, ext. 8300
Counsel for the Sisseton-Wahpeton Oyate

STEVEN J. GUNN
Special Counsel
P.O. Box 16084
St. Louis, MO 63105
(314) 920-9129
Counsel for the Cheyenne River Sioux Tribe and the Oglala Sioux Tribe

STEVEN D. SANDVEN
Attorney
116 East Main Street
Beresford, SD 57004-1819
(605) 763-2015
Counsel for the Crow Creek Sioux Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. Indian Tribes have the inherent sovereign power to impose sales taxes on purchases of goods in Indian country. 7

A. Tribes' taxation authority is an inherent sovereign power. 8

B. The scope of Tribes' taxation power is broad. 9

C. The Executive, Congress, and the States all recognize Tribes' taxation authority. 10

II. Federal law limits States' power to impose sales taxes on purchases of goods in Indian country. 13

A. States cannot directly tax Tribes or tribal members in Indian country. 14

B. States cannot tax retailers' sales to Tribes or tribal members in Indian country. 14

C. Some sales to nonmembers in Indian country are subject to double taxation, which is inefficient and unfair to Tribes. 19

III. The Court's decision in this case can readily be reconciled with Tribes' taxation authority and Indians' immunity from state sales taxes. 23

A. Tribal sales taxes can remain protected. 23

B. State sales taxes in Indian country can remain limited by using blanket exemption certificates. 25

C. Problems arising from concurrent state and tribal tax jurisdiction can be addressed through state tax credits or intergovernmental compacts. 28

D. Any fiscal impact will be minimal for the States, yet significant for the Tribes. 30

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) 9, 10

Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994) 19

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 14

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 17, 18

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 19

Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988) 19

D. H. Holmes Co. Ltd. v. McNamara, 486 U.S. 24 (1988) 4

Department of Taxation & Finance of New York v. Milhelm Attea & Brothers, Inc., 512 U.S. 61 (1994) 14

Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124 (2015) 4

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) ... 4, 7-8

Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) 8, 11

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 8, 9

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 14

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014) 20

Morris v. Hitchcock, 194 U.S. 384 (1904) 8

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 14

Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 21

Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1993) 14

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 6, 24

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 4

State v. Central Machinery Co., 589 P.2d 426 (Ariz. 1978), *rev'd sub nom. Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). 18

Wagnon v. Prairie Band of Potawatomi Nation, 546 U.S. 95 (2005) 21, 28

Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685 (1965) 16

Warren Trading Post Co. v. Moore, 387 P.2d 809 (Ariz. 1963), *rev'd sub nom. Warren Trading Post Co. v. Arizona States Tax Commission*, 380 U.S. 685 (1965) 17

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 19, 20, 21

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 19

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 8, cl. 3 ..... 3, 14

U.S. Const. art. VI, cl. 2 14

18 U.S.C. § 1151 8

25 U.S.C. § 261 15

25 U.S.C. § 262 15

25 U.S.C. § 263 15

25 U.S.C. § 264 15

25 U.S.C. § 1301(2) 10

26 U.S.C. § 901 21

26 U.S.C. § 7871(a)(3) 11

N.M. Stat. Ann. § 9-11-12.1 28

Nev. Rev. Stat. § 372.800 21

Nev. Rev. Stat. § 372.805 22

Main Street Fairness Act, H.R. 5660, §§ 5, 10(2)(C), 111th Cong. (2010) 11-12

Marketplace Fairness Act of 2017, S. 976, § 4(8), 115th Cong. (2017) 11

Marketplace Fairness Act of 2015, S. 698, § 4(8), 114th Cong. (2015) 11

Marketplace Fairness Act of 2013, S. 743, § 4(8), 113th Cong. (2013) 11

Sales Tax Fairness and Simplification Act, S. 34, §§ 5, 10(3)(C), 10(6), 110th Cong. (2007) 12

OTHER AUTHORITIES

25 C.F.R. §§ 140.1-140.26 15

25 C.F.R. §§ 141.1-141.59 15

25 C.F.R. § 141.11(a) 11

23 Op. Att'y Gen. 214 (1900) 11

Amazon Tax Exemption Program, https://www.amazon.com/gp/help/customer/display.html/ref=aw?ie=UTF8&nodeId=201633510 (last visited Mar. 1, 2018) 27

Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 Pitt. Tax Rev. 93 (2005) 20

Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country* (Joint Occasional Papers on Native Affairs May 4, 2016 draft), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf 20

Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993) 5

2 Jerome R. Hellerstein, Walter Hellerstein & John A. Swain, *State Taxation* (3d ed. 2000) 21

Susan Johnson et al., National Conference of State Legislatures, *Government to Government: Models of Cooperation Between States and Tribes* (2d ed. 2009), http://www.ncsl.org/documents/statetribe/item019417.pdf 13, 22, 28

Letter from Henry Knox to George Washington (Jan. 4, 1790), *in* 4 The Papers of George Washington: Presidential Series 529, 534-35 (Dorothy Twohig ed., 1993) 15

Multistate Tax Commission, *Tribal-State Tax Issues*, Policy Statement 2009-01, http://www.mtc.gov/getattachment/The-Commission/Policy-Statements-Resolutions/Policy-Statement-2009-01.pdf.aspx 12

National Conference of State Legislatures, *Relationship Between the Streamlined Sales and Use Tax Agreement and Tribal Governments* (May 2005) 1

National Congress of American Indians Resolution #GBW-05-028 (June 2005), http://www.ncai.org/resources/resolutions-home 1

National Congress of American Indians Resolution #MKE-17-054 (Oct. 2017), http://www.ncai.org/resources/resolutions-home 1

Nev. Att'y Gen. Op. No. 97-30 (Dec. 31, 1997) 22

Powers of Indian Tribes, 55 I.D. 14 (1934) 11

South Dakota Department of Revenue, *Tribal Tax Facts* (Jan. 2018), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Tribal.pdf 23

Streamlined Sales Tax Governing Board, Inc., *Streamlined Sales and Use Tax Agreement Certificate of Exemption*, SSTGB Form F0003 (rev. May 10, 2017, for use Jan. 1, 2018), http://www.streamlinedsalestax.org/uploads/downloads/Forms/F0003%20Exemption%20Certificate%20Revised%205-2017%20for %20use%20beginning%201-1-2018.pdf 26

Traders with Indians, 81 Fed. Reg. 89,015 (Dec. 9, 2016) 15-16

United States Census Bureau, *The American Indian and Alaska Native Population: 2010* (Jan. 2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf 30

United States Department of Health & Human Services, Indian Health Service, *Trends in Indian Health* (2014 ed.), https://www.ihs.gov/dps/includes/themes/responsive2017/display_objects/documents/Trends2014Book508.pdf 30

Washington State Department of Revenue, *Buyers' Retail Sales Tax Exemption Certificate*, Rev. 27 0032 (Aug. 4, 2017), https://dor.wa.gov/legacy/Docs/Forms/ExcsTx/ExmptFrm/BuyersRetailTxExmptCert_E.pdf 26

INTEREST OF *AMICI CURIAE*[1]

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities and promoting Indian self-determination and tribal economic development. For 15 years, NCAI has urged Congress to protect Tribes in the same manner as States when drafting any legislation authorizing States to require remote retailers with no physical presence in a State to collect and remit state sales or use taxes.[2]

The Cheyenne River Sioux Tribe of the Cheyenne River Reservation, the Crow Creek Sioux Tribe of the Crow Creek Reservation, the Flandreau Santee Sioux Tribe of South Dakota, the Lower Brule Sioux Tribe of the Lower Brule Reservation, the Oglala Sioux Tribe, the Rosebud Sioux Tribe of the Rosebud Indian Reservation, the Sisseton-Wahpeton Oyate of the Lake

---

[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, NCAI Resolution #MKE-17-054 (Oct. 2017) and NCAI Resolution #GBW-05-028 (June 2005), http://www.ncai.org/resources/resolutions-home. In this effort, NCAI has been pleased to gain the support of the National Conference of State Legislatures (NCSL). *See* NCSL, *Relationship Between the Streamlined Sales and Use Tax Agreement and Tribal Governments* (May 2005).

Traverse Reservation, and the Yankton Sioux Tribe of South Dakota are federally recognized Indian Tribes with reservations in South Dakota. Like every rural community in America, the *amicus* Tribes and their members depend heavily on mail-order and online retail commerce. For many reservation residents, in-person shopping for some types of goods requires driving hundreds of miles roundtrip.

Given the significance of mail-order and electronic commerce to Indian country in South Dakota and across the Nation, *amici*'s goals of tribal self-determination and economic self-sufficiency depend in significant part on preserving for remote sales, no less than for face-to-face transactions, two fundamental features of federal Indian tax law: first, Indian Tribes' inherent sovereign power to raise revenue by taxing transactions in Indian country; and second, Indians' immunity from state and local sales taxes in Indian country, regardless of whether the tax is imposed on the Indian purchaser or on an Indian or non-Indian seller.

While recognizing that this case does not directly present an issue of federal Indian law, *amici* have a strong interest in ensuring that the Court's opinion does not inadvertently limit either tribal taxation authority or Indians' immunity from state sales and use taxes. It would be ironic indeed if, in removing old burdens on interstate commerce, the Court accidentally created new burdens on Indian commerce.

INTRODUCTION

Amici file this brief with a straightforward objective: Regardless of whether the Court affirms or reverses the judgment below, it should take care that nothing in its opinion suggests new limits on Tribes' authority to impose sales taxes or Indians' immunity from state sales taxes. Ideally, the Court would include a sentence in its opinion stating that its decision limits neither Indian Tribes' authority to impose sales or use taxes nor the immunity from state sales and use taxes currently enjoyed by tax-exempt purchasers, including Tribes and their members in Indian country.

At a minimum, in drafting its opinion, *amici* ask the Court to avoid any language that could be misinterpreted as suggesting that, (1) if the Court reverses the judgment below, a State could then impose sales taxes on goods that remote retailers deliver to ***any*** state residents, including reservation Indians, or (2) if the Court affirms the judgment below, a Tribe cannot impose sales taxes on goods that remote retailers deliver to Indians or to other persons living on Indian lands in the Tribe's Indian country.

This simple request is grounded in the Federal Constitution, this Court's Indian jurisprudence, and a body of federal statutes and regulations dating back more than two centuries. Article I's Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The three powers—over foreign commerce, interstate commerce, and Indian commerce—have very different applications, but they were all "given in the same

words, and in the same breath, as it were." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring). All three clauses "grant ... authority to the Federal Government at the expense of the States." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996). All three clauses respect the dignity of sovereign governments: foreign nations, States, and Indian Tribes. And all three speak to issues of taxation.

Just as "interstate commerce may be required to pay its fair share of state taxes," *D. H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 31 (1988), Indian commerce should be required to pay its fair share of ***tribal*** taxes. For Tribes, no less than for States, when "startling revenue shortfall[s]" are triggered, "education systems, healthcare services, and infrastructure are weakened as a result." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

But tribal revenues have suffered not only when federal common law has limited Tribes' inherent power to impose and collect taxes, but also when it has allowed States to tax concurrently the same transactions that Tribes seek to tax. In the latter situation, given the unequal size, fiscal strength, and enforcement capabilities of the competing sovereigns, and given the practical impossibility of imposing both state and tribal taxes concurrently without driving away business and thus pushing Indian reservations deeper into poverty, it typically is the Tribe, not the State, that is forced to forgo exercising its sovereign power to tax. Thus, a "tribe's practical ability to tax [transactions] ... is inversely related to the state's

power to tax" them. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 437 (1993).

Under the Court's Indian tax precedents, absent a contrary treaty or statute, the general sales-tax rules—which this Court's opinion in this case should leave undisturbed—turn mainly on where and to whom the remote vendor delivers the purchased goods:

- Outside Indian country, transactions generally can be taxed by the State but not by a Tribe.
- Within a Tribe's Indian country, transactions with Indian buyers who are members of the Tribe can be taxed by the Tribe but not by the State.
- On Indian lands within a Tribe's Indian country, transactions with nonmember buyers can be taxed by the Tribe and in some circumstances also by the State (giving rise to double-taxation problems).
- On non-Indian lands within a Tribe's Indian country, transactions with nonmember buyers generally can be taxed by the State and in some circumstances also by the Tribe (again, giving rise to double-taxation problems).

The Court's resolution of this case need not affect any of these general principles of Indian-country sales taxation. *Amici* respectfully ask this Court to make that point expressly.

SUMMARY OF ARGUMENT

Regardless of whether it is effectuated by a decision of this Court or by an Act of Congress, the abrogation of the physical-presence rule articulated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), can readily be reconciled with the general principles of Indian-country sales taxation and with the pragmatic mechanisms that Tribes and States have developed to comply with those principles. *Quill* held that, absent congressional authorization, a State may not require a remote retailer that has no physical presence in the State (such as outlets or sales representatives) to collect and pay a sales or use tax on goods purchased for use within the State, because such a retailer lacks the substantial nexus with the taxing State that the Commerce Clause requires. *Id.* at 309–19.

Tribes, like States, have the inherent sovereign power to impose taxes on certain transactions. If South Dakota is permitted to tax items that a distant mail-order or internet retailer delivers to, say, Sioux Falls or Rapid City, then undoubtedly a Tribe can tax the same items when the same retailer delivers them to tribal members, or others living on Indian land, on the Tribe's reservation.

To the extent that States are permitted to tax remote sales, they cannot tax items delivered to the tribal government or tribal members in the Tribe's Indian country. Blackletter federal law renders reservation Indians and those who trade with them immune from state sales taxes. Any erosion of that rule would exacerbate the problem of double taxation.

Straightforward mechanisms, like Tribe/State intergovernmental compacts, state tax credits, and blanket exemption certificates, can protect these fundamental principles of Indian law—Tribes' power to tax, and Indians' immunity from state sales taxes—if either this Court or Congress abrogates *Quill*'s physical-presence rule.

ARGUMENT

I. Indian Tribes have the inherent sovereign power to impose sales taxes on purchases of goods in Indian country.

The Commerce Clause and numerous federal laws, treaties, and federal-court decisions recognize Indian Tribes as sovereign governments with the authority to collect taxes and to be immune from certain taxes. Tribal governments have the power and responsibility to enact civil and criminal laws regulating their members and their lands and have a great need for tax revenue to fund governmental services. Like States, Tribes operate courts of law, run correctional facilities, build and maintain roads and bridges, provide health care, and assist families in poverty. Tribes also have responsibilities resembling those of county and municipal governments: They fix sewer lines, provide emergency services, teach children, remove snow, build parks, collect trash, maintain cemeteries, conduct elections, put out fires, and police neighborhoods.

All sovereigns need tax revenues to fund governmental services and public goods. That is as true for Indian Tribes as it is for States—a point this Court has long recognized. *See, e.g.*, *Gibbons*, 22 U.S. (9

Wheat.) at 199 (States); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137–41 (1982) (Tribes); *Morris v. Hitchcock*, 194 U.S. 384, 388–89 (1904) (Tribes). And the sovereign authority to impose taxes includes taxing sales of tangible personal property, or goods, within the sovereign's territory. With limited exceptions under federal law, *see infra* pages 9–10, this power is held by Tribes no less than by States.

A. Tribes' taxation authority is an inherent sovereign power.

Each federally recognized Indian Tribe has the inherent power to tax sales on its reservation.[3] As the Court held unanimously in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), "[t]he power to tax members and non-Indians alike is surely an essential attribute of [tribal] self-government." *Id.* at 201 (citing President Reagan's Statement on Indian

---

[3] For brevity's sake, this brief generally refers to "sales taxes" on "goods" delivered to "Indians" on their "reservation." As used here, however, the term "sales taxes" includes not only sales taxes that are imposed on buyers or on sellers but also similar taxes imposed on sellers such as "transaction privilege taxes" or "gross receipts" taxes, as well as complementary use taxes that are imposed on buyers but that the sellers have a duty to collect. The term "goods" includes all tangible personal property. The term "Indians" includes any federally recognized Indian Tribe that governs an area of Indian country, any agency or enterprise of that Tribe, any duly enrolled member of that Tribe, and any member-owned business, but excludes non-Indians and nonmember Indians (*i.e.*, enrolled members of a different Tribe). And the term "reservation" includes reservation lands and any other lands that qualify as the Tribe's "Indian country," as defined in 18 U.S.C. § 1151.

Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983)).

The Court explained the derivation of Tribes' taxation authority in *Merrion v. Jicarilla Apache Tribe*:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

455 U.S. at 137.

B. The scope of Tribes' taxation power is broad.

The scope of Tribes' taxation authority is broad. It covers all sales to the Tribe's members on the Tribe's reservation. It also covers all sales to nonmembers (including non-Indians) on land on the Tribe's reservation that is owned by or held in trust for the Tribe or its members. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650–53 (2001). And under certain

circumstances, a Tribe's taxation authority may cover sales of goods to a nonmember on reservation land held in fee by a non-Indian. *See id.* at 654–59.[4]

So, at a minimum, if goods are delivered to a tribal member or on Indian lands (or both), on a reservation, the Tribe governing that reservation can tax the transaction. Although tribal sales taxes often cover the same transactions as state sales taxes, at the same rate, Tribes are of course free to legislate their tax codes as they see fit and need not mirror the state code. *See generally* 25 U.S.C. § 1301(2) (broadly defining Tribes' powers of self-government).

C. The Executive, Congress, and the States all recognize Tribes' taxation authority.

Like the Judicial Branch, the Executive and the Legislative Branches have for many decades recognized Tribes' broad taxing authority. As for the Executive, regulations dating back to the 1970s expressly acknowledge Tribes' power to "assess[] and collect[] such fees or taxes as they may deem

---

[4] Unless Congress has provided otherwise through treaty or statute, an Indian Tribe may tax nonmembers' activities on non-Indian fee land within its reservation if (1) the nonmembers have entered consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements, and there is a nexus between the tax and the consensual relationship, or (2) the nonmembers' conduct threatens or has some direct effect on the Tribe's political integrity, economic security, or health or welfare. *See Atkinson*, 532 U.S. at 654–59 (citing *Montana v. United States*, 450 U.S. 544, 565–66 (1981)).

appropriate from reservation businesses." 25 C.F.R. § 141.11(a). More than 80 years ago, the Solicitor of the Interior published a formal opinion stating that Tribes' sovereign power to tax "may be exercised over members of the tribe and over nonmembers." *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934), *cited in Kerr-McGee*, 471 U.S. at 199. And in 1900, when a merchant refused to pay a tribal tax, the Attorney General published a formal opinion instructing the Secretary of the Interior to shut down the merchant's business and remove him from the Tribe's reservation. *See* 23 Op. Att'y Gen. 214, 219 (1900).

Similarly, since at least the late nineteenth century, Congress has "acknowledged the validity" of taxes that Tribes impose on Indians and non-Indians alike. *Kerr-McGee*, 471 U.S. at 198–99 (citing S. Rep. No. 45-698, at 1–2 (1879)). Since the 1980s, the Internal Revenue Code has mandated that, when computing federal income-tax liability, tribal taxes are deductible to the same extent as state taxes. *See* Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871(a)(3). And the currently pending Senate bill that would effectively overrule *Quill* and allow States to tax remote sales by retailers with no in-state physical presence defines the term "State" to include Indian Tribes. *See* The Marketplace Fairness Act of 2017, S. 976, § 4(8), 115th Cong. (2017); *see also* The Marketplace Fairness Act of 2015, S. 698, § 4(8), 114th Cong. (2015); The Marketplace Fairness Act of 2013, S. 743, § 4(8), 113th Cong. (2013); The Main Street Fairness Act, H.R. 5660, §§ 5, 10(2)(C), 111th Cong.

(2010); Sales Tax Fairness and Simplification Act, S. 34, §§ 5, 10(3)(C), 10(6), 110th Cong. (2007).

Nor is such recognition limited to the Federal Government. States also have acknowledged Tribes' legitimate taxing authority. For example, the Multistate Tax Commission's formal policy statement on tribal/state issues notes that Tribes' "power to tax is just as much an inherent attribute of their sovereignty as it is to the States." Multistate Tax Commission, *Tribal–State Tax Issues*, Policy Statement 2009-01.[5]

The National Conference of State Legislatures has recognized Tribes' power to impose taxes, including sales taxes, as well:

> Tribal governments have the authority to collect taxes on transactions that occur on tribal lands, and tribal government revenues are not taxable by state governments.... Like state and local governments, tribal governments use their revenues to provide services for their citizens and develop government infrastructure. Unlike state governments, tribal governments most often are not in a position to levy property taxes due to the high percentage of land on Indian reservations that is held by the U.S. government. Income from natural resources, tribal businesses, and sales and

---

[5] *Available at* http://www.mtc.gov/getattachment/The-Commission/Policy-Statements-Resolutions/Policy-Statement-2009-01.pdf.aspx.

> excise taxes are most often the only non-federal revenue source for tribal revenue departments.

Susan Johnson et al., National Conference of State Legislatures, *Government to Government: Models of Cooperation Between States and Tribes* 67–68 (2d ed. 2009) [hereinafter NCSL, *Government to Government*].[6]

Given the broad and longstanding acceptance of Tribes' on-reservation taxation authority, if *Quill*'s physical-presence rule is abrogated—whether by this Court or by Congress—there can be no doubt that every Tribe has the power to tax mail-order and internet retailers for remote sales of goods delivered to tribal members, or on Indian lands, on the Tribe's reservation.

II. Federal law limits States' power to impose sales taxes on purchases of goods in Indian country.

In contrast to Tribes' broad power to impose sales taxes on purchases on their reservations, States' taxing authority in Indian country is significantly constrained by federal law. The Court's opinion in this case should not disturb any of the well-settled sales-tax immunities that have long applied to various tax-exempt purchasers, including Tribes and their members in Indian country.

---

[6] *Available at* http://www.ncsl.org/documents/statetribe/item019417.pdf.

A. States cannot directly tax Tribes or tribal members in Indian country.

As an initial matter, the Supremacy Clause, U.S. Const. art. VI, cl. 2, categorically bars States from imposing taxes directly on a Tribe or a member of the Tribe on the Tribe's reservation. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 127–28 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987).

This categorical rule focuses on location: Because the transaction occurs in the Tribe's Indian country, the State can tax neither the Tribe nor its members. However, an Indian residing and transacting business outside Indian country generally is subject to state taxes. *See Chickasaw Nation*, 515 U.S. at 462–64; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–50 (1973).

B. States cannot tax retailers' sales to Tribes or tribal members in Indian country.

Especially relevant here is federal law's prohibition of state sales taxes imposed on any retailer, on or off the reservation, who delivers goods to a Tribe or a member of the Tribe on its reservation.

From its earliest days, Congress has authorized sweeping and comprehensive federal regulation over persons who wish to engage in "Commerce ... with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3; *see Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 70 (1994). The Indian Trader Statutes, 25

U.S.C. §§ 261–264, which were originally enacted in 1790 and have remained unchanged for more than a century, were designed to protect Indians from fraud, economic hardship, and violent conflicts[7] by requiring businesspersons (typically non-Indians) to obtain a federal license before attempting to "introduce goods" and offer "merchandise ... for sale to the Indians" on a reservation. 25 U.S.C. § 264; *see id.* §§ 261–263.

Although the Indian Trader Statutes do not mention taxes, they do refer expressly to the "prices" that reservation Indians must pay for goods: Congress empowered the Commissioner of Indian Affairs (now the Secretary of the Interior) not only to issue and revoke Indian-trader licenses but also to promulgate "just and proper" regulations "specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." *Id.* § 261; *see* 25 C.F.R. §§ 140.1–140.26, 141.1–141.59 (implementing the Indian Trader Statutes); *see also* Traders with Indians, 81

---

[7] On January 4, 1790, Secretary of War Henry Knox wrote to President Washington with the outline of the first Indian Trader Statute: "[A]s Indian Wars almost invariably arise in consequence of disputes relative to boundaries, or trade, and as the right of declaring War, making treaties, and regulating commerce, are vested in the United States, it is highly proper [that the United States] should have the sole direction of all measures for the consequences of which they are responsible." Letter from Henry Knox to George Washington (Jan. 4, 1790), *in* 4 The Papers of George Washington: Presidential Series 529, 534–35 (Dorothy Twohig ed., 1993). Thus, from the beginning, exclusive federal regulation of trade with the Indian Tribes was driven less by paternalism than by the need to foster peaceful and respectful nation-to-nation relationships.

Fed. Reg. 89,015 (Dec. 9, 2016) (soliciting public comment on whether to update regulations).

In *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), the Court unanimously held that these statutes barred Arizona from imposing its gross-receipts tax (a type of sales tax) on a federally licensed trader that sold goods to Navajos at a retail store on the reservation. *See id.* at 686 n.1, 690. The Court concluded that the Indian Trader Statutes and the "apparently all-inclusive regulations" under them showed that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.* at 690. The Court added that the "financial burdens" imposed by a tax on a trader or its Indian customers could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 691.

Because the Court held that the state tax was preempted by the Indian Trader Statutes, it did not consider the trader's claim that the tax was also barred by the Indian Commerce Clause. *See id.* at 686. But that Clause still lay at the root of the Court's decision: "[W]e hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's ... because Congress in the exercise of its [Indian Commerce] power ... has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Id.* at 691 n.18 (citing U.S. Const. art. I,

§ 8, cl. 3); *see also Warren Trading Post Co. v. Moore*, 387 P.2d 809, 816 (Ariz. 1963) (Lockwood, J., dissenting), ("Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians—an area of commerce [that the States] delegated exclusively to the federal government in the Commerce Clause ...."), *rev'd sub nom. Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965).

Fifteen years later, the Court confirmed that federal law preempts state taxes imposed on non-Indians who sell and deliver goods to reservation Indians, regardless of whether the seller was federally licensed as an Indian trader or whether the seller maintained a place of business on the reservation. In *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), Arizona sought to impose the same gross-receipts tax at issue in *Warren Trading Post* on a one-time sale of tractors that an Arizona corporation delivered to a tribal enterprise, Gila River Farms, on the Gila River Reservation. *See id.* at 161, 164 & n.3. Unlike the trader in *Warren Trading Post*, however, Central Machinery Company had neither a place of business on the reservation nor an Indian-trader license. *See id.* at 164–65.

The tax was assessed against the non-Indian seller, Central Machinery, not the Indian purchaser, Gila River Farms. *See id.* at 162. Central Machinery added the amount of the tax as a separate item to the price of the tractors, which increased the total purchase price that Gila River Farms had to pay. *See id.* Central Machinery paid the state tax under protest and sued

for a refund, which it promised to pay over to Gila River Farms. *See id.* at 162 & n.2. Then-Judge Sandra Day O'Connor of the Maricopa County Superior Court held that the State lacked jurisdiction to tax the transaction and ordered the refund. *See State v. Cent. Mach. Co.*, 589 P.2d 426, 426–27 (Ariz. 1978) (citing trial court's opinion), *rev'd sub nom. Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980).

Following an appeal to the Arizona Supreme Court, this Court agreed with Judge O'Connor and held that the state tax could not be imposed on Central Machinery, concluding that the Indian Trader Statutes "apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader." 448 U.S. at 165. As for the vendor's failure to obtain a federal Indian-trader license, the Court held that "[i]t is the existence of the Indian trader statutes, ... and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Id.* at 165.

Warren Trading Post and *Central Machinery* make clear that, in combination, the Indian Commerce Clause, the Indian Trader Statutes that Congress enacted using its Indian Commerce power, and the regulations the Executive Branch promulgated to implement those statutes preempt any sales tax that a State attempts to impose on a non-Indian off-reservation retailer who sells goods to a Tribe or its members and delivers them to the Tribe's Indian country. Regardless of whether *Quill*'s physical-presence rule is abrogated—by this Court or by Congress—States still could not tax these transactions.

To eliminate the risk of pointless litigation, however, *amici* urge the Court to make States' inability to tax these transactions clear in its opinion in this case.

C. Some sales to nonmembers in Indian country are subject to double taxation, which is inefficient and unfair to Tribes.

Purchases by non-Indians (or nonmember Indians) are treated differently: Generally, States view these transactions as falling squarely within their taxation authority.[8]

State taxes on some on-reservation purchases by nonmembers, when added to tribal taxes on the same transactions, gives rise to a problem of double taxation. (Recall that Tribes always have authority to tax sales of goods delivered to nonmembers residing on Indian land on the reservation, and sometimes have authority to do so on non-Indian fee land, as well. *See supra* page 10 and note 4.) *See generally Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173–93 (1989) (upholding

---

[8] However, federal law preempts state sales taxes on reservation transactions even when the seller and the buyer are both non-Indian when there is "value generated on the reservation by activities involving the Tribe[]." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156–57 (1980); *see, e.g., Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434–35 (9th Cir. 1994); *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 899 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988). And the State also cannot impose any tax that would "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

concurrent tribal and state taxes on the same transaction); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150–62 (1980) (same). This problem of double taxation could be exacerbated if the Court issues an opinion in this case that lacks the limiting language *amici* seek and thus could be misinterpreted as expanding States' authority to impose sales taxes in Indian country.

Charging two sales taxes would often make purchases prohibitively expensive for consumers and thus would weaken tribal economies. *See* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 Pitt. Tax Rev. 93, 95 (2005). As Justice Sotomayor recently explained, "double taxation would discourage economic growth," as firms "'may find it easier to avoid doing business on [Indian] reservations [than to] ... bear the brunt of an added tax burden.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2044 (2014) (concurring opinion) (citations omitted); *see* Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country* (Joint Occasional Papers on Native Affairs, Paper No. 2016-1, May 4, 2016 draft) (cataloging economic harms from double taxation in Indian country).[9]

Under current federal law, States can solve the double-taxation problem by allowing a credit for sales

---

[9] *Available at* http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

taxes validly paid to Tribes. That approach is analogous to the Interstate Commerce Clause requirement that States allow credits for sales taxes validly paid to other States. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 191–95 (1995); 2 Jerome R. Hellerstein, Walter Hellerstein & John A. Swain, *State Taxation* ¶ 18.09[2], at 18-143 to 18-146 (3d ed. 2000); *see also* 26 U.S.C. § 901 (foreign tax credit).

In *Colville*, Justice Stewart would have held this approach to be mandated by the Indian Commerce Clause and congressional enactments under that Clause: "[W]hen a State and an Indian tribe tax in a functionally identical manner the same on-reservation sales to nontribal members, it is my view that congressional policy conjoined with the Indian Commerce Clause requires the State to credit against its own tax the amount of the tribe's tax." 447 U.S. at 175 (Stewart, J., concurring in part and dissenting in part). The majority in *Colville* declined to make these credits mandatory as a matter of federal law. *See id.* at 164. But some States have voluntarily "provide[d] a credit for any tribal tax imposed or enact[ed] a state tax that applies only to the extent that the [Tribe] fails to impose an equivalent tribal tax." *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 130 (2005) (Ginsburg, J., dissenting).

For example, in 1989, the Nevada Legislature recognized Tribes' authority to impose retail sales taxes on any person doing business on their reservations, Nev. Rev. Stat. § 372.800, and barred the State from collecting its own sales tax on those same transactions, so long as the Tribe's tax "is equal to or

greater than the [state] tax," *id.* § 372.805. Nevada's system has been lauded by the National Conference of State Legislatures:

> All Nevada state sales and excise taxes are waived for the purchase of any product sold on an Indian reservation, provided that a tribal tax that is equal to or greater than the comparable state tax is applied. This applies to all sales made on Indian reservations (from cigarettes to toilet paper to a loaf of bread), with the exception of gasoline. This arrangement ensures that the 17 tribes in Nevada will have an adequate tax base and recognizes that the services the tribes provide on their reservations will benefit not only tribal members but all who enter the reservation.

NCSL, *Government to Government*, *supra*, at 71; *see also* Nev. Att'y Gen. Op. No. 97-30 (Dec. 31, 1997).

Absent state legislation providing a credit for tribal sales taxes, the next-best solution to the double-taxation problem often is a State/Tribe compact governing tax administration and revenue sharing. *See infra* pages 28–29.

To be clear, *amici* believe that Tribes—to the exclusion of States and their political subdivisions—should have the sole authority to impose sales taxes on ***all*** purchases of goods delivered to their reservations (regardless of the buyer's or seller's status as a tribal member or nonmember, and regardless of the land's

status as Indian or non-Indian), and that Congress, or perhaps this Court in the appropriate case, should clarify that federal law mandates that result. But this case obviously does not present that question.

III. The Court's decision in this case can readily be reconciled with Tribes' taxation authority and Indians' immunity from state sales taxes.

Over the last 25 years, the fundamental principles of Indian tax law set forth above have proved compatible with the holding of *Quill*.[10] They would be equally compatible, however, with an Act of Congress or an opinion of this Court that overrules *Quill*.

A. Tribal sales taxes can remain protected.

As for tribal sales taxes, there is no reason to doubt that mail-order and internet retailers—regardless of whether they do or do not have a physical presence in the State where the Tribe's reservation is located—could fully comply with tribal law and pay tribal taxes on sales to reservation residents. According to respondents, there are already more than 16,000 taxing

---

[10] This does not mean that nonmembers residing on Indian reservations always readily pay the tribal sales taxes they owe, or that States always respect the sales-tax immunities that federal law guarantees to Tribes and their members. *See, e.g.*, South Dakota Department of Revenue, *Tribal Tax Facts* 8 (Jan. 2018) (stating, incorrectly, that the State's 4.5% sales tax would apply if an off-reservation retailer sold goods to a tribal member and delivered them to the member's residence on the Tribe's reservation), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Tribal.pdf. But those are issues of compliance and collection, not doctrine.

jurisdictions in the United States, mostly counties and other state subdivisions, whose tax rates must be applied by internet retailers when computing purchase prices for online orders. Petitioner suggests that respondents' figure is inflated,[11] but in any event the number is likely now to be well in excess of the "6,000-plus taxing jurisdictions" that this Court acknowledged a quarter century ago. *Quill*, 504 U.S. at 313 n.6. By contrast, there are only 573 federally recognized Indian Tribes, and many of them impose no sales taxes whatsoever. Some Tribes have no reservation or Indian country, and nearly half the Tribes are located in three States that impose no sales taxes (Alaska, Montana, and Oregon), making it less likely that the Tribes would impose their own sales taxes. So, in a post-*Quill* world, fully recognizing and implementing Tribes' authority to tax remote sales would only marginally increase the nationwide number of taxing jurisdictions whose laws remote retailers must comply with.[12]

---

[11] *Compare* Br. in Opp'n 15–16, 26, *with* Reply Br. 9–12.

[12] Nonmembers who are exempt from the tribal sales tax, perhaps by virtue of residing on non-Indian fee land, could use the same mechanism described below (*see infra* pages 25–27)—blanket exemption certificates—to ensure that the Tribe does not tax their transactions. Presumably they would be taxed instead, often at the same rate, by the State.

B. State sales taxes in Indian country can remain limited by using blanket exemption certificates.

As for state sales taxes, the correct approach is simple: States and remote retailers must take the same steps to protect Tribes and their members that they take for all other tax-exempt entities and individuals. This is not difficult.

All States that impose sales taxes also provide exemptions for purchases by the Federal Government and by various individuals and entities, often including charitable, religious, and educational nonprofits. No two States have identical administrative and recordkeeping procedures, but the following description summarizes the most common approach.

To prove tax-exempt status, the buyer fills out a short form, known as an "exemption certificate," which typically is available for download from a state website. The certificate contains blanks for the buyer's name, address, and other identifying information, such as a tax ID number or driver's license number, as well as checkboxes and blanks to concisely explain the reason for the exemption, such as a checkbox labeled "Indian" or "Tribal" and a blank for the specific Tribe's name. The buyer signs and dates the certificate, usually below a printed statement explaining that the buyer is responsible for ensuring that she qualifies for the tax exemption and warning that she may be held liable for

the unpaid tax, interest, and civil and criminal penalties if she in fact is ineligible.[13]

Although a buyer can use a certificate for a single purchase, typically a blanket certificate remains valid for a period of years or until the information on the certificate becomes outdated (for example, if the buyer moves). When purchasing goods, the buyer provides a copy of a completed certificate to the seller (not to the State). The seller is required to keep the certificate in its records and to produce a copy to the State upon request, along with records of the buyer's transactions. So, with a blanket certificate, there is no need for the buyer to re-send the certificate when making subsequent purchases from the same seller.

So long as the seller did not solicit the buyer to unlawfully claim an exemption or otherwise commit fraud, keeping a copy of the buyer's certificate in its files absolves the seller of liability to the State for failing to collect the sales tax, even if the State ultimately determines that the buyer claimed the exemption improperly. And to avoid liability to a customer who properly claimed the exemption, the

---

[13] For examples, *see* Washington State Department of Revenue, *Buyers' Retail Sales Tax Exemption Certificate*, Rev. 27 0032 (Aug. 4, 2017), https://dor.wa.gov/legacy/Docs/Forms/ExcsTx/ExmptFrm/BuyersRetailTxExmptCert_E.pdf; Streamlined Sales Tax Governing Board, Inc., *Streamlined Sales and Use Tax Agreement Certificate of Exemption*, SSTGB Form F0003 (rev. May 10, 2017, for use Jan. 1, 2018), http://www.streamlinedsalestax.org/uploads/downloads/Forms/F0003%20Exemption%20Certificate%20Revised%205-2017%20for%20use%20beginning%201-1-2018.pdf.

seller must merely accept the timely submitted, fully completed certificate and then not add the amount of the sales tax to the purchase price.

This system has long been in effect for face-to-face transactions in States that impose sales taxes. Applying it to remote sales by businesses that have an in-state physical presence has proved to be straightforward.[14] The same would be true for remote retailers that lack an in-state physical presence.

Of course, States have considerable flexibility here, so long as their administrative and recordkeeping procedures treat Indian Tribes and their members on par with other tax-exempt entities and individuals. What would not be permissible, however, is a system where, in lieu of blanket exemption certificates, the tax-exempt Tribe or individual Indian is required to pay the state sales tax and then, on a transaction-by-transaction basis or even an annual blanket basis, seek refunds from the State, or is required to seek advance permission from the State to make a tax-exempt purchase. *Amici* are not aware of any State that relies on such a system for all non-Indian tax-exempt entities and individuals. Indeed, it would be wildly inefficient and unduly burdensome to do so. Moreover, demanding payment and refund requests only from tax-exempt Indians would constitute unlawful discrimination. And it would violate this Court's blackletter rule that Indians should never pay state

---

[14] *See, e.g.*, Amazon Tax Exemption Program, https://www.amazon.com/gp/help/customer/display.html/ref=aw?ie=UTF8&nodeId=201633510 (last visited Mar. 1, 2018).

sales taxes for on-reservation purchases. *See supra* page 14.

C. Problems arising from concurrent state and tribal tax jurisdiction can be addressed through state tax credits or intergovernmental compacts.

Aside from exemption certificates (*see supra* pages 25–27) and state tax credits (*see supra* pages 20–22), another tool that will help States and Tribes alike to comply with the key Indian tax principles, regardless of this case's outcome, is the intergovernmental tax compact, "the most beneficial means to resolve conflicts of this order." *Wagnon*, 546 U.S. at 130 (Ginsburg, J., dissenting) (citing sources). As of 1998, "[m]ore than 200 tribes in 18 states ha[d] created successful state-tribal compacts that are mutually satisfactory to both parties." NCSL, *Government to Government*, *supra*, at 67. That number is likely even higher today. Nearly all the Tribes in South Dakota now have tax-collection agreements with the State. Compacts can cover a broad range of state and tribal taxes, including sales taxes. *See, e.g.*, N.M. Stat. Ann. § 9-11-12.1 (authorizing State/Tribal cooperative agreements to administer, collect, and remit tax revenues).

Intergovernmental compacts are particularly valuable in avoiding double taxation when the Tribe and the State have concurrent jurisdiction, as is often the case when nonmembers residing on the reservation purchase goods. If *Quill*'s physical-presence rule is abrogated, then remote vendors will be collecting more sales taxes and there will be an increased risk that nonmembers living in Indian country will be subject to

both tribal and state sales taxes on their remote purchases. But this is no reason to revisit the tax landscape in Indian country. As explained above, double taxation of nonmembers is not a new problem, and it can be addressed by existing tools like state credits for tribal sales taxes (as Nevada has legislated) or intergovernmental tax compacts (as South Dakota has negotiated with some *amici*).

In the context of retail sales of goods, a compact typically could provide that one, but not both, of the jurisdictions would collect from the sellers the tax revenues for on-reservation sales and then periodically remit a predetermined percentage of those revenues to the other jurisdiction, while keeping the remainder. An intergovernmental compact focused specifically on the issues implicated in this case could eliminate reservation residents' need for exemption certificates. The compact could provide that the State collect sales tax at an agreed-upon rate on all remote sales delivered to the reservation, regardless of whether the buyer is a member or nonmember, regardless of whether the goods will be delivered to Indian or non-Indian land on the reservation, and regardless of where the retailer has a physical presence. The compact could then allocate to the Tribe an agreed-upon percentage of the revenues collected.

To determine whether a county or municipal sales tax should be added to the state sales tax, internet retailers already use software that differentiates delivery addresses in one county or municipality from addresses in a neighboring jurisdiction. The same could be done for reservation addresses.

D. Any fiscal impact will be minimal for the States, yet significant for the Tribes.

Finally, an opinion of the Court clarifying that the federal Indian-law principles summarized in this brief remain fully in place would not prevent States from gaining the benefits of a judicial decision (or a congressional act) abrogating *Quill*'s physical-presence rule. Indian country is relatively sparsely populated. The United States is home to 327 million people. Fewer than two million of them are Indians living on their Tribes' reservations.[15]

In their cert-stage filings, petitioner and respondents debated the potential fiscal impact of this case, suggesting that, nationwide, the annual uncollected sales-tax revenues might total between $3.9 and $20 billion annually.[16] So the stakes for tribal governments likely total in the tens of millions of dollars annually. That is a tiny fraction of what state treasuries stand to gain from abrogation of *Quill*'s

---

[15] *See* U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010*, at 13 (Jan. 2012) (showing the 2010 nationwide Indian population on reservations, off-reservation trust lands, and other Indian statistical areas as 1,069,411), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf; U.S. Department of Health and Human Services, Indian Health Service, *Trends in Indian Health* 26 (2014 ed.) (showing the 2010 Indian Health Service's nationwide service population, outside of Alaska, where there are almost no reservations, as 1,849,129), https://www.ihs.gov/dps/includes/themes/responsive2017/display_objects/documents/Trends2014Book508.pdf.

[16] *See* Pet. 13–14; Br. in Opp'n 28–29; Reply Br. 10.

physical-presence rule. But it is a significant sum for the poorest demographic group in our Nation, its First Americans.

Sensitivity to this opinion's potential impact on tribal governments is extremely important, because the Court's ruling may set the terms for the sales-tax collection system for decades to come, and sales taxes are a critical source of government revenue for cash-strapped Indian Tribes. Like other responsible governments, Tribes seek to supply their citizens, and indeed all reservation residents, with the public services essential to their health and well-being. Fundamental fairness demands that tribal governments have the same opportunities to collect taxes as other jurisdictions within our federal system. Including appropriate limiting language in this Court's opinion will prevent countless years of litigation and avoid dealing an unintended blow to tribal self-governance and principles of equitable and efficient taxation.

CONCLUSION

Regardless of whether the Court affirms or reverses the judgment below, it should make clear that nothing in its opinion limits Tribes' authority to impose sales taxes or Indians' immunity from state sales taxes.

Respectfully submitted,

JOHN HAYDEN DOSSETT
DERRICK BEETSO
NCAI
1516 P Street, NW
Washington, DC 20005-1910
(202) 466-7767

GEOFFREY M. DAVIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-9350

SETH C. PEARMAN
Attorney
603 West Broad Avenue
Flandreau, SD 57028
(605) 573-4206
Counsel for the Flandreau Santee Sioux Tribe

SAM HIRSCH
Counsel of Record
IAN HEATH GERSHENGORN
LEONARD R. POWELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001-4412
(202) 639-6000
shirsch@jenner.com
Counsel for Amicus Curiae *The National Congress of American Indians (NCAI)*

DEBRA FLUTE
Senior Attorney
P.O. Box 509
Agency Village, SD 57262
(605) 698-3911, ext. 8300
Counsel for the Sisseton-Wahpeton Oyate

THOMASINA REAL BIRD
General Counsel
FREDERICKS PEEBLES &
MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
(303) 673-9600
Counsel for the Yankton Sioux Tribe

STEVEN J. GUNN
Special Counsel
P.O. Box 16084
St. Louis, MO 63105
(314) 920-9129
Counsel for the Cheyenne River Sioux Tribe and the Oglala Sioux Tribe

TARA L. ADAMSKI
Attorney
1801 E. Wells Ave., Suite 3
P.O. Box 866
Pierre, SD 57501
(605) 945-0890
Counsel for the Lower Brule Sioux Tribe

STEVEN D. SANDVEN
Attorney
116 East Main Street
Beresford, SD 57004-1819
(605) 763-2015
Counsel for the Crow Creek Sioux Tribe

ERIC ANTOINE
Attorney
P.O. Box 430
Rosebud, SD 57570
(605) 747-3188, ext. 247
Counsel for the Rosebud Sioux Tribe

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.
Respondents.

On a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, US CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL PUBLIC LABOR RELATIONS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, NATIONAL ASSOCIATION OF STATE TREASURERS, NATIONAL SCHOOL BOARDS ASSOCIATION, AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, AND ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL SUPPORTING PETITIONER

LISA SORONEN
EXECUTIVE DIRECTOR
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St. NW
Suite 515
Washington, DC 20001

*Counsel of Record

TILLMAN J. BRECKENRIDGE*
BAILEY & GLASSER LLP
1054 31st St., NW, Suite 230
Washington, DC 20007
Telephone: 202-463-2101
Facsimile: 202-463-2103
tbreckenridge@baileyglasser.com

Counsel for Amici Curiae

ADDITIONAL COUNSEL ON INSIDE COVER

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE AND
SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

BRIEF OF AMICI CURIAE 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. *QUILL* DEPRIVES STATE AND LOCAL GOVERNMENTS OF CRUCIAL REVENUE STREAMS AND UNREASONABLY HINDERS THEIR ABILITY TO COLLECT TAXES THAT ARE ALREADY OWED 8

A. *Quill* wreaks havoc on State and local governments' ability to collect owed sales and use taxes. 8

B. The detrimental effect of *Quill* has been, and will continue to be, increasingly exacerbated by the consistent and expansive growth of e-commerce. 15

II. ECONOMIC PRESENCE IS A NEXUS ALTERNATIVE TO PHYSICAL PRESENCE UNDER THE *COMPLETE AUTO* TEST THAT SATISFIES THE DEMANDS OF THE COMMERCE CLAUSE 18

A. *Quill* incorrectly articulated a difference between the nexus requirements of the Due Process Clause and the Commerce Clause..... 18

B. Economic Nexus Satisfies the Demands of the Commerce Clause and Resolves All Concerns of Wayfair and Amici..... 21

CONCLUSION..... 26

TABLE OF AUTHORITIES

Cases

Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967). 6, 17, 19

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977).....19, 20

Crutchfield Corp. v. *Testa*, 88 N.E.3d 900, 909-12 (Ohio 2016).....10

Direct Mktg. Ass'n v. *Brohl*, 135 S. Ct. 1124, 1134 (2015).....19

Direct Mktg. Ass'n v. *Brohl*, 814 F.3d 1129, 1149 (10th Cir. 2016).....9

Nat'l Geographic Soc'y v. *Cal. Bd. of Equalization*, 430 U.S. 551 (1977) 20

New State Ice Co. v. *Liebmann*, 285 U.S. 262, 311 (1932).....24

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992)..... passim

W. Lynn Creamery, Inc. v. *Healy*, 512 U.S. 186, 201 (1994).....8

Statutes

S.D. Codified Laws §§ 10-64-1 *et. seq.* (2016).....7

Other Authorities

Center for Public Education, *Data F1rst: How Much Money Does Our School*

District Receive from Federal, State, and Local Sources? 12, 20

Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571, 576-77 (Aug. 7, 2017) 23

Elliott D. Pollack & Company, *Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona* (2012). 14

Joe Crosby, *Economic Nexus is the Most Prevalent Type of Sales Tax Compliance Legislation This Year* (Jan. 27, 2017) 22, 24

Keshia Hannam, *A Record Amount of Brick and Mortar Stores Will Close in 2017* (Oct. 26, 2017). 13

KPMG, *SALT Alert! 2017-14: Washington State: Sales and Use Tax Economic Nexus/Use Tax Notice Bill Enacted* (July 13, 2017) 25

Lila Disque & Helen Hecht, *Beyond* Quill *and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1179-80 (2016) 23

Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online* (June 8, 2016) 15

Marissa Fessenden, *What Was the First Thing Sold on the Internet?* (Nov. 30, 2015) 15

Matt Lindner, *E-Commerce is Expected to Grow to 17% of US Retail Sales by 2022* (Aug. 9, 2017).....16

Morgan Scarboro, *To What Extent Does Your State Rely on Sales Taxes?* (Apr. 27, 2017).....12

National Center for Education Statistics, *Public School Revenue Sources* (March 2017).....12

National Conference of State Legislatures (NCSL) & International Council of Shopping Centers (ICSC), *Uncollected Sales & Use Tax from Remote Sales: Revised Figures* (Mar. 2017).....17

National Conference of State Legislatures (NCSL), *State Efforts to Collect Remote Sales Taxes* (Feb. 2014).....11

No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders Before the H. Comm. on the Judiciary, 115th Cong. (2017) (statement of Sen. Deb Peters (SD) on behalf of NCSL).....22

Quarterly Retail E-Commerce Sales: 3rd Quarter 2017, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Nov. 17, 2017, at 1.....16

Richard D. Pomp, *Revisiting* Miller Brothers, Bellas Hess, *and* Quill, 65 AM. U. L. REV. 1115, 1146 (2016).....18

Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAW. 623, 623 (2014) 18

Sales Tax Institute, *What States Impose Sales/Use Tax* 10

Scott Drenkard & Nicole Kaeding, *State and Local Sales Tax Rates in 2016* (Mar. 9, 2016) 9

South Dakota FY2018 Budget 11, 12

Tax Insights, *Alabama Adopts Economic Sales and Use Tax Nexus Regulation* (Oct. 2015) 24

The Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* 1 (Oct. 2011) 14, 15

The Impact of the Internet Sales Tax Disparity on Massachusetts Tax Revenues, Sales and Jobs, Efairness.org (Nov. 13, 2012) 14

U.S. Government Accountability Office, *Sales Tax: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain* (June 2000) 11

Younger Associates, *The Impact of Sales Tax Loss to E-Commerce in the State of Tennessee* (Sept. 2011) 15

BRIEF OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of Petitioner, the State of South Dakota, urging that this Court reverse the Supreme Court of South Dakota's decision.

INTEREST OF AMICI CURIAE

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or his counsel made a monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its more than 19,000 members are dedicated to the sound management of government financial resources.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications,

professional development, and conferences, certification, assessment, and advocacy.

The National Association of State Treasurers seeks to provide advocacy and support that enables member states to pursue and administer sound financial policies and programs benefiting the citizens of the nation. Membership is comprised of all state treasurers or state finance officials with comparable responsibilities from the United States, its commonwealths, territories, and the District of Columbia. The private sector is represented through the Corporate Affiliate Program that was established to build professional relationships and foster cooperation between the public and private sectors.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts.

AASA, the School Superintendents Association, advocates for the highest quality public education for all students, and develops and supports school system leaders. Founded in 1865, AASA is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders.

The National Association of Elementary School Principals (NAESP), founded in 1921, is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. NAESP advocates for the support principals need to be successful 21st century leaders—to achieve the highest results for children, families, and communities. And, we support the continual development of our members—principals in many different stages of their careers—through benefits, and awards. All of our activities are designed to help principals and learning communities achieve desired results for every child. The mission of NAESP is to lead in the advocacy and support for elementary and middle level principals and other education leaders in their commitment for all children.

Founded in 1910, the Association of School Business Officials International (ASBO) is a nonprofit organization that, through its members and affiliates, represents approximately 30,000 school business professionals worldwide. ASBO International is committed to providing programs, services, and a global network that promote the highest standards in school business. Its members support student achievement through effective resource management in various areas ranging from finance and operations to food services and transportation.

SUMMARY OF ARGUMENT

State and local governments lost an estimated $26 billion in sales and use tax revenue in 2015 because they were unable to effectively collect owed taxes. The direct cause of this problem is simple to

identify: the Court's decisions in *Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), and *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), erected an unjustifiable tax advantage for retailers who lack a physical presence in the taxing State that, with the growth of online retail, has imposed a massive burden on state and local governments. Under *Quill*, States cannot require out-of-state merchants to collect and remit taxes on sales to consumers within the taxing State unless the out-of-state merchant has a physical presence in the State. Questionable when decided, *Quill* has continually produced the very harms it was intended to remedy.

The devastating effect on State and local economies is two-fold. First, the physical nexus requirement results in a loss of crucial revenue from owed taxes that State and local governments depend on to fund basic government functions. Second, it disadvantages in-state brick-and-mortar retailers, who do not have the same luxury of avoiding their sales and use tax collection and remittance responsibilities. To counter the deleterious effects of *Bellas Hess* and *Quill*, States have been on the forefront of legislative and regulatory remedies designed to capture owed sales and use tax revenue. Unfortunately, due to the narrow legal confines of *Bellas Hess* and *Quill*, these tailored remedies have been severely limited in practice, if not stymied entirely. With the *Bellas Hess* and *Quill* shackles removed, States would once again be the laboratories of democracy, creating policy that fits their respective sales and use tax revenue needs while establishing price parity for brick-and-mortar retailers.

Here, the South Dakota legislature enacted a law that requires out-of-state retailers to collect and remit sales and use tax if they annually conduct with South Dakota residents either: (1) $100,000 worth of business; or, (2) 200 separate transactions. S.D. Codified Laws §§ 10-64-1 *et. seq.* (2016) That law is constitutionally appropriate under a reasonable interpretation of the Commerce Clause, but it violates the requirement set out in *Quill*.

The Court's decisions in *Bellas Hess* and *Quill* are anomalous. Instead of adhering to the Court's established Commerce Clause jurisprudence and utilizing the *Complete Auto* nexus inquiry that focuses on the connection of the taxed *transaction* to the state, the Court instead established a super-nexus that requires physical presence of the taxed *entity*. In today's digital economy, out-of-state merchants conduct billions of dollars-worth of business in states without ever establishing this physical presence. As a result, the Court's decision in *Quill* is devastating in the modern economy, as online sales expand at a rate of almost four times the rate of total retail sales.

This easily identifiable tax collection problem has a clear solution: overturning *Quill* and relying on this Court's traditional four-part test in *Complete Auto*. But even if the Court determines it must heighten the nexus requirement of *Complete Auto* to include a super-nexus, economic nexus can serve as an alternative to physical presence under *Complete Auto*'s first prong. Under this approach, out-of-state retailers with a substantial economic presence in a State should be required to remit taxes on sales within the taxing State. Determining the level of

economic activity sufficient to create an economic nexus should be left to the State legislatures, as this determination is a highly individualized and context-specific inquiry. *See W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994) (explaining that the Court's Commerce Clause jurisprudence invokes "a sensitive, case-by-case analysis of purposes and effects" when judging between the national interest and the interests of states to exercise their legitimate taxing powers).

Upholding the South Dakota legislation and overturning *Quill* ensures that out-of-state retailers who enjoy a significant business benefit from the taxing State also remit the same taxes as in-state retailers. Questionable when decided, it is time to give *Bellas Hess* and *Quill* the "complete burial" they justly deserve. *Quill Corp.*, 504 U.S. at 322 (White, J., dissenting).

ARGUMENT

I. *QUILL* DEPRIVES STATE AND LOCAL GOVERNMENTS OF CRUCIAL REVENUE STREAMS AND UNREASONABLY HINDERS THEIR ABILITY TO COLLECT TAXES THAT ARE ALREADY OWED.

A. *Quill* wreaks havoc on State and local governments' ability to collect owed sales and use taxes.

To effectively raise revenue through taxation, State and local governments must be permitted to collect taxes that are owed. Sales and use taxes on the sale of goods either purchased or consumed in the State are essential to State and local government revenue streams. They typically range from five to

ten percent. *See, e.g.*, Scott Drenkard & Nicole Kaeding, *State and Local Sales Tax Rates in 2016* (Mar. 9, 2016).[2] "Sales tax" refers to a tax assessed on the sale of a product at the point of sale. It is typically collected and then remitted to the State by the merchant. However, *Quill* does not allow a State to require the collection and remittance of tax on a sale in which the seller sits in another State, and States have been forced to seek alternative methods for collecting this lost revenue, to little avail.

Under *Quill*, an out-of-state seller must have a physical nexus in a State before the State can require the seller to collect sales taxes. *Quill Corp.*, 504 U.S. at 315-16. States thus try alternate methods to capture the tax revenue from sales made to its residents from out-of-state sellers, and lower courts have been forced, over and over, to cabin *Quill* to its facts. This Court has never attempted to explain why sales-tax collection needs a different "nexus" rule from other kinds of taxes imposed on non-resident businesses, nor has it condemned laws that impose equal or potentially heavier burdens on interstate commerce without a physical presence. Instead, this Court has acquiesced through numerous lower-court cases that effectively upheld state laws "imposing regulatory and tax duties of comparable severity to sales and use tax collection duties." *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (collecting cases). And lower courts continue to hold that seemingly indistinguishable taxes—like a

---

[2] Available at https://taxfoundation.org/state-and-local-sales-tax-rates-2016/.

"Corporate Activities Tax" on out-of-state retailers, calculated based on gross receipts from in-state sales—are not governed by *Quill* because they are not formally "sales taxes." *See, e.g., Crutchfield Corp.* v. *Testa*, 88 N.E.3d 900, 909-12 (Ohio 2016).[3]

Additionally, most States have enacted a "use tax"—a tax on consumers of a product or service that is used, consumed, or stored in the taxing State. *See* Sales Tax Institute, *What States Impose Sales/Use Tax*.[4] Sales and use taxes are complementary: a use

---

[3] Over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their state. *See* Joe Crosby, Liz Malm & Ryan Maness, *South Dakota v. Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017), available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps. By 2011, for example, New York and over 20 other states had enacted some type of "Amazon legislation," designed to establish the nexus of an out-of-state vendor through the vendor's use of in-state, click-through advertisements. *See* Sylvia Dion, *Amazon Laws: The New Normal? Internet Sales Tax Law Update* (July 17, 2011), available at http://www.salestaxsupport.com/blogs/issues/internet-tax-ecommerce/are-amazon-laws-the-new-normal-an-update-on-internet-sales-tax-laws/. In Alabama, the Department of Revenue promulgated a regulation that out-of-state sellers who met certain activity requirements and whose sales of tangible personal property in Alabama exceeded $250,000 per year were deemed to have an economic nexus in Alabama for sales and use tax purposes. *See* Tax Insights, *Alabama Adopts Economic Sales and Use Tax Nexus Regulation* (Oct. 2015), available at https://www.pwc.com/us/en/state-local-tax/newsletters/salt-insights/alabama-adopts-economic-sales-and-use-tax-nexus-regulation.html. Other states, such as Colorado, have opted for notification and reporting requirements. *See* Colorado Dep't of Revenue, *Use Tax Notice and Reporting Requirements*, available at https://www.colorado.gov/pacific/tax/usetax.

[4] Available at http://www.salestaxinstitute.com/Sales_Tax_FAQs/ What_states_impose_sales_use_tax.

tax is not assessed on transactions where a sales tax has already been collected and remitted by the seller to the State. Because *Quill* prohibits States from requiring out-of-state sellers to collect sales taxes unless they have a physical nexus in the State, the reporting and remittance burden shifts from the seller to the consumer, who is generally unaware of this obligation. The result is a de facto "honor system" for purchases by consumers from out-of-state sellers that virtually no consumer honors. Use tax compliance by individual purchasers has been estimated to be somewhere between zero and five percent. *See* U.S. Government Accountability Office, *Sales Tax: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain* (June 2000).[5]

The effects of this obstructed revenue stream are severe. For most States, sales taxes account for about one-third of all revenue. *See* National Conference of State Legislatures (NCSL), *State Efforts to Collect Remote Sales Taxes* (Feb. 2014) (hereinafter NCSL, *State Efforts to Collect*).[6] In some States, the reliance is even more profound. South Dakota, for example, depends on the sales tax for over 63 percent of total tax collections. *South Dakota FY2018 Budget*;[7] *see also* Morgan Scarboro, *To What Extent Does Your State Rely on Sales*

---

[5] Available at http://www.gao.gov/assets/240/230474.pdf.

[6] Available at http://www.ncsl.org/documents/statefed/MFA_intheStatesFeb2014.pdf.

[7] Available at https://bfm.sd.gov/budget/rec18/SummaryBook_FY2018.pdf

Taxes? (Apr. 27, 2017).[8] As online sales grow, states that do not impose corporate or personal income tax, like South Dakota, will be forced to impose or raise new taxes at threat of their fiscal sovereignty.

The States' current inability to collect sales and use taxes from remote sales therefore stifles a vital source of support for State services related to public safety, infrastructure, education, and other government services. Public schools, for example, rely on state revenues from, among other sources, sales tax. *See* Center for Public Education, *Data First: How Much Money Does Our School District Receive from Federal, State, and Local Sources?*[9] To demonstrate, the National Center for Education Statistics reported that during the 2013-2014 school year, in 23 states, at least half of education revenues came from state governments. In South Dakota, where the percentage of educational revenues coming from the state is lower than in most other states, that percentage was still 31 percent. *South Dakota FY2018 Budget*;[10] *see also* National Center for Education Statistics, *Public School Revenue Sources* (March 2017).[11]

---

[8] Available at https://taxfoundation.org/sales-taxes-percent-collections/.

[9] Available at http://www.data-first.org/data/how-much-money-does-our-school-district-receive-from-federal-state-and-local-sources/.

[10] Available at https://bfm.sd.gov/budget/rec18/SummaryBook_FY2018.pdf

[11] Available at https://nces.ed.gov/programs/coe/pdf/coe_cma.pdf.

States' inability to collect sales and use taxes also creates market distortions that further depress state sales and use tax revenues. The tax collection inequity creates a distinct disadvantage for the brick-and-mortar stores located within the State. Sellers have the advantage of not adding sales taxes to a customer's bill, and thus are able to sell their products at lower overall cost, even if the products themselves were sold for the same exact price. In-state merchants, on the other hand, are still required to collect and remit sales tax, and their prices necessarily reflect this. Because the remote retailer is not required to collect the tax, the total price that the consumer pays for an item purchased from the remote retailer will be up to 10% less than what the consumer would have to pay for the same item if he or she were to buy it from the in-state retailer, even if the advertised price is the same.

As a result, local economies and jobs suffer as consumers choose tax-free online shopping over the local mall. In 2017, retailers closed over 6,700 brick-and-mortar stores across the country; this total exceeds even the number of stores that closed during the 2008 financial crisis. *See* Keshia Hannam, *A Record Amount of Brick and Mortar Stores Will Close in 2017* (Oct. 26, 2017).[12] Each store closing reflects lost jobs and lost tax revenue opportunity on several levels.

This transition, of course, leads to depressed economic growth. In Arizona, for example, a study estimated that the economic loss impact of e-

---

12 Available at http://fortune.com/2017/10/26/a-record-amount-of-brick-and-mortar-stores-will-close-in-2017/.

commerce on Arizona would "grow to as much as 8,679 jobs, $302.5 million in wages, and $841.1 million in economic activity" by 2015. *See* Elliott D. Pollack & Company, *Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona* (2012). [13] A different study estimated that Massachusetts lost approximately $387 million in state tax revenue in 2011; the study further estimated that in that same year, tax inequity cost Massachusetts almost 2,000 new jobs. *See The Impact of the Internet Sales Tax Disparity on Massachusetts Tax Revenues, Sales and Jobs*, Efairness.org (Nov. 13, 2012).[14]

Another study found that Ohio suffered a revenue shortfall of more than $200 million as a result of sales and use tax non-payment. *See* The Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* 1 (Oct. 2011).[15] The Ohio study further noted that, based on 2011 data, 11,000 direct retail jobs could be recaptured if tax parity were achieved between store retail and online retail. *Id.* In discussing the impact this has on local economies, the study also identified a decrease in commercial rent revenues as a secondary impact of the local stores' loss of revenue; this decrease in commercial rent revenue represented a $120 million decrease in

---

[13] Available at https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b34-542c-46ca-b8d6-ce045a849330.pdf.

[14] Available at http://www.efairness.org/pdf/internet-sales-mass.pdf.

[15] Available at http://www.efairness.org/pdf/economicscenter-study.pdf.

property value. *Id.* States with financial models built upon sales tax feel this depressed economic growth particularly acutely. For example, a study estimated that Tennessee would lose $456.1 million in sales tax revenue in 2011, resulting in 6,899 lost jobs, $297.4 million wages lost by households, and a $232 million decrease in consumer spending. *See* Younger Associates, *The Impact of Sales Tax Loss to E-Commerce in the State of Tennessee* (Sept. 2011).[16]

B. The detrimental effect of *Quill* has been, and will continue to be, increasingly exacerbated by the consistent and expansive growth of e-commerce.

Remote sales—largely consisting of orders made online, over the phone, and through the mail—have increased considerably over the past several decades. When the Court decided *Quill*, e-commerce did not even exist. The first legitimate online sales transaction was not completed until 1994. *See* Marissa Fessenden, *What Was the First Thing Sold on the Internet?* (Nov. 30, 2015).[17] Today, online shopping is rampant; about 190 million U.S. consumers were expected to shop online in 2016. *See* Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online* (June 8, 2016).[18]

---

[16] Available at https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/8ff4a98d-a85f-4d1e-8f56-24dd8e27891d.pdf.

[17] Available at https://www.smithsonianmag.com/smart-news/what-was-first-thing-sold-internet-180957414/.

[18] Available at http://fortune.com/2016/06/08/online-shopping-increases/.

The expansion of e-commerce showed no signs of slowing down in 2017. The Census Bureau of the Department of Commerce reported that an estimated $115.3 billion in U.S. retail e-commerce sales were conducted in the third quarter of 2017. *Quarterly Retail E-Commerce Sales: 3rd Quarter 2017*, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Nov. 17, 2017, at 1.[19] This accounted for 8.4 percent of total sales, and it represented a 3.6 percent increase in e-commerce sales from the second quarter of 2017. During this period, total retail sales increased by only 1.1 percent. Further, the $115.3 billion in third quarter e-commerce sales represented a substantial 15.5 percent increase from the third quarter of 2016, compared to a 4.0 percent increase in total retail sales over the same period. *Id.* E-commerce sales are rapidly expanding at almost four times the rate of total retail sales. It is estimated that they will account for 17 percent of total U.S. retail sales within the next four years. *See* Matt Lindner, *E-Commerce is Expected to Grow to 17% of US Retail Sales by 2022* (Aug. 9, 2017).[20]

The effect of the States' inability to collect the taxes that are owed on these sales is impossible to overstate. Shuttered brick-and-mortar shops do not just mean lost sales tax revenue—they create lost

---

[19] Available at https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. The estimated $115.3 billion in U.S. retail e-commerce was adjusted for seasonal variation, but it was not adjusted for price changes.

[20] Available at https://www.digitalcommerce360.com/2017/08/09/e-commerce-grow-17-us-retail-sales-2022/.

property tax revenues, distressed and blighted communities that further depress property values, and vacant lots that are more dependent on municipal resources of police and firefighting as they become nuisances. Communities also lose valuable partners in community civic life when these businesses fail because of the price disadvantage they face. They no longer can sponsor local youth sports, be a source of community leaders, or employ local residents.

Ultimately, the loss of revenue is crushing. In 2015, for example, uncollected U.S. sales and use taxes from remote sales were estimated to be almost $26 billion. Of this $26 billion, over $17 billion uncollected taxes were projected to be from electronic sales. *See* National Conference of State Legislatures (NCSL) & International Council of Shopping Centers (ICSC), *Uncollected Sales & Use Tax from Remote Sales: Revised Figures* (Mar. 2017). [21] The fundamental problem that *Quill* and *Bellas Hess* imposes on the States remains: States are unable to collect owed taxes, and their revenue streams significantly suffer as a result.

---

[21] Available at http://www.efairness.org/files/Updated%20Sales%20Tax%20Loss%20Report.pdf.

II. ECONOMIC PRESENCE IS A NEXUS ALTERNATIVE TO PHYSICAL PRESENCE UNDER THE *COMPLETE AUTO* TEST THAT SATISFIES THE DEMANDS OF THE COMMERCE CLAUSE.

A. *Quill* incorrectly articulated a difference between the nexus requirements of the Due Process Clause and the Commerce Clause.

Two fundamental issues have led to the current *Quill* quagmire. First, *Quill* incorrectly determined that the nexus for Commerce Clause purposes was different from the nexus for Due Process purposes. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 311-13 (1992); Richard D. Pomp, *Revisiting* Miller Brothers, Bellas Hess, *and* Quill, 65 AM. U. L. REV. 1115, 1146 (2016). Second, the Court removed "activity" from the Commerce Clause nexus formulation. The artificial distinction between Commerce Clause nexus and Due Process nexus, coupled with a formalistic reliance on physical presence, left in its wake a flood of divergent state court opinions and uncertainty regarding the level of activity or presence that would satisfy the Commerce Clause. *See* Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAW. 623, 623 (2014) (hereinafter Handel, *A Conceptual Analysis*.

For the first time in state tax nexus jurisprudence, *Quill* articulated a difference between Due Process nexus and Commerce Clause nexus—a seller's physical presence in the state is not required for Due Process nexus, but it is required for Commerce Clause sales and use tax nexus. *See* Handel, *A Conceptual Analysis*; *see also Quill*, 504

U.S. at 325 (White, J., dissenting). The dubious distinction between the "nexus" requirements under the Due Process and Commerce Clauses resulted in a "bright-line" rule that has become opaque in the wake of technological advancement and the concomitant surge in Internet retail. Instead of giving *Bellas Hess* "the complete burial it justly deserve[d]", *Quill*, 504 U.S. at 322 (White, J., dissenting), *Quill* clung to outdated and formalistic notions of tax jurisdiction—notions that the Court had recently repudiated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). As Justice Kennedy observed, the *Quill* majority even acknowledged the prospect that its conclusion was wrong when the case was decided. *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring). *Quill*'s holding established safe harbor provisions for out-of-state retailers despite the fact that under the more recent and refined test elaborated in *Complete Auto*, "contemporary Commerce Clause jurisprudence might not dictate the same result." *Quill*, 430 U.S. at 311 (majority opinion).

The Court differentiated the nexus requirements by distinguishing the concerns and policies that animate the two standards. Due Process nexus, the Court stated, "concerns the fundamental fairness of governmental activity." *Quill*, 504 U.S. at 312. The Commerce Clause nexus requirement, on the other hand, is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.* However, the Court failed to explain the doctrinal origins of this novel interpretation of the Commerce Clause and cited no

authority for this assertion. *Id.* at 325 (White, J., dissenting). Furthermore, the Court disregarded the fact that when the Court announced the *Complete Auto* four-part framework, its nexus requirement had its doctrinal antecedents in due process concerns. *See Complete Auto*, at 430 U.S. at 281-82, 285. Under *Complete Auto*, the nexus requirement is met if a tax "is applied to an *activity* with a substantial nexus with the taxing State." 430 U.S. at 279 (emphasis added). Of course, the applicable "activity" is selling a product or service to someone in the State.

The Court removed the word "activity" from the Commerce Clause nexus formulation in *Quill* in favor of a heightened standard based on the seller itself. The sole constitutional inquiry, the Court now concluded, was whether the corporation was physically present in the state, even if the agent's physical presence had nothing to do with the taxed activity. *See Nat'l Geographic Soc'y* v. *Cal. Bd. of Equalization*, 430 U.S. 551 (1977) (holding that the National Geographic Society was liable for use tax collection responsibilities in California even though its physical presence in the state was unrelated to its mail-order sales). Before *Quill*, the Court had never found sufficient a nexus for *due process* purposes, but an insufficient nexus under the Commerce Clause. *Quill*, 504 U.S. at 319 (Scalia, J., concurring) ("It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax."). *Quill* remains the anomaly, and the most appropriate resolution here is to simply apply the *Complete Auto* test as it was originally articulated.

B. Economic Nexus Satisfies the Demands of the Commerce Clause and Resolves All Concerns of Wayfair and Amici.

Even if a heightened nexus requirement was appropriate under the Commerce Clause, there is no relationship between the physical-presence/nexus rule that *Quill* created and retains and the Commerce Clause considerations that purportedly justify it. *Quill*, 504 U.S. at 327 (White, J., dissenting). Long gone are the days of the traveling salesman when it was appropriate to condition the imposition of a tax on physical presence. *Id.* In today's digital economy, physical presence frequently has very little to do with a transaction a State might seek to tax. These transactions include a range of different activities, and these activities encompass much more than mere "communication." *See id.* at 311 (majority opinion) (characterizing mail-order commerce as merely "communicat[ing] with customers in the State by mail or common carrier as part of a general interstate business."). Wire transfers of money involving billions of dollars occur every day; out-of-state sellers intentionally and specifically target individual consumers across many different states; purchasers place orders with the click of a button; sellers ship goods by air, road, and sea—all without leaving their places of business. *See id.* at 328 (White, J., dissenting).

Economic nexus laws like South Dakota's replace the now murky concept of physical presence with a new, easily perceptible bright line—it requires a substantial economic activity by the out-of-state retailer within the State to establish a nexus between the taxing State and the retailer sufficient

to warrant taxation. More specifically, economic nexus laws set bright-line sales thresholds in dollars, number of transactions, or both. Sellers that exceed these thresholds are required to collect legally due and payable sales tax. *See* Joe Crosby, *Economic Nexus is the Most Prevalent Type of Sales Tax Compliance Legislation This Year* (Jan. 27, 2017) (hereinafter Crosby, *Economic Nexus*). [22] South Dakota's legislation creates a tax obligation for retailers that conduct a substantial amount of business activity in the state: $100,000 worth of business or 200 separate transactions.

While the imposition of this tax obligation on remote sellers has the potential to affect interstate commerce by ending unfair discrimination in its favor, South Dakota has taken steps to address the concerns raised in *Quill* to ensure the impact does not become excessive in relation to the State's legitimate exercise of its taxing authority. It is critical to "remember, this is not a new tax, it is a due tax." *No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders Before the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Sen. Deb Peters (SD) on behalf of NCSL). *Quill* prevents States from effectively collecting a tax that they are already owed. Forcing States to rely on residents to (1) be aware of and understand how the use tax laws work, (2) track out-of-state purchases, (3) note any purchases where the retailer did not collect sales tax so that the resident

---

[22] Available at https://www.multistate.us/blog/economic-nexus-is-the-most-prevalent-type-of-sales-tax-compliance-legislation-this-year.

can (4) voluntarily self-report and pay a use tax is an ineffective and unrealistic collection plan. *See, e.g.*, Lila Disque & Helen Hecht, *Beyond* Quill *and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1179-80 (2016) (observing that many in-state consumers are "unaware of the reporting requirement and have failed to keep records of their purchases" and noting efforts made by States to simplify use tax reporting).

The majority of states that impose a sales tax have joined the Streamline Sales and Use Tax Agreement ("SST"), which has made the calculation, collection, and remittance of taxes owed simple for any seller. The SST States established common definitions and administrative procedures, and certified certain tax-compliance software providers that sellers could use—at no cost—in collecting and remitting sales taxes to the relevant States. Seven certified companies now offer software for compliance in the 24 SST States, and using that software is both entirely free to merchants and a complete defense to any errors in collection and remittance. *See* Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571, 576-77 (Aug. 7, 2017). This agreement provides sellers with a database of tax rates for all jurisdictions levying taxes, and it relieves sellers from liability if there are errors in the database. As a practical matter, the SST Agreement has abated the undue burden concerns facing out-of-state sellers in all states where it has been adopted. Despite states' continued efforts to simplify their tax systems and facilitate easy tax collection, these efforts will

remain futile if *Quill* retains force and excuses out-of-state sellers from collecting and remitting their share of sales and use taxes.

Overturning *Quill* and ruling the South Dakota statute constitutionally appropriate does not fully address the level of economic presence that would be required to constitute "substantial nexus" under the Commerce Clause. But as Justice Brandeis once observed, states can serve as laboratories of democracy, and this issue is precisely the type of "novel social and economic experimen[t]" that States are equipped to handle. *See New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932).

Determination of each State's economic nexus standard is a highly individualized and context-specific inquiry that only each State's legislature is equipped to identify. However, this Court can provide guidance to States to aid their determination by recognizing that South Dakota's law comports with Commerce Clause requirements. Minimum transactional thresholds that establish significant economic presence are sound guideposts for any super-nexus requirement. At least seventeen other states have pursued similar courses. *See* Crosby, *Economic Nexus*. For instance, Alabama set a threshold of $250,000 retail sales, Indiana establishes economic nexus with retailers whose sales exceed $100,000 or 200 separate transactions, and Washington set a threshold requiring $10,000 of gross receipts. *See* Crosby, *Economic Nexus*; *see also* Tax Insights, *Alabama Adopts Economic Sales and Use Tax Nexus Regulation* (Oct. 2015)[23]; KPMG,

---

[23] Available at https://www.pwc.com/us/en/state-local-

SALT Alert! 2017-14: Washington State: Sales and Use Tax Economic Nexus/Use Tax Notice Bill Enacted (July 13, 2017)[24].

The "economic nexus" approach that these States seek to employ guarantees that the retailer's relationship to the State is "substantial," based on a legally and economically meaningful measure.

In sum, South Dakota's legislation offers a concrete alternative to the physical-presence rule that this Court can endorse in its reconsideration of *Quill*. Coupled with the remaining prongs of the *Complete Auto* test, economic presence ensures that interstate commerce pays its fair share of state taxes without unduly burdening interstate commerce.

---

tax/newsletters/salt-insights/alabama-adopts-economic-sales-and-use-tax-nexus-regulation.html.

[24] Available at https://home.kpmg.com/content/dam/kpmg/us/pdf/2017/07/tnf-washington-july13-2017.pdf

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

LISA SORONEN
EXECUTIVE DIRECTOR
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St. NW
Suite 515
Washington, DC 20001

TILLMAN J. BRECKENRIDGE*
BAILEY & GLASSER LLP
1054 31st St., NW, Suite 230
Washington, DC 20007
Telephone: 202-463-2101
Facsimile: 202-463-2103
tbreckenridge@baileyglasser.com

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE AND
SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

*Counsel of Record

Counsel for Amici Curiae

No. 17-494

In the
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., and NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR *AMICI CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION, AMERICANS FOR PROSPERITY, FREEDOMWORKS, FREEDOM PARTNERS CHAMBER OF COMMERCE, AND INSTITUTE FOR POLICY INNOVATION IN SUPPORT OF RESPONDENTS

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

April 4, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 2
ARGUMENT 6
I. This Case Implicates Core Constitutional Concerns About The Power Of States To Regulate Beyond Their Own Borders 6
A. Constitutional Constraints on States' Power to Regulate Extraterritorially Are Vital Safeguards of Liberty 6
B. The Constitution Imposes Several Mutually Reinforcing Limits on States' Power to Regulate Extraterritorially 11
C. The Power of States to Regulate Nonresidents Is Squarely at Issue Here ... 14
II. The Court Should Preserve Both Commerce Clause And Due Process Limits On States' Power To Regulate Beyond Their Borders 18
A. The Physical Presence Rule of *Bellas Hess* and *Quill* Should Be Preserved 18
B. If the Court Is to Reconsider the *Bellas Hess* Rule, It Should Also Reconsider Whether Other Constitutional Constraints Compel the Same Result 25
C. At a Minimum, the Court Should Reaffirm the Critical Due Process Constraints on States' Power to Regulate Beyond Their Borders 28
CONCLUSION 35

TABLE OF AUTHORITIES

Cases

ALS Scan, Inc.
v. Dig. Serv. Consultants, Inc.,
293 F.3d 707 (4th Cir. 2002) 31

Austin v. New Hampshire,
420 U.S. 656 (1975) 12

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 3, 8, 12, 13

Bonaparte v. Appeal Tax Court of Balt.,
104 U.S. 592 (1881) 3

Bond v. United States,
564 U.S. 211 (2011) 7, 8, 13

Boschetto v. Hansing,
539 F.3d 1011 (9th Cir. 2008) 30

Brentwood Acad.
v. Tenn. Secondary Sch. Athletic Ass'n,
531 U.S. 288 (2001) 32

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 30

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 17

Camps Newfound/Owatonna, Inc.
v. Town of Harrison,
520 U.S. 564 (1997) 11

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 15

Daimler AG v. Bauman,
134 S. Ct. 746 (2014) 27

Dep't of Revenue of Mont. v. Kurth Ranch,
511 U.S. 767 (1994) 26

Edgar v. MITE Corp.,
457 U.S. 624 (1982) 10, 13

Evans v. Norton,
382 U.S. 296 (1966) 33

Gregory v. Ashcroft,
501 U.S. 452 (1991) 9

Griffith v. ConAgra Brands, Inc.,
728 S.E.2d 74 (W. Va. 2012) 19

Hanson v. Denckla,
357 U.S. 235 (1958) 30

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989) 13, 17, 27

Hudson v. United States,
522 U.S. 93 (1997) 26

J. McIntyre Mach., Ltd. v. Nicastro,
564 U.S. 873 (2011) 8, 29, 30

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 30

McCulloch v. Maryland,
17 U.S. 316 (1819) 10

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957) 29

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 9, 20

Nat'l Geographic Soc'y
v. Cal. Bd. of Equalization,
430 U.S. 551 (1977) 26

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967) 1, 6, 14

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 24

New York v. United States, 505 U.S. 144 (1992) 4, 9

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 23

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) 12

Payne v. Tennessee, 501 U.S. 808 (1991) 22

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 12

Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal., 153 F.3d 938 (9th Cir. 1998) 18

Powell v. McCormack, 395 U.S. 486 (1969) 9

Printz v. United States, 521 U.S. 898 (1997) 10

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

Sam Francis Found. v. Christies, Inc., 784 F.3d 1320 (9th Cir. 2015) 27

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 26

Shaffer v. Heitner, 433 U.S. 186 (1977) 8

Toys "R" Us, Inc. v. Step Two, S.A.,
318 F.3d 446 (3d Cir. 2003) 30, 31

Travis v. Yale & Towne Mfg. Co.,
252 U.S. 60 (1920) 12

Trintec Indus., Inc.
v. Pedre Promotional Prods., Inc.,
395 F.3d 1275 (Fed. Cir. 2005) 32

Union Refrigerator Transit Co. v. Kentucky,
199 U.S. 194 (1905) 7, 10

United States v. Halper,
490 U.S. 435 (1989) 26

Woodruff v. Parham,
75 U.S. (8 Wall.) 123 (1868) 11

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 8

Constitutional Provisions

U.S. Const. amend. XIV 28

U.S. Const. art. I 11

U.S. Const. art. IV 11

Other Authorities

Joe Bailey et al., *The Long Tail Is Longer Than You Think: The Surprisingly Large Extent of Online Sales by Small Volume Sellers* (May 12, 2008) (unpublished working paper) (on file with the University of Maryland) 32

Joseph Bishop-Henchman, *Why the* Quill *Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction* (Nov. 5, 2007), https://bit.ly/2GFZO6C 19

Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis* (2018), https://bit.ly/2GvnwTP 21

2 Debates on the Federal Constitution (J. Elliot ed. 1876) 9

Declaration of Independence (U.S. 1776) 3, 9

Allan Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493 (2008) 8

The Federalist No. 46 (James Madison) (Jacob E. Cooke ed., 1961) 9

Holger P. Hestermeyer, *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 Nw. J. Int'l L. & Bus. 267 (2006) 16

Hayes R. Holderness, *Questioning* Quill, 37 Va. Tax Rev. 313, 341 (2018) 19

H.R. 5660, 111th Cong. (2010) 24

Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979) 9

Steven Malanga, *The State Tax Grab*, City Journal (Winter 2014), https://bit.ly/2H7IPYG 17

Tony Mauro, *How Supreme Court's Internet Tax Case Was Built 'From the Ground Up'*, Nat'l L. J. (Mar. 16, 2018), https://bit.ly/2q1Af67 33

Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468 (2007) 11

S. 1736, 108th Cong. (2003) 24

S. 1832, 112th Cong. (2011) 24

Elizabeth Shell, *California Humane Chicken Law Ruffles Feathers in Other States*, PBS News Hour (Mar. 7, 2014, 6:29 PM), http://to.pbs.org/2FI2rnV 17

U.S. Census Bureau, CB18-21, *Quarterly Retail E-Commerce Sales: 4th Quarter 2017* (Feb. 16, 2018), http://bit.ly/1bYLlrv 21

STATEMENT OF INTEREST[1]

In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), this Court held that states may not conscript out-of-state retailers into collecting and remitting state sales and use taxes on pain of penalty. The Court reaffirmed that principle 25 years later in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in the face of claims that times had changed and *Bellas Hess* had become outmoded. Although *Quill* concluded that imposing tax-collection obligations on remote vendors that have purposefully availed themselves of a state does not violate the Due Process Clause, *Quill* reaffirmed that—absent authorization by Congress—the Commerce Clause precludes states from imposing tax-collection obligations on individuals and businesses with no physical presence in the state. Justice Scalia wrote separately to underscore that the case for retaining the Commerce Clause ruling of *Bellas Hess* was particularly compelling given Congress' undoubted authority to "change the rule of *Bellas Hess* by simply saying so." *Id.* at 320 (Scalia, J., concurring in part and concurring in the judgment).

Amici curiae are non-profit, non-partisan organizations that share a commitment to the promotion and protection of individual liberty. The National Taxpayers Union Foundation, a research

---

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them, has worked extensively to analyze and provide testimony about the central questions contemplated by this case. Americans for Prosperity is a grassroots organization with over 3.2 million activists nationwide advocating for the principles of a free and open society, including federalism and a limited government in concert with the U.S. Constitution. FreedomWorks is a grassroots organization that seeks to educate citizens on, and promote the adoption of, free-market policies that inure to the benefit of consumers and citizens generally. Freedom Partners Chamber of Commerce and its members support free enterprise, fiscal responsibility, and fair markets. Finally, the Institute for Policy Innovation is a think tank founded to research, develop, and promote innovative and non-partisan solutions to today's public policy problems.

Amici share the conviction that while business models change, first principles remain constant. No taxation without representation was among the core principles on which the Republic was founded. It is no less vital today than when a distant power yielded to the temptation to over-tax colonists who lacked any effective voice in London. *Amici* write principally to ensure that these first principles are not overlooked in a debate about maximizing state tax revenue.

SUMMARY OF ARGUMENT

While this case undoubtedly is about sales and use taxes, it is about much more. It is about power. It is more particularly about the power of government to tax, to collect the tax, and in the event of non-

compliance, to bring the law enforcement power of government to bear on nonresident individuals and companies with no voice in the polity.

The Framers could not have anticipated the Internet, Amazon.com, or the notion that Amazon would belatedly recognize the benefits of physical presence and build a brick-and-mortar bookstore in Georgetown. But the Framers needed no crystal ball to foresee the prospect that a distant sovereign might impose taxes or regulatory burdens on those without representation in the halls of the government. That reality stared the Framers in the face, and they were not indifferent. They dumped tea in the harbor; filed petitions, memorials, remonstrances, and declarations; and ultimately fought a revolution to prevent taxation without representation.

The Framers did not fight a revolution to redress the "Injuries and Usurpations" of a distant sovereign, including particularly "imposing Taxes on us without our Consent," Declaration of Independence paras. 2, 19 (U.S. 1776), only to write a Constitution that allowed comparable injuries and usurpations to be replicated. It is thus no surprise that it is a bedrock principle of constitutional law that a state may not "legislate except with reference to its own jurisdiction." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (quoting *Bonaparte v. Appeal Tax Court of Balt.*, 104 U.S. 592, 594 (1881)).

That limitation is reflected in numerous constitutional provisions, including the Due Process Clause, the Commerce Clause, and the Import-Export Clause. And like other structural protections in our Constitution, that limitation serves the foundational

purposes of ensuring that sovereign power derives "from the Consent of the Governed," Declaration of Independence para. 2, and securing "the liberties that derive from the diffusion of sovereign power," *New York v. United States*, 505 U.S. 144, 181 (1992). Accordingly, while a state certainly has the power to impose taxes on its in-state residents, its power to force out-of-state retailers with no voice in the state's political process to serve as the state's private tax collector is another matter entirely. The physical presence rule that this Court established in *Bellas Hess* and reaffirmed in *Quill* continues to serve as a vital limit on that power.

Petitioner's myopic focus on the purportedly decreased burdens remote retailers face in collecting taxes for distant states thus misses the mark. The principal objection to the Stamp Act and the Tea Act was not that collecting the taxes was burdensome. The problem was far more fundamental—namely, that the burdens were imposed by a distant Parliament in which the colonists were denied representation. Here, too, the problem with imposing tax-collection responsibilities on out-of-state entities with no voice in the halls of state government is not principally about whether the latest software lessens the burdens of compliance with such responsibilities. Whether tax-collection responsibilities are easy or hard, they are politically unpopular. After all, nothing in the Constitution stops states from doubling down on efforts to collect sales taxes on in-state residents. What curtails states' own enforcement efforts directed to in-state residents is not a constitutional limit, but the ballot box. How convenient and tempting, then, to impose those collection obligations on out-of-state (or

even out-of-nation) retailers who cannot vote. And since the ballot box imposes no constraint on offloading enforcement obligations on nonresidents, only the Constitution prevents states from yielding to that temptation.

The physical presence rule of *Quill* and *Bellas Hess* protects these critical constitutional values. While there are plausible arguments that other constitutional provisions might better protect these values as an original matter, the physical presence rule has a distinct and weighty consideration to recommend it: It has been the law of the land for half a century and survived a previous effort to overturn it. Indeed, the *stare decisis* considerations Justice Scalia identified 25 years ago have even more force today, as hundreds of thousands of private parties have ordered their affairs in reliance on that rule in the more than two decades since this Court declined the last state's plea to abandon it. And while South Dakota's made-for-this-litigation statute imposes only prospective tax-collection obligations, there is nothing in the logic of its position to prevent retroactive burdens, and other states have already made clear that they will not exercise such restraint.

Finally, as Justice Scalia emphasized, this case is a particularly poor candidate for jettisoning *stare decisis* because Congress has the power to address petitioner's concerns. That Congress, a body in which out-of-state entities have equal representation, has so far declined impassioned pleas to override the physical presence rule should give this Court serious pause about overruling one of its precedents based on public policy arguments that are much better suited for

resolution by a political process in which all affected parties have a voice.

But however this Court resolves the question presented, it should make clear that states do not have free rein to regulate beyond their own borders. The Commerce Clause is not and has not ever been the only constitutional constraint on that power. Indeed, if the Court is inclined to reconsider the Commerce Clause without regard to *stare decisis*, it should afford the same treatment to the Due Process Clause. As an original matter, there is no valid reason to allow a state to impose regulatory tax-collection responsibilities on an out-of-state retailer without either a physical presence or a voice in the jurisdiction. And even if this Court does not fully reconsider the due process limits on states imposing such collection responsibilities, it should at least reaffirm that the Due Process Clause imposes meaningful limits that protect individuals and businesses from the long arm of governments in which they have no political voice.

ARGUMENT

I. This Case Implicates Core Constitutional Concerns About The Power Of States To Regulate Beyond Their Own Borders.

A. Constitutional Constraints on States' Power to Regulate Extraterritorially Are Vital Safeguards of Liberty.

The question in this case is whether a state has the "power to deputize an out-of-state retailer as its collection agent for a use tax" imposed on an in-state resident. *Bellas Hess*, 386 U.S. at 757. Rather than focus on that question as a constitutional matter, petitioner and its *amici* stress the dangers that the

Internet poses to state tax revenues and champion the promise of newfangled software in easing the burdens of compliance with a vast array of shifting tax-collection obligations. Those arguments are seriously flawed even on their own terms, *see, e.g.*, Respondents' Br. 30-38; Br. of *Amici Curiae* eBay et al. 6-16, but petitioner's focus on modern technology obscures the reality that the basic problem in this case is older than the Republic. The Framers well understood the problems with a distant sovereign imposing taxes and regulatory burdens on far-removed subjects with no voice in the halls of government. No taxation without representation became a rallying cry in the revolution, and the Framers did not forget that fundament of liberty when it came to writing the Constitution.

Specific provisions of the Constitution limit the states' ability to tax out-of-state entities, lest taxation without representation recur in the new Republic. And this Court has long identified a complementary structural limit on the ability of states to regulate extraterritorially. These limitations, like other structural aspects of the Constitution, are critical safeguards of individual liberty. *See Bond v. United States*, 564 U.S. 211, 221-22 (2011). After all, as this Court observed over a century ago, if taxes are imposed on those without presence or voice in the taxing jurisdiction, the imposition "partakes rather of the nature of an extortion than a tax." *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 202 (1905).

While the allocation of power in our federal system is most often articulated in terms of "the prerogatives and responsibilities of the States and the

National Government vis-à-vis one another," *Bond*, 564 U.S. at 221, the federal-state divide is not federalism's only axis. "The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty coequal states that must peaceably coexist." Allan Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493, 494 (2008). The Framers "intended that the States retain many essential attributes of sovereignty," and the "sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). That limitation takes many forms, but one is paramount: Because "each State has a sovereignty that is not subject to unlawful intrusion by other States," *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion), "[n]o State can legislate except with reference to its own jurisdiction," *Gore*, 517 U.S. at 571.

This territorial constraint "is, in part, an end in itself," as it "ensure[s] that States function as political entities in their own right." *Bond*, 564 U.S. at 221. Indeed, "any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977). But that limitation "is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond*, 564 U.S. at 221. It also "secures to citizens the liberties that

derive from the diffusion of sovereign power." *New York*, 505 U.S. at 181.

Federalism's horizontal axis protects individual liberty in a number of ways. First, it "makes [each state] government more responsive," *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), by helping ensure that citizens can correctly attribute government actions to their proper source. Blurring of political responsibility undermines the value of a citizen's right to select the policies and priorities he wishes to pursue. *See* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 890 (1979). More fundamentally, if the voting public does not know whom to blame (or thank) for public policy decisions, then the governed—"the ultimate authority" in our constitutional system, The Federalist No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961)—cease to be the masters of the governors. *See Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them." (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876))).

Conversely, confining the states' regulatory and taxing power to their own respective spheres ensures that the power of government derives from "the consent of the Governed." Declaration of Independence para. 2. In contrast to the federal government, "the Constitution is not the source of the[States'] power." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J.). States derive their authority from the people themselves. But the relevant "people" underlying a

state's authority consist only of persons actually represented by the state—*i.e.*, those who can exercise political will in the jurisdiction and to whose political activity the state government will respond. *See Printz v. United States*, 521 U.S. 898, 920 (1997) (state governments "represent and remain accountable to [their] own citizens"); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (plurality opinion) ("the State has no legitimate interest in protecting nonresident[s]").

Confining a state's regulatory and taxing authority to those within its jurisdiction ensures that the state's power is constrained by the will of the governed. Taxes, and even more so the regulatory responsibility for collecting them, are unpopular and if unconstrained have the "power to destroy." *See McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). It is thus critical that states impose taxes and tax-collection obligations only on those who can constrain this dangerous and unpopular power at the ballot box. Moreover, limiting taxes and tax-collection obligations to those in the jurisdiction ensures that the basic bargain implicit in taxation is honored. "The power of taxation," while indispensable, "is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property." *Union Refrigerator*, 199 U.S. at 202. But if taxation is rendered on property or persons outside the jurisdiction and who "owe an allegiance" to, and "look[] for protection" from, other states, the imposition "partakes rather of the nature of an extortion than a tax." *Id.*

B. The Constitution Imposes Several Mutually Reinforcing Limits on States' Power to Regulate Extraterritorially.

Consistent with the core federalism objectives it advances, "[t]he principle that states are territorially bound ... permeates the Constitution." Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1520 (2007). It "finds explicit textual manifestation in the New State Clause's protection of an existing state's territory." *Id.*; *see* U.S. Const. art. IV, §3, cl. 1 ("[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."). And it is a common thread uniting this Court's interpretation of several constitutional provisions.

For instance, the Import-Export Clause, U.S. Const. art. I, §10, cl. 2, limits the power of states to impose tax burdens on outsiders through duties and tariffs. While the Court has limited that provision to tariffs levied against foreign nations, *see Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868), there is a powerful original argument that the Clause prohibits such taxes on goods from sister states of the union. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); Br. of Professor John S. Baker, Jr. as *Amicus Curiae* Supporting Neither Party ("Baker.Br.").

In addition, one of the central purposes of the Privileges and Immunities Clause of the Fourteenth

Amendment is to guard against the possibility that a state might exploit nonresidents' lack of meaningful representation in the political process to pass laws that specifically disadvantage them. *See Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920) (Privileges and Immunities Clause "place[s] the citizens of each state upon the same footing with citizens of other states" by "reliev[ing] them from the disabilities of alienage in other states" and "inhibit[ing] discriminating legislation against them by other states." (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868))). By preventing the exercise of one state's power to disadvantage residents of another, the Clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975).

The Due Process Clause likewise imposes territorial constraints on the states' regulatory power. As this Court has long explained, "the requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *see also, e.g.*, *Gore*, 517 U.S. at 572 (states may not punish out-of-state conduct that was lawful where it occurred). And while it is often discussed in terms of the power of state courts to adjudicate disputes involving nonresidents, due process is not concerned solely with the exercise of state judicial authority. "The limits on a State's power to enact substantive legislation" that applies to persons or property beyond its border "are similar to

the limits on the jurisdiction of state courts." *Edgar*, 457 U.S. at 643 (plurality opinion).

Finally, consistent with the Framers' "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres," "the Commerce Clause protects against ... the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-37 (1989) (footnote omitted). To that end, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 336. Indeed, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature" and regardless of the statute's effect on interstate commerce. *Id.*

In short, "one State's power to impose burdens on" nonresidents "is not only subordinate to" Congress' powers to regulate interstate commerce and to tax and spend, "but is also constrained by the need to respect the interests of other States." *Gore*, 517 U.S. at 571. And just as efforts by the federal government to eschew the limits on its powers inevitably threaten the liberty of the people, *see Bond*, 564 U.S. at 222, any attempt by one state to enlarge its jurisdiction at the expense of another is antithetical to the freedoms our constitutional system is designed to protect.

C. The Power of States to Regulate Nonresidents Is Squarely at Issue Here.

The Constitution's concern with extraterritorial state legislation is squarely at issue here. While petitioner proceeds as if this case were about a state's power to impose sales or use taxes on in-state transactions, that is decidedly not what this case is about. The Constitution gives states a free hand to impose sales and use taxes on state residents and to use their own forces to collect them. What constrains the states in those collection efforts is not the Constitution, but the ballot box. And to avoid the constraints of the ballot box and the inherent unpopularity of tax collection, states have long strived to offload those collection responsibilities on third parties. What this case is about, then, is the extent to which the Constitution constrains the "State's power to deputize an out-of-state retailer as its collection agent for a use tax" imposed on an in-state resident. *Bellas Hess*, 386 U.S. at 757. The need to constrain the ability to offload that unpopular state function on out-of-state retailers who do not vote or have a say in the polity is obvious.

The states' deputization power is no broader than any other power a state possesses to regulate those outside its borders. Indeed, there are many reasons to think it should be far narrower. Not only does extraterritorial regulation impose a particularly unpleasant responsibility on out-of-state retailers; it creates an admixture of state and private authority that poses its own threat to liberty. Moreover, treating participation in interstate commerce as sufficient to subject out-of-state actors to the

regulatory power of 50 different states (not to mention countless local jurisdictions and the federal government) is not just an imposition on individual liberty, but a powerful impediment to interstate commerce.

Petitioner's myopic focus on how much easier it purportedly now is for retailers to collect taxes for remote jurisdictions thus misses the more fundamental point. To be sure, the burdens of complying with a state regulation are relevant to whether that regulation "discriminate[s] against interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). But the principal objection to the Stamp Act and the Tea Act was not that compliance and collection were difficult. The objection was far more fundamental—namely, that a distant sovereign with no political accountability to the governed had no business imposing a tax on the colonies. It was the very definition of tyranny, and a violation of the fundamental norm that legitimate authority derives from "the consent of the Governed."

Given the history of our founding, it should be self-evident that concerns with extraterritorial regulation by states do not fall by the wayside just because a tax is involved. Indeed, even without that history, "[i]t is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax." *Quill*, 504 U.S. at 319 (Scalia, J., concurring in part and concurring in the judgment). Thus, even accepting the deeply flawed premise that conscripting remote sellers into service as state tax collectors would be less burdensome today than it would have been 25 years ago, *but see* Respondents'

Br. 30-38; Br. of *Amici Curiae* eBay et al. 6-16, decreased administrative burdens on the regulated do not invariably translate into increased power to regulate out-of-state participants in interstate commerce.

To take just one of countless examples, it is undoubtedly easier today than it was 25 years ago for oil and gas enterprises to identify and decipher the environmental regulations of distant jurisdictions. But surely that does not mean that California may now regulate how gas can be extracted in El Paso or how rigs can be constructed in Abilene—even if some of the oil produced in Texas may end up being sold in Los Angeles. Of course, California is free to regulate its own residents and their energy purchases, just as South Dakota is free to impose on and collect from its own residents sales and use taxes. But the state's power to regulate the out-of-state conduct of out-of-state actors remains a horse of a very different color.

Indeed, if anything, the advent of the Internet makes the constitutional constraints on extraterritorial state regulations more important, not less. "Information posted online is accessible worldwide," Holger P. Hestermeyer, *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 Nw. J. Int'l L. & Bus. 267, 267 (2006), and modern communication tools can effectively shrink geographic barriers to essentially nil. Accordingly, without a robust constitutional constraint on the power of states to regulate out-of-state actors, *every* jurisdiction could fairly claim the power to regulate nearly *everything* that finds its way into the state via the Internet—not to mention the

contents of remotely hosted webpages themselves. Giving 50 separate states free rein to impose 50 separate sets of rules governing the Internet is a recipe for precisely the sort of regulatory chaos the Constitution was designed to avoid. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring in the judgment) (state law "must be evaluated not only by considering the consequences of the statute itself, but also by considering ... what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation" (alteration in original) (quoting *Healy*, 491 U.S. at 336)).

And the Internet is hardly the only channel of interstate commerce that states have tried to leverage to justify regulation of nonresidents. Nebraska recently assessed a business tax on a trucking company with no employees, no property, no inventory, and no sales in the state simply because the business had admitted its employees had driven through the state. Steven Malanga, *The State Tax Grab*, City Journal (Winter 2014), https://bit.ly/2H7IPYG. And California has effectively regulated the size of hen cages in other states by denying access to the California market for any producer not meeting its standards, sparking a legal battle with other states. Elizabeth Shell, *California Humane Chicken Law Ruffles Feathers in Other States*, PBS News Hour (Mar. 7, 2014, 6:29 PM), http://to.pbs.org/2FI2rnV.

Petitioner's suggestion that modern technology should make this Court *less* concerned about extraterritorial state regulation thus gets things

exactly backward. That the realities of interstate commerce today have loosened the traditional reins on regulation of remote actors only reinforces the need for this Court to continue to impose meaningful restrictions on the states' power to regulate beyond their own borders.

II. The Court Should Preserve Both Commerce Clause And Due Process Limits On States' Power To Regulate Beyond Their Borders.

A. The Physical Presence Rule of *Bellas Hess* and *Quill* Should Be Preserved.

1. Petitioner identifies no compelling reason to jettison the rule that states may not impose tax-collection obligations on sellers who lack a physical presence within their borders. As this Court concluded the last time it confronted the question, "the bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause" by enforcing the "substantial nexus" prong of the *Complete Auto* test and "demarcati[ng] ... a discrete realm of commercial activity that is free from interstate taxation." *Quill*, 504 U.S. at 314-15. This Court has decided more than a dozen dormant Commerce Clause cases since *Quill*, and not one of them undermines that conclusion.

To the contrary, the physical presence rule continues to provide a bright-line rule that both protects interstate commerce from undue burdens and confines states to their appropriate regulatory spheres. It also serves the critical end of ensuring predictability for commercial actors. *See, e.g.*, *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 943 (9th Cir. 1998) (recognizing "the importance of predictability to commercial

relations"). Whatever else may be said about it, the *Bellas Hess* rule is not is difficult to understand or follow. Indeed, petitioner does not seriously claim otherwise, but instead only notes that recalcitrant states are trying to muddy clear waters by "push[ing] the envelope" on what qualifies as "physical." Petitioner's Br. 32.

As those efforts to chip away the physical presence rule underscore, "an amorphous test" divorced from physical presence would be "practically useless in aiding an out-of-state entity in planning for its tax liability arising from its economic contact with [a] State," *Griffith v. ConAgra Brands, Inc.*, 728 S.E.2d 74, 86-87 (W. Va. 2012) (Benjamin, J., concurring), and would inevitably force at least some businesses to abandon certain markets or business activities to ensure that they would not be not roped into onerous new tax-collection obligations and the compliance costs that come with them. Indeed, even one of the *amici* supporting petitioner's position has previously warned that "[o]verruling the *Quill* rule would usher in decades of confusion, running the risk of damaging the national economy." Joseph Bishop-Henchman, *Why the* Quill *Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction* (Nov. 5, 2007), https://bit.ly/2GFZO6C.

That is particularly true given the consequences of noncompliance with state tax-collection obligations. Even beyond being subject to audit—which is no minor burden, *see* Hayes R. Holderness, *Questioning* Quill, 37 Va. Tax Rev. 313, 341 (2018) ("[a]udits can be costly and time-consuming, and may result in additional liability for the collector")—failure to collect and remit

taxes may leave a business deprived of property and an individual deprived of liberty. Indeed, sanctions for failing to collect and remit taxes owed "can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 573 (opinion of the Court). Those very real consequences of extraterritorial state tax-collection laws are no less an impediment to interstate commerce today than they were when this Court decided *Quill*.

2. Petitioner does not even attempt to identify any aspect of this Court's dormant Commerce Clause jurisprudence that has changed in any material way since *Quill*. Instead, petitioner and its *amici* contend that it is the times that have changed, and that the physical presence rule is not well-suited to the Internet age. But that argument is doubly mistaken. First, e-commerce is rapidly changing in ways that make the overruling of *Quill* less pressing and the virtues of deferring to Congress more obvious. Second, the changing nature of the Internet does not ameliorate the age-old problem of government imposing burdens on those without a voice in the polity.

As to the first point, much of petitioner's brief is addressed to the technology of five years ago, not the reality of Amazon opening a brick-and-mortar bookstore in Georgetown, paying taxes in every state

with a sales tax, and having multiple states use their precious tax revenues to lure Amazon to construct a second headquarters in their borders. And this phenomenon is not limited to Amazon. The world of e-commerce and traditional commerce are merging, with e-retailers recognizing the value of physical presence and quick distribution, and traditional brick-and-mortar retailers understanding the importance of an online presence. In fact, nine of the ten top e-retailers maintain heavy brick-and-mortar presences across the country. *See* Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis*, 13-14 & n.22 (2018), https://bit.ly/2GvnwTP. That is not to say that the quickly changing world of e-commerce has entirely eliminated the problem petitioner seeks to address. But the reality that the highest volume e-commerce sites have physical presences in most jurisdictions certainly changes the scope of the problem.[2]

It also underscores the virtues of leaving this problem to Congress. The e-commerce dynamic of 2018 is different from the dynamic of 2008 or 2013, and inevitably will be different from the dynamic of 2023. Congress has the power to address this issue with a targeted solution for 2018 and then revisit the issues when e-commerce takes the next unpredictable turn. This Court has no comparable luxury. It faces

---

[2] So does the reality that e-commerce comprises less than 10 percent of all commerce in the United States. *See* U.S. Census Bureau, CB18-21, *Quarterly Retail E-Commerce Sales: 4th Quarter 2017* (Feb. 16, 2018), http://bit.ly/1bYLlrv. More than 90 cents of every retail dollar is still spent in brick-and-mortar stores, which already collect and remit taxes to jurisdictions in which they have a physical presence.

a binary choice between retaining or abandoning the physical presence requirement, which has stood for decades as a bright-line bulwark against states imposing regulatory burdens on those without a meaningful presence in the forum.

Equally important, the rapidly evolving nature of the Internet does nothing to remedy the fundamental problem of states imposing regulatory burdens on those without any voice in the burden-imposing polity. Indeed, the difference between a small Internet retailer and a large-scale mail-order catalog only exacerbates the potential for taxation without representation. A large-scale mail-order catalog at least makes a conscious decision to send its catalogs into particular states with the hope of attracting out-of-state customers. A small Internet retailer, by contrast, may not even have out-of-state customers in mind when it sets up a website. *See infra* 30-33. And the minimal volume of business it does in another state is unlikely to give it any political clout whatsoever. E-commerce thus serves principally to even further distance out-of-state retailers from the foreign states that seek to conscript them into their tax-collection services.

3. As all of that underscores, there is no reason to reconsider the physical presence test in the first place. But this case would be a particularly poor candidate for abandoning the ordinary operation of *stare decisis* even if there were. First, it is axiomatic that "the demands of [*stare decisis*] are 'at their acme ... where reliance interests are involved.'" *Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and concurring in the judgment) (second alteration in original) (quoting

Payne v. Tennessee, 501 U.S. 808, 828 (1991)). And there can be no question that hundreds of thousands of private parties (if not more) have ordered their affairs in reliance on the rule of *Quill* and *Bellas Hess*. Indeed, what was true in 1992—that "the *Bellas Hess* rule ha[d] engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry," *id.* at 317 (majority opinion)—has become only more true in the intervening decades, especially after the Court expressly declined to abandon the physical presence requirement in *Quill*.

Second, unlike in most constitutional cases, this Court is not the ultimate arbiter of this dispute. "Congress has the final say over regulation of interstate commerce." *Id.* at 320 (Scalia, J., concurring in part and concurring in the judgment). "[T]he doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what [the Court has] done.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Moreover, not only does Congress retain the power to alter the status quo; Congress is also "better qualified to resolve" whether it is necessary to do so. *Id.* at 318 (majority opinion).

That is particularly true when one considers the fundamental problem of states imposing regulatory burdens on out-of-state retailers. Those out-of-state retailers, especially small ones, have no voice in the halls of state legislatures, let alone city halls and tribal councils of thousands of taxing jurisdictions. But they at least have a shot at getting their voice heard in Congress. Every e-retailer in the United States is at home somewhere, and has a Member or Senator potentially able to take up their cause.

Indeed, the genius of the Framers, as reflected in the Commerce Clause and Import-Export Clause, is to limit state taxing and regulatory power unless and until Congress, where everyone has a voice, approves it—and by the same token, to place in the single body representative to all the power and obligation to protect interstate actors from locally motivated regulation.

Petitioner thus draws the wrong conclusion from the fact that Congress has considered legislation addressing the issue several times over the years but so far has declined to alter the status quo. *See, e.g.*, S. 1832, 112th Cong. (2011); H.R. 5660, 111th Cong. (2010); S. 1736, 108th Cong. (2003). Petitioner may see that as a failure to address the issue. But particularly given the countless hours Congress has spent studying, considering, and debating the issue, one can equally read that as a representative Congress protecting the liberty and the sovereign interests of *all* states.[3] Offloading tax-collection burdens on outsiders is easy; passing federal legislation is hard. But the Framers made passing legislation hard for a reason, and the physical presence rule of *Bellas Hess* and *Quill* stands as an obstacle to imposing burdens on those

---

[3] Notably, not every state even has sales or use taxes. Allowing foreign jurisdictions to impose tax-collection obligations on sellers based in states that do not would be both fundamentally unfair and fundamentally antithetical to the experimentation our federalist system is intended to foster. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

without so much as a physical presence or meaningful voice in the state. That is a powerful reason to retain the rule.

None of this is to suggest that the physical presence requirement is a perfect test, or even that mooring this obstacle to taxation without representation to the Commerce Clause was correct as an original matter. But it is a fair surmise that Justice Scalia—no fan of the dormant Commerce Clause—would not have embraced the rule of *Bellas Hess* as an original matter, and yet he embraced it as a matter of *stare decisis*. All of the reasons he offered in *Quill* remain valid today; two deserve special mention. First, as discussed, the rule remains bright and administrable. Even more important, however, the physical presence rule continues to serve as a protection against taxation without representation. Physical presence may not be a perfect proxy for having a sufficient voice in the polity to ensure that unpopular tax-collection burdens, but it is a fair proxy, and a clear one. Petitioner has presented no valid reason to abandon it.

B. If the Court Is to Reconsider the *Bellas Hess* Rule, It Should Also Reconsider Whether Other Constitutional Constraints Compel the Same Result.

In all events, if the Court is going to decide the Commerce Clause question on a clean slate, there is no reason not to consider the entire matter afresh. The fact that the physical presence rule of *Bellas Hess* has been the governing law for 50 years has prevented states from yielding to the obvious temptation to offload unpleasant tax-collection responsibilities on

political outsiders. It has also obviated the need for the Court to consider whether other possible constraints on comparable state action have an even firmer basis in the Constitution. *Cf. Hudson v. United States*, 522 U.S. 93 (1997) (disavowing *United States v. Halper*, 490 U.S. 435 (1989), but noting that "some of the ills at which *Halper* was directed are addressed by other constitutional provisions"); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 798-805 (1994) (Scalia, J., dissenting) (advocating "put[ting] the *Halper* genie back in the bottle" in light of the "perfectly clear" "text of the Constitution").

As Justice Scalia noted in his *Quill* concurrence, "[a]s an original matter, it might have been possible to distinguish between jurisdiction to tax and jurisdiction to compel collection of taxes as agent for the State," but the Court has treated them as the one and the same. 504 U.S. at 319 (Scalia, J., concurring in part and concurring in the judgment); *see, e.g., Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 558 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960). By adhering to the physical presence rule as a matter of *stare decisis*, Justice Scalia obviated the need to consider that distinction "as an original matter." But if *Bellas Hess* is to be reexamined, there is no reason to let the false equivalence between jurisdiction to tax and jurisdiction to conscript as a collection agent go unexamined.

The latter power is far more problematic, in that it offloads one of government's least popular responsibilities onto political outsiders; is generally backed with substantial potential liability for failing to properly collect and account; and intertwines the

state and out-of-state retailers in a way that the power to tax does not. While the state can surely impose those kinds of responsibilities on someone who is at home in the state (in a manner that would satisfy the requirements for general jurisdiction, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760-62 (2014)), the ability to impose those onerous responsibilities on an out-of-state retailer based on nothing more than the minimum contacts necessary to tax them (akin to specific jurisdiction for the tax itself) is a category mistake. That mistake, moreover, is particularly evident when it comes to remote retailers that are not just out-of-state, but out-of-nation. It is one thing to impose a tax on those foreign citizens, *cf.* Baker.Br.8-15, but quite another matter to conscript a foreign citizen as a tax collector for state and local jurisdictions in this country. "As an original matter," that is a far more problematic and burdensome assertion of extraterritorial jurisdiction.

Moreover, at the same time that the Court's decisions rest on a false equivalence between "jurisdiction to tax and jurisdiction to compel collection of taxes as agent of the State," the Court's decisions simultaneously rest on there being a critical difference between the two. This Court has never held that a state can tax an out-of-state transaction that truly occurs out of state just because the transaction involves one of its citizens. *Cf. Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (states may not "require[] the payment of royalties" for sales by in-state residents that nonetheless "'take[] place wholly outside of the State's borders'" (quoting *Healy*, 491 U.S. at 336)). Instead, states have been allowed to evade limits on their extraterritorial taxing

jurisdiction by conceptualizing the tax as a sales or use tax imposed in-state on state residents. But it makes little sense, at least "as an original matter," to allow a state that could not directly tax an out-of-state retailer for its half of an out-of-state sale to conscript the very same out-of-state retailer as tax collector for the in-state half of the transaction.

The only thing that has prevented that illogic from circumventing sensible limits on states' territorial jurisdiction is the physical presence rule of *Bellas Hess* and *Quill*. Thus, if the Court is going to reexamine and jettison that liberty preserving rule as a Commerce Clause matter, that should be the beginning, not the end, of the Court's analysis of whether a law like South Dakota's is consistent with the Constitution.

C. At a Minimum, the Court Should Reaffirm the Critical Due Process Constraints on States' Power to Regulate Beyond Their Borders.

In all events, even if this Court is not inclined to consider the constitutional limits on the states' regulatory jurisdiction on an entirely clean slate, at a bare minimum, it should reaffirm the limits that the Court's due process doctrine imposes on remote regulation. Indeed, the increased ease with which states can regulate out-of-state vendors in the twenty-first century makes it critical to do so.

1. The Fourteenth Amendment prohibits states from depriving persons of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. Before a state may impose tax-collection or other regulatory obligations on a remote seller, due process

requires, at a minimum, *see supra* Part II.B (arguing that tax-collection responsibilities should require a greater showing akin to that required for general jurisdiction), that the seller "purposefully avail[] itself" of the benefits of the state's economic market. *J. McIntyre*, 564 U.S. at 877 (plurality opinion). Due process also "requires a forum-by-forum, or sovereign-by-sovereign, analysis," *id.* at 884, which means that a seller must have purposefully availed itself of *each* taxing state to be subject to that state's taxing authority.

In some circumstances—*e.g.*, where it creates a "substantial connection" with the forum—a private party's single act may give rise to a foreign state's regulatory authority. *See, e.g.*, *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (ongoing life insurance contract). But "the Court ... has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place." *J. McIntyre*, 564 U.S. at 888-89 (Breyer, J., concurring). Indeed, *Quill* itself makes clear that an out-of-state retailer's mere delivery of an item to another state does not give rise to sufficient minimum contacts for due process purposes: If delivery were sufficient, then Quill's status as a mail-order retailer would have been dispositive.

Moreover, even repeated contacts with a state are not necessarily enough to give rise to jurisdiction for due process purposes. While "parties who reach out beyond one state and create continuing relationships

and obligations with citizens of another state" satisfy purposeful availment, if the "nature and quality and the circumstances of their commission create only an attenuated affiliation with the forum," then an actor cannot be said to have purposefully availed itself of the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 475 n.18 (1985). In short, it is the quality, not just the quantity, of contacts with the taxing state that ultimately controls the due process analysis.

2. Those principles apply with no less—and indeed, arguably more—force in the Internet age. Despite the undeniable fact that the Internet has made it easier to do business across state lines, "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on ... personal jurisdiction." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Now as before, "the principal inquiry" remains "whether the defendant's activities manifest an intention to submit to the power of a sovereign." *J. McIntyre*, 564 U.S. at 882 (plurality opinion).

That a remote seller's website is accessible in a state hardly ends that inquiry, for the "mere operation of a commercially interactive web site" does not show "that the [operator] 'purposefully availed' itself of conducting activity in the forum state." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003). After all, an e-retailer's sale to a resident of a state touches that state "only because that is where the purchaser happened to reside," *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008), and that sort of "random, isolated, or fortuitous" contact is insufficient for due process. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). Indeed, with e-commerce, the

purposeful availment often runs in the other direction, with the consumer in search of a niche product diligently tracking down a website operated in a distant state or foreign country. The critical question is thus whether the business "directly target[ed] its web site to the state, knowingly interacting with residents of the forum state via its web site," or whether it, in fact, was the other way around. *Toys "R" Us*, 318 F.3d at 454; *see also ALS Scan, Inc. v. Dig. Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

The United States contends that "e-commerce more closely resembles brick-and-mortar retail than it resembles commerce undertaken through mail-order catalogs" because "retail websites ... hold themselves out to the public as places ... where customers initiate transactions." Br. for the United States 27. That puzzling claim misses a fundamental distinction: Before it can make a single sale to a South Dakotan, the proprietor of a brick-and-mortar store has to make the conscious decision to open a store *in South Dakota*. That is obviously not true of the proprietor of an *online* store—any more than it is true of an out-of-state seller that sends catalogs to South Dakotans. An online retailer thus need not purposefully avail itself of South Dakota for a South Dakotan to purchase its wares any more than a mail-order retailer need purposefully avail itself of South Dakota for a South Dakotan to purchase its wares.

Indeed, if anything, e-commerce involves even less purposeful availment than sending catalogs to in-state residents, as a "website is not directed at customers in [any State], but instead is available to all

customers throughout the country who have access to the Internet." *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1281 (Fed. Cir. 2005). That is why courts have consistently rejected the conclusion that merely placing an item for sale online constitutes "purposeful availment" of the benefits and protections of the laws of the state where the purchaser happens to reside.

And the lack of contact between the remote seller and the taxing state is starkest when an item is placed for sale on a third-party marketplace or auction website. There are millions of small-volume sellers online, all of which "are too small to measure activities at a unique web site," and so instead sell via eBay.com and other platforms. Joe Bailey et al., *The Long Tail Is Longer Than You Think: The Surprisingly Large Extent of Online Sales by Small Volume Sellers* 5, 7 (May 12, 2008) (unpublished working paper) (on file with the University of Maryland). Efforts by remote jurisdictions to tax such small-volume sellers would raise serious due process problems.

Nor would forcing the platform itself to satisfy the remote sellers' state tax-collection obligations solve the constitutional problem. To the contrary, it would simply substitute one due process problem for another. This Court has "treated a nominally private entity as a state actor"—and thus allowed constitutional challenges based on its actions—when the nominally private entity "has been delegated a public function by the State, ... when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S.

288, 295-96 (2001) (alteration in original) (quoting *Evans v. Norton*, 382 U.S. 296, 301-02 (1966)). It is difficult to imagine a more core public function than the collection of taxes. *Evans*, for instance, held that "the service rendered" by the private operation of a private park was "municipal in nature" for purposes of the state-action doctrine. 382 U.S. at 301-02. Relying on private platforms to collect taxes is *a fortiori* delegating a public function. And unlike the collection of state sales taxes by in-state retailers, who can exercise meaningful political will in favor of (or against) their (dis)favored tax policies, there is no such accountability when it comes to forcing remote retailers to act as arms of the state. As a result, any state efforts to turn national platforms into mini-government tax-collection agencies would raise serious due process concerns of their own.

3. Perhaps recognizing that, like e-retailers themselves, remote vendors' contacts with a taxing jurisdiction come in all shapes and sizes, petitioner consistently emphasizes the particular contact requirements of South Dakota's Senate Bill 106. But those requirements were gerrymandered with this litigation in mind. *See* Tony Mauro, *How Supreme Court's Internet Tax Case Was Built 'From the Ground Up'*, Nat'l L. J. (Mar. 16, 2018), https://bit.ly/2q1Af67 (noting that petitioner's counsel "designed the legislation" at issue in this case, "[g]ot the legislation passed," and even "timed the case from the enactment of the legislation, all the way through" the certiorari and merits stages before this Court).

It should be no great surprise that a law specifically designed to take down the physical

presence requirement would be directed at the Wayfair.coms of the world. But if this highly-engineered statute succeeds in its objective and takes out the physical presence requirement, there will be little in this Court's Commerce Clause jurisprudence to prevent other jurisdictions from treating any sale as a basis for imposing tax-collection responsibilities. Thus, if this Court is inclined to jettison the physical presence rule that has protected small out-of-state retailers for half a century, it is vital that it reaffirm that the Due Process Clause remains a bulwark against efforts to treat any Internet sale as a basis for state regulation.

In the end, South Dakota's elaborate effort to limit its statute to out-of-state sellers with a specific volume or number of sales only illustrates the virtues of a legislative solution. Unlike this Court, a legislature can tailor its approach and differentiate between large and small retailers, and between prospective and retroactive burdens. The problem is that the *wrong* legislative body is addressing this problem. Small out-of-state retailers have no voice in the South Dakota legislature. If the *Bellas Hess* rule is eliminated, state legislatures will no longer have any reason to assure this Court of their reasonableness, and will have no reason to be restrained in offloading unpopular tax-collection responsibilities on out-of-state retailers with no voice in the state capital. By contrast, if Congress addresses this problem, which is (at least) national in scope, then everyone—states, retailers big and small, and taxpayers alike—will have a voice. Given the enduring need to prevent taxation without representation, leaving this issue to that representative body is a far better solution than

jettisoning the one obstacle that has prevented states from imposing regulatory burdens on out-of-state retailers with no physical presence in the state and no voice in the state legislative process.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

April 4, 2018

No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF FOR STATE OF NEW HAMPSHIRE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

GORDON J. MACDONALD
Attorney General

LAURA E.B. LOMBARDI
Senior Assistant Attorney General

ANTHONY J. GALDIERI*
Assistant Attorney General

NEW HAMPSHIRE DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
Laura.Lombardi@doj.nh.gov
Anthony.Galdieri@doj.nh.gov

CHRISTOPHER T. SUNUNU
Governor

OFFICE OF THE GOVERNOR
State House
107 North Main Street
Concord, NH 03301
(603) 271-2121

April 4, 2018

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. *Stare decisis* demands adherence to *Bellas Hess*'s physical-presence requirements for sales and use taxes 4

A. *Stare decisis* applies with enhanced strength in this case 6

1. Overturning *Bellas Hess*'s physical-presence requirement for sales and use taxes will unsettle existing property and contract rights 6

2. Congress retains the power to relax *Bellas Hess*'s physical-presence requirement in prospective, nuanced ways that this Court cannot accommodate 14

3. Congress has foregone multiple opportunities to change or otherwise modify *Bellas Hess* and *Quill* 16

4. *Bellas Hess*'s physical-presence requirement creates a bright-line rule of taxation that creates business confidence 17

TABLE OF CONTENTS – Continued

Page

B. No special justifications of any significance counsel overturning *Bellas Hess*'s physical-presence requirement 20

C. The considerations in favor of *stare decisis* outweigh any special justifications 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Arizona Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) 17

Arkansas Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 19

Case of the State Freight Tax, 82 U.S. 232 (1872) 7, 20

Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015) 7

Goldberg v. Sweet, 488 U.S. 252 (1989) 10

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) 5

In re Scholastic Book Clubs, Inc., 920 P.2d 947 (Kan. 1996) 21

Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401 (2015) ..... *passim*

McCulloch v. Maryland, 17 U.S. 316 (1819) 7

McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944) 18

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014) 4

Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) 24

National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) ..... *passim*

National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977) 10, 21

TABLE OF AUTHORITIES – Continued

Page

Northwest States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 24

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 11, 18

Overstock.com, Inc. v New York State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013) 21

Payne v. Tennessee, 501 U.S. 808 (1991) 4, 21

Printup v. Kenner, 180 N.W.2d 512 (S.D. 1920) 6

Public Util. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) 19

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

Scholastic Book Clubs, Inc. v. Commissioner of Revenue Servs., 38 A.3d 1183 (Conn. 2012) 21

Scholastic Book Clubs, Inc. v. State Bd. of Equalization, 207 Cal. App. 3d 734, 255 Cal. Rptr. 77 (Cal. 1989) 21

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 19

Shepherd v. United States, 544 U.S. 13 (2005) 16

Sullivan v. United States, 395 U.S. 169 (1969) 18

Travelocity.com, LP v. Wyoming Dep't of Revenue, 329 P.3d 131 (Wyo. 2014) 21

United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973) 11

Vasquez v. Hillery, 474 U.S. 254 (1986) 5

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) 17

TABLE OF AUTHORITIES – Continued

Page

Watson v. United States, 552 U.S. 74 (2007) 16

Williams v. Fiat & Slagle Co., 42 A. 431 (Del. 1899) 7

RULES

Sup. Ct. R. 37.4 2

OTHER AUTHORITIES

Bloomberg BNA, 2017 Survey of State Tax Departments, Special Report, Multistate Tax Report, Vol. 24, No. 4 (Tax Management Inc. 2017) 12

H.R.2193, Remote Transactions Parity Act (2017-2018).....16

H.R.2887 – No Regulation Without Representation Act of 2017 (2017-2018).....16

S.976 – Marketplace Fairness Act of 2017 (2017-2018) 16

INTEREST OF *AMICUS CURIAE*

In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), this Court held in the context of sales and use taxes that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992). The Court reaffirmed this holding in *Quill*, which has now shaped sales-and-use-tax dormant Commerce Clause jurisprudence for the past 51 years.

Amicus curiae, the State of New Hampshire, has a compelling interest in supporting *Bellas Hess*'s physical-presence requirement for sales and use taxes for at least the following reasons. First, New Hampshire has a long, proud history of frugality and limited taxation. It does not impose a sales tax on retail goods and its retail businesses have never had to face the burden and expense of attempting to collect, hold, and account for the sales taxes of different jurisdictions. Second, abrogation of *Bellas Hess*'s physical-presence requirement will harm New Hampshire's sovereign interests by permitting other States to reach across its borders and impose sales tax collection compliance on New Hampshire retail businesses. Such a result threatens brick-and-mortar border businesses, as well as small Internet retailers, within New Hampshire with sales tax obligations that promise to be extraordinarily difficult for them to detect and may expose them to unknown tax liability in other States. Permitting other States to extend their sales tax collection obligations

into New Hampshire will also dilute an important economic advantage that New Hampshire possesses as a non-sales tax State in attracting new business to open and settle within its borders. Finally, imposing increased sales tax collection compliance obligations on New Hampshire businesses will likely increase the price of retail goods for New Hampshire consumers, as New Hampshire retailers pass the cost of collections and compliance with out-of-state taxing jurisdictions onto local customers. Accordingly, for at least all of the above reasons, the State of New Hampshire has a compelling interest in supporting *Bellas Hess*'s physical-presence requirement for sales and use taxes.

SUMMARY OF THE ARGUMENT

1. *Stare decisis* applies with enhanced force in this case and requires *Bellas Hess*'s physical-presence requirement to be retained. Significant property and contract rights have developed around and in reliance on this physical-presence requirement, which has been in place for over 50 years. Congress retains the power to relax this physical-presence requirement in prospective, nuanced ways that this Court cannot. Congress is acutely aware of *Bellas Hess*'s physical-presence requirement and has proposed legislation concerning it on many occasions. Congress's refusal to modify *Bellas Hess*'s physical-presence requirement is a powerful indication that Congress believes that this

Court has struck the correct balance. Also, *Bellas Hess*'s physical-presence requirement creates a bright-line rule in the unique and complex area of sales and use taxation. A bright-line rule in this context provides confidence to small business owners and private individuals regarding their sales and use tax obligations and enables them to do business over the Internet without the need to invest in expensive software and other professional services in order to discern and meet thousands of different sales and use tax obligations.

2. No special justifications of any significance justify abandoning *Bellas Hess*'s physical-presence requirement. Changes in law have not undermined *Bellas Hess*'s physical-presence requirement. Rather, this Court's jurisprudence and the jurisprudence of other States has developed around and in reliance on *Bellas Hess*'s physical-presence requirement. State-by-state innovation and creativity in taxing large Internet retailers is also enabling States to identify physical presences potentially substantial enough to permit the imposition of sales and use taxes, consistent with *Bellas Hess*'s physical-presence requirement. *Bellas Hess*'s physical-presence requirement is not a detriment to coherency in the law. It is instead consistent with this Court's substantial nexus jurisprudence, while recognizing the uniqueness of sales and use taxes and the complexities that surround individual compliance with them. *Bellas Hess*'s physical-presence requirement is also not badly reasoned, but is a sensible, workable rule that is capable of being adapted and applied to large Internet retailers, while insulating small

Internet retailers, small brick-and-mortar businesses, and private individuals from overly burdensome, multitudinous sales and use tax obligations. To the extent the States believe that *Bellas Hess*'s physical-presence requirement should be changed or modified to better accommodate the reality of Internet sales and mobile transactions, those concerns are better addressed by Congress than this Court.

3. In short, a "superpowered form of *stare decisis*" attaches to *Bellas Hess*'s physical-presence requirement for sales and use taxes that is not outweighed by any special justifications. *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2410 (2015). Accordingly, *Bellas Hess*'s physical-presence requirement should be retained on *stare decisis* grounds. The judgment below should therefore be affirmed.

ARGUMENT

I. *Stare decisis* demands adherence to *Bellas Hess*'s physical-presence requirements for sales and use taxes.

Stare decisis is the "foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014). It "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne*

v. Tennessee, 501 U.S. 808, 827 (1991). In this way, *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals. . . ." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

While *stare decisis* is flexible to a point, like all self-policing measures, it furthers its intended goals only if it is applied in a consistent and principled manner over time. Thus, by necessity, "[r]especting *stare decisis* means sticking to some wrong decisions." *Kimble*, 135 S. Ct. at 2409. "Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Id.* An argument that the Court got it wrong "cannot by itself justify scrapping settled precedent." *Id.* Rather, a " 'special justification' – over and above the belief that precedent was wrongly decided" must be shown. *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)).

Whether a "special justification" exists and whether that "special justification" is sufficient to supplant existing precedent is evaluated on a case-by-case basis. The analysis has three components. First, the Court determines the strength with which *stare decisis* applies. Second, the Court determines the strength of the "special justifications" asserted. Third, the Court balances the *stare decisis* considerations against the "special justifications" to determine whether to adhere to or abandon a particular precedent. This Court's

opinion in *Kimble* follows that basic analytical framework. 135 S. Ct. at 2409-15 (assessing strength of *stare decisis* considerations and balancing them against the special justifications asserted).

A. *Stare decisis* applies with enhanced strength in this case.

The doctrine of *stare decisis* applies with enhanced strength in this case for at least the following four reasons.

1. Overturning *Bellas Hess*'s physical-presence requirement for sales and use taxes will unsettle existing property and contract rights.

Stare decisis is at its "acme" where overturning precedent means unsettling existing property and contract rights. *See, e.g.*, *Kimble*, 135 S. Ct. at 2410; *Payne*, 501 U.S. at 828. "That is because parties are especially likely to rely on such precedents when ordering their affairs." *Kimble*, 135 S. Ct. at 2410; *see Printup v. Kenner*, 180 N.W.2d 512, 513 (S.D. 1920) (applying *stare decisis* to uphold incorrect decision of statutory construction because that decision established a rule of property in the state for 16 years). "The maxim of *stare decisis* has generally been strictly applied where titles to real estate have been acquired or commercial usages have been established under decisions of the court; even where such decisions may have been erroneous, for the reason that a reversal of such decisions would

disturb property rights already acquired and would work harm and mischief upon those who have honestly invested their means upon the faith of such decisions." *Williams v. Fiat & Slagle Co.*, 42 A. 431, 438 (Del. 1899).

This Court's dormant Commerce Clause jurisprudence lies inescapably at the confluence of property and contract rights. Its purpose is to establish the boundary between congressional power to regulate interstate commerce and State power to burden interstate commerce. "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, State tariffs and other laws that burdened interstate commerce." *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

This Court recognized early on that, absent some limits on the States to impose tax burdens on interstate commerce, goods in one part of the country could be effectively excluded from the markets of another part of the country by a crush of multitudinous State taxes. *Case of the State Freight Tax*, 82 U.S. 232, 280 (1872); *see also McCulloch v. Maryland*, 17 U.S. 316, 431 (1819) (recognizing that "the power to tax involves the power to destroy"). As a result, this Court's dormant Commerce Clause jurisprudence has not just engendered significant reliance interests, it has shaped and formed industries and, in some cases, has permitted the creation of businesses that might not

otherwise exist. It is therefore critical that the Court treat its dormant Commerce Clause jurisprudence as establishing clear, fixed, decisional boundaries that, if they are to be moved at all, move slowly, incrementally, and almost imperceptibly over time, without irreparably damaging the property and contract rights of established businesses and private individuals, or, even worse, wiping them out entirely.

Quill reaffirmed *Bellas Hess* at the dawn of the e-commerce boom. Since then, many businesses, including small businesses, have established an online presence in order to generate wealth and compete in the marketplace. Brick-and-mortar retail establishments have been steadily declining, either by shifting to an e-commerce business model in whole or in part or by going out of business. Society has similarly been devoting more resources to educating private citizens on how to create, develop, and sustain businesses that rely in whole or in part on retail sales driven by the Internet.

This massive shift in how America does business has been aided in part by *Bellas Hess*'s physical-presence requirement. Under *Bellas Hess*, small business owners can solicit customers via e-mail at little to no expense and sell their goods to customers over the Internet without having to worry about collecting sales or use taxes from jurisdictions in which they do not have a physical presence. Undoing *Bellas Hess* makes the sales and use tax obligations of these small businesses highly uncertain.

If *Bellas Hess*'s physical-presence requirement is abandoned, small Internet retail businesses will have to navigate and comply with the sales-and-use tax requirements of approximately 10,000 to 12,000 different jurisdictions. The task will be significantly burdensome, if not impossible, for many small Internet retail businesses to meet. There exists no uniform system of laws for sales and use taxes. Every State has its own exemptions, deductions, credits, and rates and some declare temporary tax holidays. Small businesses will have to employ sophisticated, expensive software to manage these various different tax obligations and will have to invest additional resources, including potentially seeking legal and accounting advice, to determine what precisely their sales-and-use tax obligations are. *See Bellas Hess*, 386 U.S. at 759-60 (observing that the "many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations").

The prevalence of remote Internet transactions only complicates matters. For example, it is not uncommon in today's world that a customer who is domiciled in California may review an e-mail solicitation that exists on a computer server in Virginia on her iPhone while traveling through Kansas. She may then purchase a product based on that solicitation using her iPhone from a New Hampshire business, provide her California address as her billing address, and have the product shipped to her college dormitory at Kentucky

State University. Let's say all of foregoing jurisdictions except for New Hampshire have a sales tax potentially applicable to the transaction. The seller has to collect and remit the tax. In the absence of *Bellas Hess*'s physical-presence requirement, the following questions arise: does this small New Hampshire business have a "substantial nexus" to any of the sales and use taxing jurisdictions mentioned and, if so, to which ones? If the small business owner cannot divine the answers to these questions, it can never meaningfully meet its sales tax obligations and, more importantly, can never feel secure that someday a particular State will not assess it for years of back sales taxes it could not identify and collect from customers in real time.

Perhaps the answer to the above questions is that a small business in this scenario has no "substantial nexus" to any of the sales and use taxing jurisdictions mentioned above, other than the jurisdiction in which the small business is physically present. This Court's existing jurisprudence would appear to support that result. *See, e.g.*, *Quill Corp.*, 504 U.S. at 315 n. 8 (suggesting that having "title to 'a few floppy diskettes' present in a State" in addition to common carrier contacts does not constitute a "substantial nexus" under the Commerce Clause); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) ("We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call."); *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977) (refusing to endorse a "'slightest presence' standard of constitutional nexus"); *United*

Air Lines, Inc. v. Mahin, 410 U.S. 623, 631 (1973) (holding that State has no nexus to tax an airplane based solely on its flight over the State).

But that result will effectively create a mobile customer exception in place of *Bellas Hess*'s physical-presence requirement. Such an exception will inevitably permit certain types of businesses to flourish over others. It may also cause industries to restructure and adapt their business models in different ways to try to ensure a "substantial nexus" is not created with any particular sales tax jurisdiction other than the sales tax jurisdiction in which the business itself is physically located. Then, in another 25 to 30 years, this Court will be asked by another State to overrule that exception and further dilute dormant Commerce Clause requirements in the sales and use tax space. That does not seem like the preferred course.

Perhaps instead the answer to the above hypothetical is that Kansas, in addition to New Hampshire, has a "substantial nexus" to the sale sufficient to tax it. After all, a sales tax is a tax on the incidence of a particular transaction, *i.e.*, the passing of title in exchange for consideration. If the sale of the retail good is deemed consummated in Kansas, then Kansas sales tax should apply. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) ("It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by the State.").

But that begs the next question: How does the small business Internet retailer in New Hampshire know the sale was con ummated in Kansas, as opposed to California (the billing address) or Kentucky (the delivery address)? After all, the purchaser was simply passing through Kansas at the time the purchase was consummated and may have only been technically present in Kansas for a short period of time. If the small business Internet retailer cannot discern where the sale was consummated, it cannot appropriately collect, account for, and remit the sales tax owed.

The problem of "sourcing" – the way in which the location of the consummation of the sale is determined – would be exacerbated by overruling *Bellas Hess* and *Quill*. "Every state imposing sales and use taxes provides sourcing rules to identify the location of a sale and to determine which jurisdiction is entitled to the revenue generated from the transaction." Bloomberg BNA, 2017 Survey of State Tax Departments, Special Report, Multistate Tax Report, Vol. 24, No. 4 at S-357 (Tax Management Inc. 2017). "Yet sourcing has become a complicated endeavor for taxpayers." *Id.* "Sourcing rules vary from state to state and may depend upon the object of the transaction; they may be further complicated by the type of transaction and mode of delivery." *Id.* As complicated as these varying sourcing rules may be now, they will only get worse without the bright-line test which currently bounds the question in the sales and use tax realm.

Thus, even setting aside the burden each State's substantive sales and use tax laws will impose on

small businesses and private individuals, the added burden on those entities and persons to understand and comply with the various State sourcing rules for sales and use taxation without a bright-line physical-presence rule could force those businesses and persons out of the Internet retail market. Such a potential result militates strongly in favoring of retaining *Bellas Hess*'s physical-presence requirement.

Brick-and-mortar border businesses in New Hampshire also face the loss of their property and contract rights if *Bellas Hess*'s physical-presence requirement is overturned. New Hampshire borders Vermont, Massachusetts, Maine, and the Province of Quebec. New Hampshire has no sales tax, a feature which draws residents of neighboring States across the border to make purchases from New Hampshire border businesses. These border businesses may advertise into these bordering jurisdictions, but otherwise lack a physical presence in them. If *Bellas Hess*'s physical-presence requirement is overturned, these border stores may now be faced with the burden of having to collect, account for, and remit sales tax to those neighboring States. That obligation will likely force those businesses to increase their prices to consumers, including New Hampshire consumers, who have chosen through their elected representatives to keep the price of retail goods in their State low by not imposing a statewide sales tax on retail goods.

In short, significant reliance interests, including significant property and contract rights, have developed around *Bellas Hess*'s physical-presence requirement

over the past 51 years. *Bellas Hess* and *Quill* cannot be overturned without unsettling those property and contract rights and potentially putting certain small businesses or private individuals out of business. Moreover, to the extent there is even uncertainty as to whether overturning *Bellas Hess*'s physical-presence requirement will unsettle existing property and contract rights (and the *amicus curiae* suggests that there is plenty), this Court has held that such uncertainty cuts in favor of *stare decisis*. *See Kimble*, 135 S. Ct. at 2410 ("[E]ven uncertainty . . . cuts in Marvel's direction. So long as we see a reasonable possibility that parties have structured their business transactions in light of *Brulotte*, we have one more reason to let it stand.").

Accordingly, *stare decisis* considerations should be given great weight in this context because of the significant property and contract rights that have developed around and in reliance on *Bellas Hess*'s physical-presence rule.

2. Congress retains the power to relax *Bellas Hess*'s physical-presence requirement in prospective, nuanced ways that this Court cannot accommodate.

This Court has recognized that *stare decisis* carries special weight where Congress retains the power to resolve the matter. *See, e.g.*, *Kimble*, 135 S. Ct. at 2409; *Quill Corp.*, 504 U.S. at 318. Congress possesses the legislative tools necessary to resolve the debate

regarding *Bellas Hess*'s physical-presence requirement in a responsible manner without unduly harming small businesses and private individuals. For example, Congress can set an effective date for a law lifting *Bellas Hess*'s physical-presence requirement out far enough to ensure that persons have enough time to restructure their businesses to comply with any new sales and use tax obligations they might face. Congress can also hear testimony and review evidence related to the impact any proposed legislation may have on the States, the e-commerce industry, large businesses, small businesses, and private individuals. Congress can then weigh the various interests involved and fashion a solution that is far more comprehensive, nuanced, and protective of existing property and contract rights than this Court is capable of crafting. Among other things, Congress could provide tax deductions, compensatory schemes, or other forms of financial relief to small businesses and private individuals to help them shoulder the cost and burden of compliance with any new sales and use tax obligations.

But Congress cannot cede authority to the States that this Court deems Congress never had in the first place. Thus, if overturning *Bellas Hess*'s physical-presence requirement for sales and use taxes turns out to be a problematic economic decision, only this Court will be able to correct that decision and only in an appropriate case. Accordingly, *stare decisis* considerations should be given considerable weight in this case because Congress retains the power to relax *Bellas*

Hess's physical-presence requirement in prospective, nuanced ways that this Court cannot.

3. Congress has foregone multiple opportunities to change or otherwise modify *Bellas Hess* and *Quill*.

Considerations favoring *stare decisis* also apply with added force where Congress "has spurned multiple opportunities to reverse" the decision. *Kimble*, 135 S. Ct. at 2404; *see, e.g.*, *Watson v. United States*, 552 U.S. 74, 82-83 (2007) ("What is more, in 14 years Congress has taken no step to modify *Smith*'s holding, and this long congressional acquiescence has enhanced even the usual precedential force we accord to our interpretations of statutes.") (internal quotations omitted); *Shepherd v. United States*, 544 U.S. 13, 23 (2005) ("In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed since *Taylor* came down, without any action by Congress to modify the statute. . . .").

Congress has been well aware of *Bellas Hess*'s physical-presence requirement for over half a century and has proposed legislation concerning the requirement on many occasions, including very recently. *See, e.g.*, H.R.2193, Remote Transactions Parity Act (2017-2018); H.R.2887 – No Regulation Without Representation Act of 2017 (2017-2018); S.976 – Marketplace Fairness Act of 2017 (2017-2018); *see also Quill Corp.*, 504 U.S. at 318 n.11. Congress is therefore acutely aware of *Bellas Hess*'s physical-presence

requirement and has nonetheless spurned multiple opportunities to change or alter it. This state of affairs also cuts in favor of applying *stare decisis*.

4. *Bellas Hess*'s physical-presence requirement creates a bright-line rule of taxation that creates business confidence.

This Court has recognized that bright-line rules in the area of transaction taxation are preferable over more amorphous balancing or factor-driven tests. *See, e.g.*, *Quill Corp.*, 504 U.S. at 315-16; *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113-14 (2005) ("The application of the interest-balancing test to the Kansas motor fuel tax is not only inconsistent with the special geographic sovereignty concerns that gave rise to that test, but also with our efforts to establish 'bright line standard[s]' in the context of tax administration.") (quoting *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999)). Indeed, this Court identified the bright-line test *Bellas Hess* created as a virtue in *Quill*: "Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." *Quill Corp.*, 504 U.S. at 315-16.

Approximately 10,000 to 12,000 different jurisdictions exist in the United States capable of levying a sales and use tax on retail goods. The sale of retail goods is commonplace throughout the United States

and is engaged in daily by millions of small businesses and consumers. Sales taxes differ substantially from income taxes and other kinds of taxes, and this Court has properly recognized sales and use taxes as unique. The incidence of a sales tax "is not the property itself or its presence within the State," but "is the transfer of title for consideration, a legal act which can be accomplished without the property ever entering the State." *Sullivan v. United States*, 395 U.S. 169, 175-76 (1969); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("A sales tax is a tax on the freedom of purchase. . . ."); *see Jefferson Lines*, 514 U.S. at 186 ("A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which the buyer is taxed.").

Moreover, with a typical retail sale, the consumer pays the sales tax and the seller is responsible for holding the funds as a trustee for the State or local jurisdiction permitted to collect it. *See Jefferson Lines*, 514 U.S. at 190 (differentiating from an income tax on a seller and a sales tax which "falls on the buyer"). The seller becomes, in effect, an agent for the State tax collector, to move tax dollars from the buyer to the State. At the same time, in many jurisdictions, the consequences to a seller who does not faithfully fulfill their obligations with respect to such "trust fund taxes" can be severe. Typically, failure to comply encompasses personal liability, stiff penalties, and, potentially, criminal jeopardy. The seller must therefore know precisely

which States or local jurisdictions are taxing the transaction, account carefully for the collected funds, and appropriately remit those collected funds for a multitude of individual transactions.

The same burdens do not accompany income taxes, which are levied by a small fraction of the number of jurisdictions that can levy a sales or use tax and which are based on the gross taxable income or receipts of the business, subject to deductions, credits, etc., and are apportioned based on the extent of the business' activity in the State. The distinction and the justification for the bright line *in sales and use taxes* is manifest. If the State wishes to require the seller to serve as its agent for tax collection and expose the seller to the kinds of consequences noted above, it must establish a solid jurisdictional basis to fix liability, and a bright-line rule makes it fair and puts the seller on notice of what it may be getting itself, and the individuals involved, into. *See, e.g., Quill Corp.*, 504 U.S. at 315-16 (explaining that, though a bright-line rule in the sales and use tax space may be artificial, its "artificiality . . . is more than offset by the benefits of a clear rule"); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211-13 (1960) (discussing need for due process when tasking seller to be State's sales and use tax collector).

That places *Bellas Hess*'s physical-presence requirement in a unique context that other Commerce Clause precedents did not find themselves at the time this Court overruled them. *See, e.g., Arkansas Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Public Util. Comm'n of Rhode Island v.*

Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). Indeed, the number of taxing jurisdictions that can legitimately tax a particular item or transaction has been a relevant consideration in this Court's dormant Commerce Clause jurisprudence since the beginning. *Case of the State Freight Tax*, 82 U.S. at 280. Additionally, the number of sales transactions that occur on a daily basis across the United States far exceeds the number of times during a year a State can levy an income tax on a particular entity. Thus, certainty for small businesses and private individuals in the area of sales and use tax obligations is critical as they may not have the resources to comply with multi-jurisdictional tax obligations or to purchase the software and other services needed to ensure compliance with those obligations, including the services necessary to facilitate the careful accounting for and remittance of trust fund taxes.

Consequently, for all of the above reasons, the same "superpowered form of *stare decisis*" that existed in *Kimble* exists in this case. 135 S. Ct. at 2410. Thus, to overcome it, there must be "a superspecial justification." *Id.* For the reasons described in detail below, no such justification exists.

B. No special justifications of any significance counsel overturning *Bellas Hess*'s physical-presence requirement.

This Court has recognized at least the following special justifications that may advise overturning existing precedent: (1) whether changes in the law have

undermined the precedent; (2) the need to bring the law into line with experience and newly ascertained facts; (3) whether the precedent has become a detriment to coherence and consistency in the law; and (4) whether the precedent is unworkable in practice or badly reasoned. *See Payne*, 501 U.S. at 828; *id.* at 842 (Scalia, J., concurring); *id.* at 849 (Marshall, J., dissenting). None of these special justifications counsels in favor of overturning *Bellas Hess*'s physical-presence requirement for sales and use taxes.

First, changes in law have not undermined *Bellas Hess*'s physical-presence requirement. Rather, this Court's jurisprudence has developed around and in reliance on *Bellas Hess*'s physical-presence requirement. Not only have many cases directly relied on *Bellas Hess* and *Quill*, but many have distinguished themselves from those cases in order to bring further clarity to the boundary between congressional authority to regulate interstate commerce in the area of sales and use taxes and State authority to impose such taxes. *See, e.g.*, *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977); *Travelocity.com, LP v. Wyoming Dep't of Revenue*, 329 P.3d 131 (Wyo. 2014); *Overstock.com, Inc. v New York State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013); *Scholastic Book Clubs, Inc. v. Commissioner of Revenue Servs.*, 38 A.3d 1183 (Conn. 2012); *In re Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996); *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 207 Cal. App. 3d 734, 738, 255 Cal. Rptr. 77 (Cal. 1989).

State-by-state innovation and creativity in taxing large Internet retailers is also enabling States to identify physical presences that may be substantial enough to permit the imposition of sales and use taxes. *See* Brief of the Tax Foundation as Amicus Curiae in Support of Neither Party at 19-26, 27-28. Indeed, if a business desires to grow beyond a certain point, it almost certainly needs to have some form of physical presence in many or all States, even if that physical presence is through unwritten agreements with in-state agents to promote their business on local websites or through downloadable "apps" or "cookies" or data-harvesting equipment or devices. These new forms of physical presence may be capable of meeting *Bellas Hess*'s physical-presence requirement and demonstrate that legislative innovation is capable of meeting and attempting to solve the challenges presented by new modes of doing business.

Moreover, to the extent *Bellas Hess*'s physical-presence requirement could be refined for the digital age, Congress is better equipped to bring it into conformance with current experience in a much more comprehensive and nuanced fashion than this Court.

Second, *Bellas Hess*'s physical-presence requirement has not become a detriment to coherence and consistency in the law nor is it unworkable in practice. Rather, as this Court observed in *Quill*, the physical-presence requirement for sales and use taxes is consistent with this Court's substantial nexus jurisprudence and creates a bright-line rule that provides

business confidence in a unique and complex area of taxation.

Additionally, overruling *Bellas Hess*'s physical-presence requirement will not make this Court's dormant Commerce Clause jurisprudence any more coherent or consistent. As technology advances and society changes, businesses will adapt and find new business models that seek to minimize tax obligations. It is therefore inevitable that the quandary this Court faces today will re-emerge in the future, even in the absence of *Bellas Hess*'s physical-presence requirement. Thus, this case presents a critical sub-question for this Court: is its dormant Commerce Clause jurisprudence an ongoing effort in national economic policymaking or is it an attempt to discern the boundary between congressional power to regulate interstate commerce and State authority to burden it? If this Court's dormant Commerce Clause jurisprudence is an ongoing effort in national economic policymaking, then coherency and consistency in the law with respect to it will never be achieved.

Third, while some may believe that *Bellas Hess*'s physical-presence requirement established an economic error, *stare decisis* "does not ordinarily bend to wrong on the merits-type arguments; it instead assumes Congress will correct whatever mistakes [the Court] commit[s]." *Kimble*, 135 S. Ct. at 2413. In any event, far from an economic error, *Bellas Hess*'s physical-presence requirement represents a sensible, workable rule for the Internet age that is capable of being adapted and applied to large Internet retailers, while

insulating small Internet retailers, small brick-and-mortar businesses, and private individuals from overly burdensome, multitudinous sales and use tax obligations that threaten to make the price of doing business over the Internet too high for them. *Bellas Hess* was well reasoned and considered and should not be lightly overturned.

Moreover, any attempt by this Court to correct whatever economic problems it believes that *Bellas Hess* and *Quill* may have created is, at this stage, fraught with the same perils as the creation of that precedent in the first instance. *See, e.g.*, *Northwest States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954). Indeed, scrapping over 50 years of sales and use tax jurisprudence and attempting to reform a body of physical-presence precedent to accommodate the unique challenges and aspects those types of taxes present promises only to deepen the quagmire in which this Court's dormant Commerce Clause jurisprudence finds itself. *Northwest States Portland Cement Co.*, 358 U.S. at 458. Consequently, preservation of *Bellas Hess* and *Quill* ought to be the preferred course.

Fourth, the claim that *Bellas Hess*'s physical-presence requirement works a disadvantage on certain States and localities has not been clearly established and, in any event, is insufficient to overcome *stare decisis*. Legislative innovation is proving potentially capable of extending sales and use taxes to certain Internet retailers and should be given the room and opportunity to continue to expand within *Bellas Hess*'s

physical-presence requirement. Additionally, claims that a precedent capable of being changed by Congress may have harmful consequences on the economies of the States or its localities are more appropriately left to Congress to resolve. *See Kimble*, 135 S. Ct. at 2414. Congress is better equipped to weigh claims of harm by the States and localities against the harm private businesses and individuals may suffer and to develop innovative, nuanced policy solutions to resolve those competing interests. Congress is also better equipped to manage those solutions in order to mitigate any adverse effects on public and private parties. This Court does not make national economic policy and is therefore not well equipped to fashion a solution without risking the creation of further problems.

C. The considerations in favor of *stare decisis* outweigh any special justifications.

As explained above, a "superpowered form of *stare decisis*" attaches to *Bellas Hess*'s physical-presence requirement for sales and use taxes that is not outweighed by any special justifications. *Bellas Hess*'s physical-presence requirement has been in existence for approximately 51 years and, during that time, has engendered significant reliance interests, including the vesting of substantial property and contract rights. Congress retains the power to reverse, change, or otherwise modify *Bellas Hess*'s physical-presence requirement in ways that protect those important reliance interests.

In the meantime, *Bellas Hess* and *Quill* provide a bright-line rule in a complex, unique area of taxation that affects millions of American businesses every day, including many small businesses, private individuals, and consumers. Removing that bright-line rule has the potential of making the cost of doing business over the Internet too high and too uncertain for many small business owners and private individuals who rely to varying degrees on Internet-based retail sales made through websites like eBay or Etsy. It also has the potential of increasing consumer costs in States that have chosen through their elected representatives not to impose a sales tax on retail goods in order to keep retail prices low.

Given these established interests and expectations, no special justifications of any significance exist for departing from *Bellas Hess* and *Quill*. The States must work instead within *Bellas Hess*'s physical-presence requirement and, if they are concerned about their present inability to impose antiquated sales and use tax laws on large Internet retailers, they must employ innovative, legislative solutions capable of reaching those companies or otherwise persuade their federal representatives in Congress to change *Bellas Hess*'s physical-presence requirement through the legislative process.

CONCLUSION

For all of the above reasons, this Court should decline to overrule the physical-presence requirement for sales and use taxes established in *Bellas Hess* and reaffirmed in *Quill* on *stare decisis* grounds. The judgment below should therefore be affirmed.

Respectfully submitted,

GORDON J. MACDONALD
Attorney General

LAURA E.B. LOMBARDI
Senior Assistant
Attorney General

ANTHONY J. GALDIERI*
Assistant Attorney General

NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
Laura.Lombardi@doj.nh.gov
Anthony.Galdieri@doj.nh.gov

CHRISTOPHER T. SUNUNU
Governor

OFFICE OF THE GOVERNOR
State House
107 North Main Street
Concord, NH 03301
(603) 271-2121

April 4, 2018

**Counsel of Record*

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICUS CURIAE* ONLINE MERCHANTS GUILD IN SUPPORT OF RESPONDENTS

PAUL S. RAFELSON
Counsel of Record
ONLINE MERCHANTS GUILD
1150 Walnut Street 2nd Floor
Newton, MA 02461
(617) 903-7255
paul@onlinemerchantsguild.org
Counsel for Amicus Curiae

April 4, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT 4

I. AS PETITIONER AND ITS AMICI MAKE STATEMENTS TO THE CONTRARY, THEIR PRESENT ACTIONS TOWARDS ONLINE MERCHANTS PROVE THERE IS NO REGARD FOR BURDENS ON INTERSTATE COMMERCE 4

II. PETITIONER'S CHOICE TO FOCUS ON RESPONDENTS WAS STRATEGIC TO DIVERT THE COURT'S ATTENTION AWAY FROM THEIR TRUE TARGET: ONLINE MERCHANTS 8

SUMMARY OF THE ARGUMENT 10

ARGUMENT 13

I. PHYSICAL PRESENCE IS NOT THE BARRIER PETITIONER CLAIMS IT TO BE, THEREFORE THIS MATTER SHOULD NOT BE BEFORE THIS COURT 13

II. *QUILL*'S PHYSICAL-PRESENCE RULE SHOULD BE UPHELD 22

III. *QUILL*'S EMPHASIS ON THE COMPLIANCE BURDEN SHOULD NOT BE OVERLOOKED OR DIMINISHED 27

TABLE OF CONTENTS—Continued

Page

IV. SIGNIFICANTLY LESS BURDENSOME OPTIONS ARE AVAILABLE 29

CONCLUSION 33

TABLE OF AUTHORITIES

CASES Page(s)

Amazon.com LLC. v, New York State Dept. of Taxation and Finance, 20 NY3d 586 (2013), *cert. denied*, No. 13-259 (Dec. 2, 2013) 10

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)..... 22

Hanson v. Denckla, 357 U.S. 235 (1958) 26

National Bellas Hess v. Illinois State Dept. of Revenue, 386 U.S. 753 (1967).....*passim*

J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011)..... 26, 27

Quill v. North Dakota, 504 U.S. 298 (1992).....*passim*

Overstock.com, Inc. v. New York State Dept. of Taxation and Finance, 20 NY3d 586 (2013), *cert. denied*, No. 13-252 (Dec. 2, 2013)..... 10, 11

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)..... 28, 29, 30

Scripto, Inc. v. Carson, 362 U.S. 207 (1960)..... 10, 17, 26, 30

Tyler Pipe Industries v. Washington State Dept. of Revenue, 483 U.S. 232 (1987), No. 85-1963 (Jun. 23, 1987)..... 10, 30

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page(s)

U.S. Const. art. I, § 8, cl. 3 ..... 23, 26

U.S. Const. amend. XIV 26

STATUTES

28 U.S.C. § 1341 ..... 32, 33

Interstate Income Act of 1959, Pub. L. 86-272, 15 U.S.C. §§ 381-384..... 21

Mass. Gen. Laws. 64H, § 1..... 16

Washington Marketplace Fairness Act (EHB 2163), ch. 28, Laws of 2017 ..... 5, 11

OTHER AUTHORITIES

Amy Hamilton, News Analysis: Amnesty Exposes Rift Among Amazon Marketplace Sellers, Tax-analysts (Sept. 7, 2017), http://www.taxanalysts.org/content/news-analysis-amnesty-exposes-rift-among-amazon-marketplace-sellers..... 11

Amazon, *Announcing Amazon Fulfillment Web Service* (Mar. 19, 2008), http://aws.amazon.com/about-aws/whats-new/2008/03/19/announcing-amazon-fulfillment-web-service/ 24

Brad Stone, *The Everything Store: Jeff Bezos and the Age of Amazon* (2013)..... 13

TABLE OF AUTHORITIES—Continued

Page(s)

eBay Inc., Reports Fourth Quarter and Full Year 2017 Results (Jan. 31, 2018), available at http://files.shareholder.com/downloads/ebay/6169581134x0x970140/C1C54245-B6C1-4344-8428-5251DADBBDB7/EBAY_News_2018_1_31_Earnings.pdf 9

Eugene Kim, Amazon gives in to Massachusetts tax officials and agrees to turn over third-party seller data (Jan. 23, 1028, 3:48pm) https://www.cnbc.com/2018/01/23/amazon-will-turn-over-third-party-seller-tax-data-to-massachusetts.html ... 16

Ina Steiner, Amazon Holds Panel to Help Minority Entrepreneurs, eCommerceBytes.com (Feb. 23, 2017, 3:10pm), goo.gl/crkigK 1

California Dept. of Taxes and Fees Administration, Email (March 2018)..... 18

Marie Edinger, Mississippi man finds Amazon sales tax loophole, MSNews Now (Feb. 8, 2017, 1:04am), http://www.msnewsnow.com/story/34452080/mississippi-man-finds-amazon-sales-tax-loophole ... 30

Monica Eaton-Cardone, *More Women Are Working around the a-Commerce Gender Barrier*, SDCExecutive.com (Feb. 29, 2016), https://www.sdcexec.com/warehousing/blog/12159612/more-women-are-working-around-the-ecommerce-gender-barrier 1

TABLE OF AUTHORITIES—Continued

Page(s)

Multistate Tax Commission, FAQ, http://www.mtc.gov/Nexus-Program/Online-Marketplace-Seller-Initiative/FAQ (last visited Apr. 2, 2018) 21

Multistate Tax Commission, *Marketplace Seller Voluntary Disclosure Initiative-MTC Emergency Nexus Committee Meeting Teleconference* (Oct. 11, 2017), https://www.youtube.com/watch?v=2fw8A8CDo6U ..... *passim*

Multistate Tax Commission, Richard Cram, email communication with Counsel for Online Merchants Guild (September 8, 2017) 14

Nasdaq, OSTK Company Financials, available at https://www.nasdaq.com/symbol/ostk/financials?query=income-statement (last visited Apr. 2, 2018) 9

Paul Rafelson, Amazon FBA Seller: What to do if you receive a California Sales Tax Letter, ecommerceChris (Last updated Nov. 9, 2017, 1:34am), available at https://www.ecommercechris.com/amazon-fba-sellers-california-sales-tax-letter/... 19

Russell Blair, Connecticut Hunting Down Online Shoppers Who Didn't Pay Sales tax, Hartford Current (Feb. 15, 2018, 6:00am), http://www.courant.com/politics/hc-pol-online-sales-tax-20180214-story.html 32

TABLE OF AUTHORITIES—Continued

Page(s)

Ryan Mac, Geek-Favorite Electronics Retailer Newegg Hatches New Billionaire on Rising Sales, Forbes Magazine (Jun. 19, 2013), available at https://www.forbes.com/sites/ryanmac/2013/06/19/geek-favorite-electronics-retailer-newegg-hatches-new-billionaire-on-rising-sales/#2a99eef13d15 9

South Carolina Determination Letter (July 21, 2017), available at http://src.bna.com/rI4 15

Thomas Smale, *Amazon Marketplace: It's Bigger Than It Looks*, Entrepreneur (Oct. 25, 2017), https://www.entrepreneur.com/ article/303532 9

Wayfair, *Wayfair Announces Fourth Quarter and Full Year 2017 Results* (Feb. 22, 2018), available at https://investor.wayfair.com/investor-relations/press-releases/press-releases-details/2018/Wayfair-Announces-Fourth-Quarter-and-Full-Year-2017-Results/default.aspx..... 9

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the Online Merchants Guild, a collection of merchants that sell goods via websites such as Amazon.com ("Amazon"), eBay.com, Walmart.com, and Etsy.com.[2] *Amici* submit this brief in support of Respondents, as the physical presence rule is the last bastion of defense any small business has against Petitioner[3], whose contradictory actions over the last

---

[1] This brief is filed pursuant to the parties' blanket consent. No party or counsel for a party has authored or contributed monetarily to the preparation or submission of any portion of this brief.

[2] *Amici* Curiae wish to inform the Court that, conservatively, hundreds of thousands of online merchants are businesses owned by members of a protected class and are at risk of being forced to shut down due to actions presently taken by Petitioner that contradict their key arguments made to this Court. We request that the Court consider an appropriate level of scrutiny with respect to the statements contained herein, in light of the resulting disparate impact Petitioner's action has had, and will continue to have, on online merchants currently in business, and the future entrepreneurs who will no longer be able to thrive as a result of Petitioner's actions.

See e.g. "'We're in the middle of a black entrepreneurship renaissance fueled by the internet and ecommerce,' Congresswoman Robin Kelly (D-IL), co-Chair of the Diversifying Tech Caucus, said. 'Companies like Amazon have reduced the barrier to entry and made it easier to sell goods, products and services online. And black entrepreneurs have taken advantage of this opportunity and are chasing their dreams.'" goo.gl/crkigK

See also "More women in the U.S. and foreign countries are starting their own e-commerce businesses through websites like Amazon, Alibaba, Etsy and personal websites." https://goo.gl/f4ynZr

[3] Although South Dakota is the sole Petitioner in this case, South Dakota is a representative member of a group of dozens of homogeneous states, all sharing identical motivations and goals. In this brief, reference to the Petitioner, can be read to include reference to all other states that have taken action or will act to

ten years, particularly with respect to one company, Amazon, have directly caused the devastating consequences that Petitioner highlights. It is the Petitioner and like states, and not the Constitution or any ruling of this Court, that is responsible for lost tax revenue and the tilted playing field in favor of select online retailers over bricks and mortars. It was and still is within the power of the Petitioner and like states to enforce the existing laws in a consistent manner and stop offering select retailers the opportunity to operate "duty-free" in exchange for the promise of jobs and capital investments.

Amici Curiae are the merchants that are, presently, real world victims of the Petitioner's gross misstatements, misrepresentations and malicious claims. These are the small business merchants who use Amazon's fulfillment and logistics services in order to have their products sold on Amazon's retail platform. These merchants have been victimized by the Petitioner's continual lowering of the bar of constitutional decency. The scare tactics have worked; at least one million individual merchants are weighing whether it is a sound business decision to continue engaging in interstate commerce with the fear of state's threatening of financial ruin and even jail time. As a result of the Petitioner's absurd interpretation of physical presence, and a clear disregard for undue burdens on interstate commerce, these *amici* are a dying breed.

Amici Curiae are also those merchants who will become the next wave of real world victims should a decision be rendered in favor of the Petitioner, as it is these merchants that have narrowly escaped the

---

indiscriminately inflict the devastating consequences later discussed in this brief on the *amici* and the *amici*'s community.

states' cruelty thus far due to their lack of so-called physical presence, because they do not utilize the Amazon logistics and delivery services. These are the small business merchants whose products are sold on retail platforms such as Amazon, eBay, and Etsy, but who ship and fulfill orders from their own locations; typically their home. Left to the Petitioner's own devices and discretion, the Petitioner will now be free to apply the same destructive tactics it is currently using against the merchants using Amazon fulfillment services, by placing the same unconstitutional burdens on the merchants of the remaining small business owners that do not.

Amici's interest in this case is survival. The *amici* are the merchants that cannot withstand the compliance demands of over ten thousand sales tax jurisdictions and the even more burdensome income tax compliance obligations, a burden that the Petitioner is fully aware of but are deliberately leaving out of this case. The *amici* will simply not be able to meet the $100,000, or more, annual cost of compliance. Knowing that *amici* are the most vulnerable, the Petitioner strategically brought this case against the Respondents, and in doing so sought to avoid being perceived as the ruthless Goliaths they are to over two million online merchant businesses worldwide. As *amici* will show, Petitioner's supposed selfless attempts to save brick and mortar retailers and avoid placing undue burdens on interstate commerce are, to put it mildly, not true.

STATEMENT

I. AS PETITIONER AND ITS AMICI MAKE STATEMENTS TO THE CONTRARY, THEIR PRESENT ACTIONS TOWARDS ONLINE MERCHANTS PROVE THERE IS NO REGARD FOR BURDENS PLACED ON INTERSTATE COMMERCE.

To truly grasp the extent of the Petitioner's mistruths, the decade long relationship between the Petitioner and its *amici*, and retail giant Amazon, must be provided as context. Therefore, just as the Respondent stated in its reply brief, "an extended statement is required to set the record straight."

To provide appropriate context for its support of the Respondent, *amici* must recount the unconstitutional nightmare that is the reality for hundreds of thousands of online merchants, most of which are home based businesses. Petitioner and its *amici* are hunting down merchants for taxes that according to state statutory law or the United States Constitution, are not due. Despite statements made to the contrary by the Petitioner to this Court, states are driving online merchants to their breaking points, pushing them to make drastic and unsound business decisions purely out of fear that the taxmen cometh. Thankfully, the Petitioner did not wait until after the Court rendered a decision to begin its witch-hunt; had the states held off, *amici* would not be able to enlighten the Court of Petitioner's blatant misrepresentations.

Over the last year, the states have ramped up their enforcement efforts with harassing letters, emails and phone calls to remote small business online merchants that go as far as threatening incarceration for the failure to comply with sales tax demands. California

has employed a task force of call center representatives, all with minimal tax training, to bombard the landlines and cell phones of small business online merchants with the sole purpose of bringing the merchants "into compliance" and pitch a deal for cooperation that, surprise surprise, includes the merchants' having to estimate and pony up six years of back taxes. The Multistate Tax Commission ("MTC") is no better, having facilitated an "amnesty" program that injected fear and created the false hope for businesses of all sizes; a promise of amnesty for up to ten years of back taxes. In reality, the MTC program was a trap for the unwary home-based business owner, leading to a multistate sales and income tax compliance obligations that even the most sophisticated of businesses struggle to comply with; requiring the support of countless accountants and lawyers, something no small business could ever afford.

The facts above are undeniable. Yet the Petitioner and its *amici* have presented a series of deliberately misleading statements claiming they can administer taxes on remote vendors without unduly burdening interstate commerce, purposefully omitting those facts that show the Petitioner and its *amici* already have burden free means of accomplishing those goals but have chosen not to pursue such means for nefarious reasons. Petitioner and its *amici* already have access to a simplistic statutory remedy to collect the tax that does not involve this Court's intervention; one that's even been implemented by Washington State.[4] However, Petitioner has chosen to hide that possibility from the Court due to a continuous dysfunctional

---

[4] On January 1st, 2018, a Washington statute requiring Amazon to collect tax on all of its sales, including marketplace sales, went into effect.

relationship Petitioner and its *amici* have developed with Amazon, over the last ten years.

Petitioner has placed unbearable burdens on hundreds of thousands of small online merchants, worldwide, who use Amazon's platform. Such burdens may have been constitutionally tolerable at a time when access to the global economy was limited to multi-billion-dollar enterprises. However, the realities of 1992 are not the same as the realities of 2018. Enterprises that have full access to the global economy no longer need substantial capital investments and operations worldwide. Now, individuals located anywhere in the world can easily offer their products on a global scale, with merely a laptop. For today's online merchant can go from an idea to production to selling in a global marketplace in a matter of a few months and with only a few thousand dollars of starting capital. This revolutionary change in accessibility to the global economy has resulted in an explosion of entrepreneurship worldwide and has granted unprecedented freedom to the hundreds of thousands of people who no longer have to be tethered to a city in order to make a living.

Petitioner, on the other hand, refuses to adapt to these changing times. Petitioner sees no reason to distinguish a home-based business who can now sell globally, from a Fortune-Fifty enterprise. No matter how dramatically things change, the Petitioner is always going to act as if it is innovation's responsibility to absorb the burden at all costs, and never the Petitioner's responsibility to adapt to innovation. Compliance at all costs will always be the mantra of the Petitioner and its *amici* who have time and time again showed zero regard for the burdens they place on interstate commerce with their draconian

compliance and enforcement methods. As we stand at the forefront of the next evolutionary wave of commerce, Petitioner holds on for dear life in order to keep things the way they were, instead of embracing the way things could be.

These dire consequences are not unknown to the Petitioner. To the contrary, members of the *amici* community recently spoke directly to the Petitioner and its *amici* about these ramifications, hoping it would spark an amicable dialogue to work on a modern solution to their 25-year old problem. During an MTC meeting regarding the Online-Marketplace Seller Voluntary Disclosure Initiative, the MTC was required to offer public comment, during which online merchants asked the states to explain why they were fixated on imposing individual tax compliance burdens on over two million online merchants, when they could have much more efficiently imposed that burden on Amazon.[5] Despite this being the first time states had an opportunity to address members of the online merchant community, the opportunity was met with a chilling silence. To be fair, burdens were addressed during the MTC meeting, just not the online merchants' burdens. It was the burden of MTC amnesty facilitator, Richard Cram, that the states were concerned about, as he was overwhelmed by the hundreds of applications he was trying to process. Fortunately for Mr. Cram, the hundreds of thousands of businesses, of all sizes, that the MTC "invited" to participate in the program saw their "sham-nesty" program for what it was, saving the MTC from having a truly impossible compliance burden placed upon them. Thankfully, the entire MTC teleconference was

---

[5] Audio available at https://www.youtube.com/watch?v=2fw8A8CDo6U.

recorded and subsequently posted to YouTube so that now, for the first time in the history of our nation, there is an audio recording of states caught in the act of unconstitutionally burdening interstate commerce.[6]

II. PETITIONER'S CHOICE TO FOCUS ON RESPONDENTS WAS STRATEGIC TO DIVERT THE COURT'S ATTENTION AWAY FROM THEIR TRUE TARGET: ONLINE MERCHANTS.

The Petitioner has stepped carefully and strategically to be before the Court and has identified and targeted the perfect Respondents. *Quill v. North Dakota*, 504 U.S. 298 (1992), teaches that the Court will not uphold state action that unduly burdens an industry as organized and sophisticated as the catalog industry. Therefore, the Petitioner could not have aimed its sword at small business owners that work from their homes; the Petitioner had to attack an adversary even more established today than the catalog industry was in 1992. Never mentioning who it is truly after, the Petitioner is attempting to convince the Court of its right to tax big online business on Constitutional grounds. In reality, the Petitioner will apply a holding in its favor to small business online merchants, as is evidenced by the fact that the Petitioner and its *amici* are currently doing it, while making statements to the contrary to this Court. Petitioner and its *amici* are fully cognizant of the optics and resulting fallout of a case in which the states seek permission to place undue burdens on a worldwide community of home-based businesses. Aware of the history of the Court's decisions regarding states' interference with interstate commerce, Petitioner

---

[6] *Id.*

brought the case that it believed it could win, with Respondents who would garner little sympathy, and hoping that their true motivation would remain concealed.

One need only look at the numbers and see how the online merchant community's sales far surpass the Respondents, to see Petitioner's hidden agenda. According to Credit Suisse, the estimated annual revenue of third party merchants, for products sold on Amazon alone, account for approximately $135 Billion of goods sold in ecommerce.[7] For the same reason the Petitioner did not include Amazon merchants – perception - it also strategically chose not to include eBay merchants, whose community of predominantly small business online merchants are responsible for approximately $83 Billion of goods sold in ecommerce.[8] On these two platforms alone, small business merchants drive over $200 Billion of ecommerce sales per year. The Respondents, on the other hand, collectively, reported a total of approximately $10.95 billion of ecommerce sales, less than 5% of *amici* and its community of online merchants sales. While tax on $10.95 billion would surely help with budget shortfalls, tax on Amazon and eBay sales would do a

---

[7] https://www.entrepreneur.com/article/303532

[8] "Total marketplace volume per eBay http://files.shareholder.com/downloads/ebay/6169581134x0x970140/C1C54245-B6C1-4344-8428-5251DADBBDB7/EBAY_News_2018_1_31_Earnings.pdf; Newegg sales discussed in Forbes Magazineavailable at https://www.forbes.com/sites/ryanmac/2013/06/19/geek-favorite-electronics-retailernewegg-hatches-new-billionaire-on-rising-sales/#2a99eef13d15; Overstock annual sales available at https://www.nasdaq.com/symbol/ostk/financials?query=income-statement; Wayfair total sales available at https://investor.wayfair.com/investor-relations/press-releases/press-releases-details/2018/Wayfair-Announces-Fourth-Quarter-and-Full-Year-2017-Results/default.aspx.

whole lot more towards balancing state budgets. The truth is that this case is not about Petitioner's ability to compel the Respondents to collect and remit sales tax. It is about allowing the states the right to compel the Respondents and *amici*, while at the same time giving the states the option to continue to pretend that the biggest potential revenue source, Amazon, is not required to do the same, since they are merely a marketplace.

SUMMARY OF THE ARGUMENT:

1. Physical presence is not the barrier Petitioner claims it to be, therefore this matter should not be before this Court. Petitioner and its *amici* have grossly exaggerated the harms it suffers as a result of *Quill*, while diverting this Court's attention away from the harm it causes and will continue to cause should this Court rule in its favor. Petitioner has crafted an enticing opportunity to challenge *Quill*, yet this case has nothing to do with the legitimacy of the physical presence standard. The state's story of loss and hardship is just that, a story. In reality, South Dakota and its *amici* already have constitutionally sound laws in place[9] that allow them to collect all of the revenue

---

[9] *See supra*, note 3, Amazon's nexus in all jurisdictions places no restriction on any state to require Amazon to collect use tax. For other large ecommerce businesses whose nexus may not be as apparent, Petitioner has a remedy, one that was proven to be effective against Amazon. In the NY Court of Appeals ruling against Amazon, *Amazon.com LLC v. New York State Dept. of Taxation and Finance*, 20 NY3d 586 (2013), nexus was found by that court to exist by way of physically present affiliates. The case relied on the precedent from this Court, *Scripto* and *Tyler Pipe Industries v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); what are often referred to as the "agency nexus" cases. *Cert.* was denied in this case and could be used as a framework for asserting nexus over large marketplace businesses. A

they claim cannot be collected, yet they are curiously reluctant to instantly mitigate the majority of the tax loss.[10]

Petitioner claims that it is out to protect the brick-and-mortar retailers and that its intent is to require big businesses like the Respondents to collect and remit sales and use taxes. In reality, the states are attempting to require small business online merchants, including those brick-and-mortar retailers who also sell online, to collect and remit sales and use taxes, and are refusing to do the same to the biggest online business of all, Amazon.[11] If the Petitioner had any interest in protecting its local businesses from unfair advantages, it would have, by taking actions to compel Amazon to collect tax. The decision to mask its deliberate and ongoing failure to protect local merchants from the unfair tax advantages of online marketplaces such as Amazon is merely a means of

---

retroactive application of such rule would seem cruel, but going forward, a holding consistent with New York's ruling in *Overstock* would likely give Petitioner's all they need to collect almost all of the tax they are entitled to. However, the assertion of income tax nexus and the associated burden which is greater than sales tax for small businesses, should still be considered. *See Overstock.com, Inc. v. New York State Dept. of Taxation and Finance*, 987 N.E. 2d, 621 (N.Y. 2013).

[10] On January 1st, 2018 a Washington State statute went into effect requiring Amazon to collect on 100% of its sales, including the half it claims it is exempt from collecting as a marketplace. Despite the ability to adopt statutory or other remedies based on their present statutory law, Petitioner has chosen to bring this matter before the Court, unnecessarily.

[11] States are fully aware of Amazon's activity as a retailer and have chosen not to enforce the law. http://www.taxanalysts.org/content/news-analysis-amnesty-exposes-rift-among-amazon-marketplace-sellers.

trying to deflect attention away from the fact that it was the states inaction alone that helped fuel what is commonly known as the "retail apocalypse".

2. *Quill*'s physical-presence rule should be upheld. The world of mail order catalogues is essentially history, and since Canadian Mark Fraser's purchase of a broken laser pointer from AuctionWeb in 1995, buyers and sellers from around the world have been granted access to a truly international marketplace. Fulfillment by Amazon, which was introduced to the world as Amazon Fulfillment Web Service in 2008, opened the marketplace even further; for the first time, an interest in selling to the global economy was all a merchant needed in order to sell to the global economy, Amazon handled the rest. Petitioner's present actions, placing undue and unnecessary burdens on interstate commerce, will likely put an end to what most would view as progress; placing impossible burdens on more small businesses, not less. The rule of law is, and should be, physical-presence; a state may only demand a seller collect and remit sales and use tax if the merchant has sufficient nexus.

3. *Quill*'s emphasis on the compliance burden should not be overlooked or diminished. Precedent requires that states cannot levy taxes on a physically present taxpayer with utter disregard for the burden that such taxes impose on interstate commerce. "Undue burdens on interstate commerce may be avoided ... by a case by case evaluation of the actual burdens imposed by particular ... taxes...." *Quill*. The troublesome burdens that the Court in *Bellas Hess* noted could "entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose [taxes]"; *Bellas Hess*; still exist online and in physical

world. Requiring small business online merchants to collect and remit sales tax in the thousands of varied jurisdictions across the nation places an undue burden on interstate commerce, and is therefore unconstitutional.

4. Significantly less burdensome options are available. When the regulation of interstate commerce is necessary, the burden that doing so places on such commerce must be evaluated in light of other less burdensome options. There are less burdensome ways that the states can collect sales and use taxes based on Internet marketplace sales, including holding the few businesses that control the Internet marketplace responsible for collecting such taxes, or simplifying compliance obligations. Other options lie within the hands of the Court.

ARGUMENT

I. PHYSICAL PRESENCE IS NOT THE BARRIER PETITIONER CLAIMS IT TO BE, THEREFORE THIS MATTER SHOULD NOT BE BEFORE THIS COURT.

Fear of disrupting a cozy and dysfunctional relationship with retail giant Amazon, not the Constitution, has prevented the states from collecting tax, and achieving tax parity for both online and offline businesses.[12] In its Petition to the Court, Petitioner claims that "States' inability to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike." *Petition for Writ of Certiorari*. The Petitioner goes on to cite its need to "maintain a balanced budget" and its

---

[12] *See* Brad Stone, The Everything Store: Jeff Bezos and the Age of Amazon 286-294 (2013)

"revenue shortfalls" as among the reasons that the Court should overturn *Quill*, its holding now giving "internet sellers ... an unfair advantage over their brick-and-mortar rivals."

Claims that the Petitioner is unable to collect taxes from remote sellers are patently false. The Petitioner has all the means necessary to recover most if not all of the taxes they claim to be constitutionally barred from collecting. Petitioner has statutory authority and jurisdiction to place a use tax collection burden on Amazon for all of its sales, including the half of its sales that Amazon claims are exempt due to adhesive "contractual shifts" normally not given any regard by Petitioner or its *amici*, in tax matters. However, when such shifts are tied to jobs and capital investment, states have developed a willingness to turn a blind eye. Even the MTC, an organization that at one point considered offering a network of transfer pricing experts to assist states with complex audits involving the shifting of income via questionable intercompany contracts, claimed to take no issue with Amazon's contractual shifting tactics that blatantly contradicted Amazon's economic realities. As Richard Cram, the MTC's amnesty mastermind explained in an email:[13]

> *"Under Amazon's FBA seller business model, the contractual relationship between Amazon and the online marketplace seller places the responsibility on the online marketplace seller to indicate to Amazon which states the seller has nexus in. Amazon then collects sales/use tax on sales into those states, forwards that*

---

[13] Statement taken from email communication between Richard Cram and Counsel for Online Merchants Guild (emphasis mine).

> *collected amount to the seller, and the seller is responsible for registering with the state and filing the appropriate sales/use tax returns with the state. The MTC online marketplace seller voluntary disclosure initiative offers interested online marketplace sellers a way to come into tax compliance while minimizing their back tax liability and also bringing to the participating states revenue from those online marketplace sellers' sales, starting not later than December 1, 2017."*

Suddenly Amazon is being treated by Petitioner and its *amici* as the tax equivalent of Switzerland, acknowledging its "neutrality" simply because Amazon relinquished control of their "tax or not to tax" button to the millions of online merchants, leaving it to the individual to determine their tax collection responsibilities. It is absurd that Amazon, retailer with nexus in every state, could avoid tax collection by way of contractual fiction, especially when all transactions are processed by Amazon, subject to Amazon's terms and conditions, purchased by people who are contractually Amazon's customer and only see Amazon's logo when purchasing products supplied by the online merchant. These are the same observations raised by South Carolina, the one state pursuing Amazon for back taxes, essentially arguing that Amazon's self-serving and adhesive contractual distinctions are meaningless and don't mimic reality.[14] Petitioner and *amici* are unphased by South Carolina's thought leadership with respect to Amazon, not even willing to offer comment

---

[14] *See* South Carolina Determination Letter (July 21, 2017) available at http://src.bna.com/rI4.

other than saying each state's law is different. While it may be true that the laws are written differently, their effect when it comes to sales tax is consistent.[15] Nonetheless on January 1, 2018, a Washington State law went into effect requiring Amazon to collect taxes on all of its retail sales, regardless of contractual distinctions. Unfortunately, that has not stopped Washington from aggressively and unconstitutionally burdening small online merchants with eight years of back tax assessments, and retroactively applying laws in support of them. Petitioner and its *amici* have granted Amazon quasi "duty-free" status yet seek to mitigate their unethical decision by burdening hundreds of thousands of individual merchants with tax compliance costs most cannot afford, or seek back taxes because the online merchant did not collect, even though statutorily, constitutionally and practically, it is and was Amazon's responsibility. The absurdity of taxpayers using self-serving "contractual shifts" to

---

[15] Mass. Gen. Laws. 64H, Section 1 Definitions. The law defines a sale for sales tax purposes as follows:

"'Sale'" and "'selling'" include (i) any transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property or the performance of services for a consideration, in any manner or by any means whatsoever." When an FBA merchant sells a product the transfer of title and possession is completely controlled by Amazon. That didn't stop Massachusetts from scaring online merchants by publicly requiring Amazon to turn over individual merchant data so that Mass. could hunt down individual online merchants. With statutory law that would make Amazon the clear "seller" and even laws that allow the state's tax commissioner to re-assign the tax collection burden in the interests of effectively administering the tax code, it seems odd that the Amazon.com Headquarters finalist and recent recipient of thousands of jobs from Amazon chose this approach. https://www.cnbc.com/2018/01/23/amazon-will-turn-over-third-party-seller-tax-data-to-massachusetts.html

avoid tax has been acknowledged by the Court, stating that:

> "[t]he formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida ... [t]o permit such formal "contractual shifts" to make a constitutional difference would open the gates to a stampede of tax avoidance."

Scripto, Inc. v. *Carson*, 362 U.S. 207, 211 (1960).

Contractual shifts do not constitute some magical change that allows an entity to avoid tax burdens; but for Amazon, the ultimate exception to the rule, the same is not true. MTC and the states have avoided explaining the rationale for this exception and are unwilling to answer to the small business merchants that are being forced out of business by the exception. Perhaps these parties, who claim to be out for the good of the brick and mortar retailer, will respond differently to demands from the Court, as opposed to Meredith the small business owner from New Jersey.[16]

Petitioner and its *amici*'s reluctance to take any meaningful steps to embrace the power of modern technology to streamline the tax burdens on small business in any meaningful way, despite their claims to the contrary, is directly tied to their dealings with Amazon. As the Petitioner and its *amici* are well aware, efficient compliance would shut down the Amazon loophole that Petitioner and its *amici* have been willfully blind to, in exchange for Amazon's jobs

---

[16] *See* discussion of MTC meeting below.

and capital investments. California, where Amazon employs 30,000 residents, who was once known by its peers for being an innovator and thought leader when it came to holding taxpayers accountable for tax obligations, has now shown that it can also be an innovator and thought leader for foreign dictatorships too; threatening out of state small business owners with incarceration for taking what is essentially the same legal stance as the Respondents who have been brought before this Court.[17] But incarceration is just one example of California's descent into the abyss of unethical burdens it has placed on interstate commerce.

Presently, as *amici* for the Petitioner, California is shaking down the smallest online merchants for eight years of back taxes, supposedly when Amazon started placing online merchants' inventory in California warehouses. A question this raises is why, if Amazon had a warehouse in California in 2010, is the state that pioneered unitary principles for income tax, only requiring Amazon to collect tax in September of 2012; and why are online merchants being held accountable for taxes back to 2010, when Amazon was never held accountable and only started collecting in 2012? Unfortunately, California's chicanery does not end

---

[17] An email to an out of state online merchant sent from California Department of Taxes and Fees Administration employee, sent in March of 2018, stated that "[CDTFA Employee] also wanted to advise [Merchant] that operating unlawfully you can be prosecuted [sic] . . ." referring the merchant to an excerpt of a California law that states, "any person who violates this part with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony . . . shall be punished by a fine . . . or imprisonment for 16 months, two years, or three years, or both the fine and imprisonment in the discretion of the court."

there. In November of 2017, a letter drafted at the request of a state elected official was hand delivered to the California Governor.[18] It was sent on behalf of online merchants explaining how California could collect tax, burden-free, while also asking California to clarify the laws that support their shakedown of small business online merchants for eight years of back taxes. While no clarification was provided, California responded to the letter, three months later in the form of what was essentially a state letter ruling. California claimed it was issued by its in-house tax attorneys, but what it lacked as far as on point substantive analysis, it made up for in an aggressive tone; not usually what you'd expect from a state government. However, what was most surprising about the response was that, a review of the source document, which was sent to merchants in Microsoft Word format, revealed hidden metadata indicating the ruling was prepared by Amazon and copied onto official California letterhead.[19] If the financial harm caused to Petitioner and its *amici* is voluntary, then bringing this matter before the Court is inappropriate, and in the light of recent behavior, it is deceptive.

Actions by Petitioner and its *amici* have harmed hundreds of thousands of small business online merchants, a subset of the over two million merchants active today. The undue influence that Amazon has

---

[18] https://www.ecommercechris.com/amazon-fba-sellers-california-sales-tax-letter/

[19] Metadata was in the form of a hidden digital watermark header stating "Amazon Fulfillment Services, Inc." Further, a reporter who had contacted California for comment about the metadata never received a denial from the state. Also, an attempt to submit a FOIA request regarding the matter was denied as it was deemed to be Amazon's confidential taxpayer information.

over the Petitioner and its *amici* has turned governments against their own people, resulted in frivolous claims of unpreventable loss and harm that are currently before the Court, and is itself a burden on interstate commerce that must be answered for, and appropriately addressed. The actions of the Petitioner and its *amici* thus far forecast the future if a ruling by the Court allows the states the freedom to burden interstate commerce even further.

Petitioner's claims that "internet sellers" have an "unfair advantage over their brick-and-mortar rivals" glosses over a crucial point. The unfair advantage was fueled by Petitioner and its *amici's* willingness to look the other way, allowing Amazon to operate "duty-free," both presently and in the past, meanwhile they stand before this Court making statements to the contrary, claiming only a Constitutional remedy can help them. Even Richard Cram of the MTC acknowledged that a substantial amount of Petitioner's sales tax losses were due to statutory, not Constitutional, barriers in an email stating that "[W]hether Amazon should or should not be the one collecting sales/use tax on sales by its third-party sellers...we do not have a position on that. Each state can address that question, depending on how its statutes and regulations define who is required to register and collect its sales/use tax." *See supra*, note 14.

In August of 2017, instead of encouraging states to look within, MTC decided to facilitate the false accusation of hundreds of thousands of small business online merchants for failing to collect and pay sales and income taxes. However, being the "mensches" that they are, MTC, the Petitioner and some of its *amici* offered full or partial tax forgiveness, if they comply with the sales and income tax requirements of more

than twenty states, by Christmas, which entailed providing estimates of years of back taxes. Merchants were given sixty days to submit their application; a pretty cruel window of time to make such a decision and meet the requirements, and it also happened to coincide with the most important time of year for online merchants, planning for the holiday season.[20]

Two months later, in October of 2017, MTC and thirty-one states held an emergency meeting to discuss whether to extend the deadline for online merchants to "take advantage" of amnesty.[21] Although empathetic on its face, the meeting was a farce. The MTC opened the meeting for comment, and countless small business online merchants, listening to the teleconference live, called in to present the human side of the conversation and the real-world consequences of Petitioner's actions. One public commenter, a small merchant from California who lost his job and began selling via Amazon to support his family, literally stated that "this would destroy my business ... I would have to take up a new occupation.... By targeting [small business online merchants] individually, it is only going to create chaos, ruin businesses, and destroy

---

[20] The FAQ states that merchants will not protected by PL 86-272, because "an online marketplace seller with inventory in the state . . . would be considered activity in the state beyond the scope of solicitation activity . . .," considering nexus was based solely on Amazon's redistribution of online merchant supplied inventory across Amazon's network distribution centers. Constructive ownership of the inventory is Amazon's, and titled ownership remained with the merchant to facilitate strategic tax planning for Amazon that no other business would ever be allowed to rely on for similar tax collection avoidance strategies. http://www.mtc.gov/Nexus-Program/Online-Marketplace-Seller-Initiative/FAQ.

[21] *See* https://www.youtube.com/watch?v=2fw8A8CDo6U.

what has been a fledgling small business movement in this country...." *See* https://www.youtube.com/watch?v=2fw8A8CDo6U, at approx. 18:30. Another public commenter, from New Jersey, explained his concern with compliance costs. "You are asking me to pay for ... fixed costs that a big corporation has the cash to take care of. I am not a big corporation.... I can't be filing fifty state tax returns, let alone how many municipal tax returns. I'm not set up for that. I'm not a multimillionaire.... There are scores of thousands more like me that are in the same position."[22] Instead of responding or acknowledging those claims, the MTC and the states cut the comment period short, silencing those voices that they now claim they are fighting to save.

Petitioner has chosen to keep Amazon happy by not fixing their law, opting instead for an artificial amnesty program that only placed further burdens on interstate commerce and accomplished nothing. It is the Petitioner's own doing that local retail has suffered for so long, not *Quill*, whose rule of law is operating as intended by at least protecting those Amazon FBA merchants, and other small businesses, that lack a physical presence.

II. *QUILL*'S PHYSICAL-PRESENCE RULE SHOULD BE UPHELD.

1. The facts of this case are analogous to *Quill*, therefore the reasoning and holding from *Quill* apply.

Revisiting *Quill* is unnecessary, as it is not the root cause of any problem the Petitioner claims it to be. If anything, the Court should acknowledge that *Quill* is merely a starting point for analyzing *Complete Auto*

---

[22] *See* https://www.youtube.com/watch?v=2fw8A8CDo6U, at approx. 20:37.

Transit Inc. v. Brady, 430 U.S. 274 (1977) first prong, "Substantial Nexus," not the per se substantial nexus threshold Petitioner believes it to be, and that burdens must still be considered even if substantial nexus is established. A ruling in favor of the Petitioner would be premature. The burdens concurrently placed on millions of small businesses at a magnitude exponentially greater than the burdens at issue in *Quill* demonstrate that Petitioner hasn't learned from history, and therefore should be "doomed to repeat it." Until actual evidence demonstrating that states can and will administer the tax without burdening interstate commerce, their freedom to recover tax outside their jurisdiction warrants further restriction, not expansion.

The *amici* sellers strongly urge the Court to recognize the similarities between Quill Corporation and the small business online merchant. Based on Quill Corporation's solicitation of customers in the state, North Dakota argued that Quill Corporation was required to remit taxes on sales to North Dakota customers. Out of concern for "the national economy"; *Quill*; stating that the "negative implication of the Commerce Clause ... bars state regulations that unduly burden interstate commerce"; *Quill*; the Court decided in favor of the taxpayer. The Court reasserted the *Bellas Hess* sales and use tax "safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United states mail,'" and in doing so helped the mail order industry continue to exist.

While the mail order industry is virtually nonexistent, today the rise of ecommerce and services such as Fulfillment by Amazon (FBA) have taken its place. Amazon Fulfillment Web Service, originally promoted

as, "allow[ing] merchants to access Amazon.com's world-class fulfillment capabilities through a simple web services interface ... [and] mak[ing] it easy for merchants and developers to programmatically integrate the benefits of Fulfillment by Amazon (FBA) into their own web sites or other sales channels. With FBA, merchants [could] store inventory in Amazon's warehouses and Amazon [would] pick, pack, and ship products directly to merchant's customers." (http://aws.amazon.com/about-aws/whats-new/2008/03/19/announcing-amazon-fulfillment-web-service/).

In reality, online merchants relinquish all control over the selling process once their products are received by the common carrier and sent to one of Amazon's warehouses. It's the Amazon prepared shipping label, not the merchant, that determines which Amazon facility the merchants products are sent to. Once the products arrive at the warehouse they are often redistributed by Amazon to other Amazon warehouse locations throughout the country. It was that act by Amazon, Amazon's redistribution of the goods, that created the absurd nexus "gotcha" that led to California and Washington's scare tactics, and the MTC amnesty program; even though the online merchant no longer physically possesses the good, has no control over unsold or wrongfully returned goods, and is not involved with where the good is sent or stored. *See Marketplace Seller Voluntary Disclosure Initiative, https://www.youtube.com/watch?v=2fw8A8CDo6U,* at approx. 17:43-18:01. The typical online merchant's only connection with a state outside of its home state is a result of Amazon putting products they supplied, and self-serving contractual tagging of the online merchant as the "owner" or "seller," which is odd considering the online merchant has no rights to seek out its customers for future business outside of Amazon,

making the online merchant a retailer exclusively for "tax purposes." This is what the states use to justify scaring a single mom in Oahu, who can choose to be at home with her kids, where she wants to be, thanks to her home-based Amazon business.[23] To think that she now has to fear that she might be going to jail, will lose her business, or will be forever in debt to the Petitioner and its *amici*, is exactly the kind of burdens *Quill* was meant to prevent. Even more egregious is that Petitioner and company could have avoided placing such a horrifying burden on the online merchant in Oahu by enforcing or amending their statutory law requiring one party, Amazon, to collect the taxes that, ironically, Amazon still has to collect any time a merchant decides that they are going to do so. The tax revenue is held by Amazon for two weeks in most cases, however, because Amazon conveniently refers to that as "Tax Calculation" services, they are exempt from their responsibility. It's shameful behavior on the part of every state, except South Carolina, and it is a foreshadow of what's to come if *Quill* ceases to be.

The tax logic that applies to Amazon marketplace is like any other large, physically present retailer. So, in theory, if the states were to uniformly apply the tax law, Target/BestBuy/Walmart could also claim tax exemption too, by way of converting their retail outlets into "marketplaces," on paper, contractually converting their suppliers into "sellers" and putting little disclaimers like "Sold by Quill Corporation" in small print on every product display. Meanwhile, the customer's retail buying experience has not changed. They take products from shelf placing it in their cart, use the same retail checkouts and return products at

---

[23] True story, not hypothetical.

the same customer service desk; the substance of the retail shopping process is identical, the only thing that's different is the contractual form. Of course, if a big box retailer claimed exemption due to such a formality no state would ever respect it and their statutory law, as well as *Scripto* supports their ability not to do so. Amazon, a physically present retailer, known for showering states with employment opportunities and warehouses, gets a state sanctioned duty-free pass, facilitating their advantage over local retailers, and if that's not bad enough, Petitioner seeks to place undue burdens on millions of individual merchants, in order to mitigate the effect of their generosity, by bullying small businesses with questionable nexus assertions and unreasonable demands. These actions far exceed the unconstitutional boundaries *Quill* established; the only reason that, barely, prevents Petitioners from placing even more damaging burdens on interstate commerce.

2. Assuming arguendo that the states' taxation goals are in compliance with the Commerce Clause and its implications, compelling the small business online merchant to collect and remit sales and use tax is violative of the Due Process Clause as interpreted and applied in *J. McIntyre Machinery, Ltd.* The small business online merchant has not "purposely availed [her]self of the privilege of conducting activities within the ... State [and has therefore not] invoke[ed] the benefits and protections of its laws." *McIntyre*, quoting *Hanson* v. *Denckla*. "The principal inquiry in cases of this sort is whether the [seller's] activities manifest an intention to submit to the power of a sovereign." *McIntyre*. In the situation described in the preceding section in which the small business online merchant participates in the Internet marketplace via FBA, the small business online merchant has not manifested

such an intention, Amazon has. She has not targeted the forum; *McIntyre*; Amazon has. Regardless of the merchant's knowledge and expectation of Amazon's intentions, the merchant has not acted in any way to allow the state to subject her to tax. In *McIntyre*, the fact that four machines "ended up in New Jersey" was not enough to show that "McIntyre purposefully availed itself of the New Jersey Market." *McIntyre*. Similarly, here, the fact that a merchant's products end up in a state because Amazon directs that they do so does not establish purposeful availment. The state is without power to compel the merchant to collect and remit sales and use tax; to allow the state to do so would violate due process.

III. *QUILL'S* EMPHASIS ON THE COMPLIANCE BURDEN SHOULD NOT BE OVERLOOKED OR DIMINISHED.

The nation's taxing jurisdictions are no closer to being uniform than they were in the early 1990s. The burdens specifically identified by the Court in *Bellas Hess* still exist; tax rates vary, as do allowable exemptions and administrative and record keeping requirements.[24] As the *Bellas Hess* and *Quill* courts recognized, compelling an unequipped entity to collect and remit sales and use taxes throughout the nation's taxing jurisdictions has dire consequences; the small business online merchant, today's mail order house, cannot meet these demands. The *Quill* Court agreed with *Bellas Hess* Court that complying with complicated compliance obligations was enough to render an

---

[24] The same was made clear by one of the small business online merchants who voiced his concerns with the compliance burdens to the MTC in October of 2017. *See* https://www.youtube.com/watch?v=2fw8A8CDo6U, at approx. 20:37.

industry obsolete, yet states are now willing to extend such obligations even further, a decade into the past, with total disregard for the impact on the taxpayer and, more constitutionally significant, the interstate markets that taxpayers will no longer be able to operate in.

Petitioner's *amici* refer to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) as the solution for ensuring interstate commerce is protected from undue burdens. We agree and hope the Court will consider *Pike* as it is particularly relevant to the current situation involving our merchants, where undue burden for tax collection is placed, but could be easily mitigated by requiring the platform to collect on any transactions, regardless of whether or not the platform considers itself a retailer under state law. The Washington law that went into effect at the beginning of the year is evidence of the fact that there is no constitutional barrier preventing states from collecting the tax; it's made up. Nevertheless, Washington's removal of a sales tax burden doesn't liberate online merchants from the burdens of its Business and Occupation tax that it believes can be imposed on hundreds of thousands of online merchants based on their products being placed in an Amazon facility in Washington. Therefore, while yes in theory *amici* support a *Pike* balancing approach, its clear based on present actions that Petitioner and its *amici* will not respect it putting unreasonable stress on our nation's, and others', smallest of businesses. As one merchant stated in an email sent at 1:30am: "[It's] [o]ne of those odd nights where I can't stop thinking about [Washington's Assessment and reply brief]."

Washington is also seeking eight years of back taxes from this out of state tax taxpayer, whose only connection to the state is because Amazon decided to put his products in one of their warehouses. What's more chilling about Washington's aggressive behavior is the fact that the taxpayer has emails from the Department of Revenue indicating an Amazon tax executive had the ear of the state's chief tax executive, Vikki Smith, and was advising her on how to handle the taxpayer's case; an obvious conflict of interest since, if the taxpayer were to prevail on statutory grounds, it would mean, implicitly, that it was Amazon that should have been collecting tax, not the taxpayer, meaning Amazon could owe eight years of back taxes not for one, but for every taxpayer who bought product from its marketplace over the last eight years. Thank goodness Washington saw the problem that would cause and decided to act against a Utah small businesses instead of disrupting in-state corporate giants. In a not so surprising twist, the taxpayer's multiple requests to speak with Ms. Smith were denied. Washington like every other state will never apply *Pike* balancing the way it was intended, instead states will use their ability to put the brakes on the wheels of justice to force small business taxpayers into submission.

IV. SIGNIFICANTLY LESS BURDENSOME OPTIONS ARE AVAILABLE.

1. Small business online merchants support each state's need and want to collect all taxes that it is entitled to, whether sales and use, income, or any other tax type. Petitioner and its *amici* can administer their tax while ensuring the burden placed on the small online merchant is proportionate to the scale of their enterprise, they choose not to, even though under

Pike they are required to. When states regulate to affect interstate commerce, "the extent of the burden [imposed on such commerce] that will be tolerated ... [depends] ... [in part] on whether [the local interest involved] could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). In light of its holding in *Pike*, the Court must consider the fact that the Petitioners, whose *amici* raise *Pike* as a constitutional check, have no interest in self-administering such a check, as they are presently placing destructive burdens on interstate commerce. The states' interests in collecting sales and use, income or any other taxes can be better satisfied with a lesser impact on interstate activities, especially now that the technology exists to make full compliance effortless for the online merchant of any size. Yet, no solution purported by the Petitioner offers meaningful reduction of the multistate tax compliance burden to a manageable level, for small businesses.

2. Petitioner and its *amici* have the option of seeking tax collection from the marketplace providers and seek collection from large remote vendors following the line of reasoning New York followed which included the Court's prior decisions *Scripto and Tyler Pipe*. Quid pro quo agreements with Amazon, signing the state's rights away to collect tax, despite being questionable behavior in itself, does not justify the states placing undue burdens on interstate commerce. An example of such an agreement was made obvious due to a comment made by the Mississippi Department of Revenue in response to a local news inquiry on the subject stating that:[25] "Any sales made

---

[25] http://www.msnewsnow.com/story/34452080/mississippi-man-finds-amazon-sales-tax-loophole Given that the states are facilitating what the Petitioner, in its petition, claims is an unfair

by a third-party independent seller, even though made through the Amazon marketplace, are not covered under the agreement." The question is, why not?

3. When it comes to administering the tax law, modern technology has turned what was impossible in 1992, to practical in 2018, but Petitioner and its *amici* have refused to embrace any such modernization. Whether out of fear that uniform tax collection might aggravate their corporate benefactor, or simply an inability of Petitioner and *amici* to function cohesively, the supposed purpose of forming the MTC in 1967, no progress has been made to streamline the process of use tax collection and remittance, or any other tax for that matter. Having done so would allow small businesses to collect use tax and even pay income tax without having to forgo twice their annual income to tax advisors, just so they can comply with the same tax filing burdens as Walmart. With Application Protocol Interfaces the framework was in place for the MTC to work with Amazon and eBay to create fast track filing options for online merchants. However, the MTC chose amnesty instead.

4. Petitioner claims use tax enforcement intrastate is impractical, but technology implemented by the states in a non-tax context would indicate otherwise.[26] What was impractical in 1992, is no longer

---

advantage that websites have over local retail, is it appropriate for the Petitioner to point to this competitive price advantage, which is really due to selective enforcement, as a reason why the Court must intervene?

[26] In 2017, New York City bridges modernized toll collections; removing cash toll booths and replacing them with toll by mail. Guaranteed cash was abandoned in favor of having to seek toll payment by mail from individual motorists domiciled anywhere

impractical in 2018. Petitioner has jurisdiction to impose a tax on its own citizens, and therefore could enforce the use tax intrastate. Connecticut has taken such steps, placing pressure on Newegg, Inc. to provide the state with all data related to customer purchases in Connecticut, so that Connecticut can pursue back taxes from its own residents who failed to pay a tax that has probably never been meaningfully enforced since it came into existence. Nonetheless, according to Connecticut tax Commissioner Kevin Sullivan, companies are willing to "squeal on our customers and [Connecticut] can beat up on them ... The people who sold to them have ratted them out."[27] Connecticut might be on the right track, but they've also overreached; requesting item specific data from Newegg. Accordingly, while Connecticut can now easily figure out the use tax that Mr. Jones owes, it can also commend Mr. Jones for his choice in diamonds for Mrs. Jones, and his choice in rubies for his mistress. Considering that there are less invasive means to acquire the data necessary to determine a use tax liability, perhaps it's time for the Court to consider whether the claim of impracticality is still valid in 2018.

5. If physical presence is abandoned, then we ask this Court to offer federal courts guidance as to when the Tax Injunction Act is considered appropriate if states weaponize their slow wheels of justice. 28 U.S.C. § 1341.[28]

---

in the U.S., Canada and Mexico; a daunting task compared to using website data to generate a tax bill to be enforced intrastate.

[27] http://www.courant.com/politics/hc-pol-online-sales-tax-20180214-story.html

[28] "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a

CONCLUSION

The experience of our merchants over the last year foreshadow the burdens Petitioner and its *amici* will place on both the national and global economy, if granted further freedom to act without clear constitutional boundaries. States have all they need to accomplish what they claim they cannot; removing physical presence will only allow Petitioner more freedom to burden interstate commerce without regard for the consequences. Therefore, the Court should rule in favor of the Respondent.

Respectfully submitted,

PAUL S. RAFELSON
Counsel of Record
ONLINE MERCHANTS GUILD
1150 Walnut Street 2nd Floor
Newton, MA 02461
(617) 903-7255
paul@onlinemerchantsguild.org
Counsel for Amicus Curiae

April 4, 2018

---

plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF RETAIL LITIGATION CENTER, INC. AND 21 RETAIL AND WHOLESALE DISTRIBUTION TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
RETAIL INDUSTRY LEADERS ASSOCIATION
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW, 7th Floor
Washington, D.C. 20004
donald.verrilli@mto.com
(202) 220-1100

MARK R. YOHALEM
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071

ADDITIONAL ATTORNEYS ON BACK OF COVER

STEPHANIE MARTZ
RACHELLE BERNSTEIN
NATIONAL RETAIL FEDERATION
1101 New York Ave, N.W.
Washington, D.C. 20005

Counsel for National Retail Federation

DOUG SMITH
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street NW
Seventh Floor
Washington, D.C. 20007

Counsel for American Lighting Association

ISHAM R. JONES, III
AMERICAN VETERINARY MEDICAL ASSOCIATION
1910 Sunderland Place, NW
Washington, D.C. 20036

Counsel for American Veterinary Medical Association

NATHAN J. BREEN
HOWE & HUNTON, LTD.
125 S. Wacker Drive
Suite 2310
Chicago, IL 22209

Counsel for American Specialty Toy Retailing Association

HUBERT H. HOGEMAN III
PROMETHEAN LEGAL SERVICES – HOGEMAN LEGAL SERVICES, LLC
3620 Paces Valley Road
Atlanta, GA 30327

Counsel for Auto Care Association

DAVE DAVIS
UTAH FOOD INDUSTRY ASSOCIATION
UTAH RETAIL MERCHANTS ASSOCIATION
4286 South Main Street
Murray, UT 84020

Counsel for Food Industry Association Executives

JAMES A. HARRELL, III.
BODE & HARRELL, LLP
2600 Fairview Road,
Suite 200
Raleigh, NC 27608

Counsel for Council of State Retail Associations

MARK D. ALCORN
ALCORN LAW CORPORATION
ALCORN ASSOCIATES MANAGEMENT CONSULTING
1000 Q Street, Suite 120
Sacramento, CA 95811

Counsel for Home Furnishings Association

BRIAN SCHNEIDER
ARENT FOX LLP
1717 K Street NW
Washington, DC 20006

Counsel for National Association of College Stores

CHRISTOPHER FETZER
TIMOTHY M. HAAKE
HAAKE FETZER
1900 K Street NW, Suite 100
Washington, DC 20006

Counsel for Jewelers of America

IAN REYNOLDS
NATIONAL ASSOCIATION OF ELECTRICAL DISTRIBUTORS
1181 Corporate Lake Drive
St. Louis, MO 63132

Counsel for National Association of Electrical Distributers

CHRISTOPHER JONES
NATIONAL GROCERS ASSOCIATION
1005 North Glebe Road
Suite 250
Arlington, Virginia 22201

Counsel for National Grocers Association

GEORGE W. KEELEY
KEELEY, KUENN & REID
200 S. Wacker Drive
Suite 3100
Chicago, IL 60606

Counsel for American Supply Association; Independent Office Products and Furniture Dealers Association; and National Association of Wholesaler-Distributors

MATT MCKINNEY
KOENIG, OELSNER, TAYLOR, SCHOENFELD & GADDIS PC
2060 Broadway,
Suite 200
Boulder, CO 80302

Counsel for Outdoor Industry Association

MONICA LANGFELDT
LANGFELDT LAW PPLC
2560 5th Avenue West
Seattle, WA 98119

Counsel for Running Industry Association

PAULA COZZI GOEDERT
BARNES & THORNBURG LLP
1 N. Wacker Drive
Suite 4400
Chicago, IL 60606

Counsel for National Ski and Snowboard Retailers Association and National Sporting Goods Association

TRACY N. BETZ
TAFT STETTINIUS & HOLLISTER LLP
One Indiana Square
Suite 3500
Indianapolis, IN 46204

Counsel for North American Retail Hardware Associations

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 6

ARGUMENT 10

I. RETAIL HAS TRANSFORMED IN WAYS THAT DISPROVE THE ECONOMIC ASSUMPTIONS OF *QUILL* AND *BELLAS HESS* 10

A. E-Commerce Is Huge and Robust 11

B. Online-Only Retailers Are Persistently Active and Economically Present Despite Physical Absence 15

C. Absentee Retail Sales Are Not "Tax Exempt" 21

D. Collecting Sales Taxes Online Is a "Minor Duty," Not a Great Burden 24

II. THE TRANSFORMATION OF THE RETAIL ECONOMY MEANS THAT *STARE DECISIS* CANNOT JUSTIFY RETAINING THE PHYSICAL-PRESENCE REQUIREMENT 25

III. THE COURT SHOULD UPHOLD SOUTH DAKOTA'S LAW, WHICH FITS WITH THE COMMERCE CLAUSE AND THE RETAIL ECONOMY, WHILE *QUILL'S* PHYSICAL PRESENCE REQUIREMENT DOES NOT 28

A. South Dakota's Law Accords with the Commerce Clause, While the Physical-Presence Requirement Does Not 28

B. South Dakota's Law Fairly Reflects Economic Reality, While the Physical-Presence Requirement Unfairly Distorts It 29

C. South Dakota's Law Is Administrable and Clear, While the Physical-Presence Requirement Is Causing Litigation and Confusion 32

IV. THE COURT SHOULD NOT EXPECT CONGRESS TO CORRECT THE CONSTITUTIONAL ERROR OF *BELLAS HESS* AND *QUILL* 37

CONCLUSION 39

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Trucking Ass'ns, Inc. v. Scheiner,
483 U.S. 266 (1987) 25

Capitol Greyhound Lines v. Brice,
339 U.S. 542 (1950),
abrogated on other grounds by Am. Trucking Ass'ns, Inc. v. Smith,
496 U.S. 167 (1990) 38

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 29

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 10, 25, 28, 33

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) ..... passim

Direct Mktg. Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) ..... passim

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 38

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 27

Granholm v. Heald,
544 U.S. 460 (2005) 26

Halliburton Co. v. Erica P. John Fund, Inc.,
134 S. Ct. 2398 (2014) 38

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 15

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 21

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 39

National Bellas Hess, Inc. v. Department of Revenue of Ill.,
386 U.S. 753 (1967) ..... passim

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 29

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... passim

State Oil Co. v. Khan,
522 U.S. 3 (1997) 9, 26, 39

STATE CODES

Colo. Rev. Stat. § 39–21–112(3.5) 22, 34

830 Mass. Code Regs. 64H1.7 35

OTHER AUTHORITIES

Alexandra Wolfe, *Marc Lore Looks to the Future of Online Shopping*, Wall St. J. (Jan. 26, 2018, 3:31 p.m.) 13

Andy Hoar et al., *B2B eCommerce: A Trillion Dollars for the Taking*, Forrester Research (July 26, 2016), https://www.forrester.com/report/B2B+eCommerce+A+Trillion+Dollars+For+The+Taking/-/E-RES82102 20

Brad Tuttle, *Best Buy Swears Shoppers Don't Have to Bother Showrooming Anymore*, Time (Feb. 20, 2013) 19

Brian Baugh et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* Nat'l Bureau of Econ. Research (April 2014, revised, Jan. 2018) 20

Cecillia Barr, *Growing Impact of Showrooming on Retail Businesses*, BFS Capital Blog (June 19, 2017), https://www.bfscapital.com/blog/impact-of-showrooming-on-retail-businesses/ 16, 18

Chris Isidore, *Jeff Bezos is the Richest Person in History*, CNN (Jan. 9, 2018, 8:33 a.m.), http://money.cnn.com/2018/01/09/technology/jeff-bezos-richest/index.html 12

Clifford Stoll, *Why the Web Won't Be Nirvana*, Newsweek (Feb. 26, 1995, 7:00 p.m.) 12

Corinne Ruff & Ben Unglesbee, *The Running List of 2017 Retail Apocalypse Victims*, Retail Dive (Dec. 13, 2017) 27

Dan O'Shea, *Mobile Commerce to Dominate Online Sales by 2021*, Retail Dive (Oct. 29, 2017) 16

David Z. Morris, *Amazon to Collect Sales Tax in Most States Starting April 1st*, Fortune (Mar. 25, 2017) 8

Eric T. Anderson, et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. of Mktg. Research 229, 237-239 (April 2010) 8, 19, 20, 27

Internet Live Stats, *United States Internet Users*, http://www.internetlivestats.com/internet-users/us/ (last visited Feb. 28, 2018) 11

Jay Yarow, *Paul Krugman Responds To All The People Throwing Around His Old Internet Quote*, Business Insider (Dec. 30, 2013, 9:06 a.m.), http://www.businessinsider.com/paul-krugman-responds-to-internet-quote-2013-12 12

Kelly Phillips Erb, *Tax Free No More: Amazon To Begin Collecting Sales Tax Nationwide on April 1*, Forbes (March 27, 2017, 4:22 p.m.) 13

Lance Muzslay, *It's More About Protecting a False Competitive Advantage than Difficulty in Collecting Sales Tax*, 21st Century Retail (June 24, 2015) 19

Laura Stevens, *Amazon's Cashierless 'Go' Convenience Store Set to Open*, Wall St. J. (Jan. 21, 2018, 10:00 a.m.) 14

Liran Einav et al., *Sales Taxes and Internet Commerce*, Nat'l Bureau of Econ. Research (April 2012) 20

Mark Davis, *State Finds New Way to Collect Sales Tax for Online Sales*, WTNH (Feb. 15, 2018, 9:49 a.m., updated 8:01 p.m.), http://wtnh.com/2018/02/15/state-finds-way-to-collect-sales-tax-on-online-purchases/ 23

Matthew Nesto, *Conn. Embarks On Aggressive Effort to Collect Online Tax*, Law 360 (Feb. 20, 2018, 6:45 p.m.), https://www.law360.com/articles/1013422/conn-embarks-on-aggressive-effort-to-collect-online-tax 34

MM.LaFleur, *Locations*,
https://mmlafleur.com/locations
(last visited Mar. 1, 2018) 35

MM.LaFleur, *Start a Bento*,
https://mmlafleur.com/bento
(last visited Mar. 1, 2018) 35

Monica Chin, *Amazon May Soon Launch a National Delivery Service*,
Mashable (February 9, 2018),
https://mashable.com/2018/02/09/amazon-may-soon-launch-delivery-service/#GUQDOu3.nmql 19

Morgan True, *State Sending 20,000 Letters to Collect Alternative Sales Tax*,
Brattleboro Reformer
(Sept. 4, 2017, 5:33 p.m.),
http://www.reformer.com/stories/state-sending-20000-letters-to-collect-alternative-sales-tax,518443 23

Nick Wingfield & Nellie Bowles, *Jeff Bezos, Mr. Amazon, Steps Out*,
N. Y. Times (Jan. 12, 2018) 8

NYU Stern School of Business,
Margins by Sector (US),
(January 2018),
http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html 19

Overstock.com, *Benefits of Equity*, https://www.overstock.com/downloads/pdf/ Benefits_of_Equity_in_Sales_Tax_Collection_Act.pdf (last visited Feb. 28, 2018)..... 7, 13, 27, 31

Oxford Dictionaries, *Word of the Year 2013 – Shortlist*, https://en.oxforddictionaries.com/word-of-the-year/shortlist-2013 (last visited Feb. 28, 2018)..... 16

Pew Research Center, *Mobile Fact Sheet*, http://www.pewinternet.org/fact-sheet/mobile/ (last visited Feb. 28, 2018)..... 15

PwC, *Total Retail 2015: Retailers and the Age of Disruption* (Feb. 2015), https://www.pwc.com/sg/en/publications/assets/ total-retail-2015.pdf..... 18

(R)Tech, *Pressures Driving Industry Change*, http://rtech.org/ pressures-driving-industry-change/ (last visited Mar. 2, 2018)..... 35

Retail Litigation Center, *eFairness Litigation: Leveling the Playing Field*, http://www.rila.org/enterprise/retaillitigationcenter/efairnesslitigation/Pages/eFairness%20Litigation.aspx (last visited Mar. 1, 2018)..... 37

Ronak Meghani, *B2B E-Commerce Startups Should Check This Infographic for the Latest Trends* (Jan. 24, 2018), https://e27.co/b2b-e-commerce-startups-check-trends-2018-infographic-20180124/ 20

Shan Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, Los Angeles Times (July 24, 2015, 1:06 p.m.) 12

Tax Cloud, *Welcome*, https://taxcloud.net/#Welcome (last visited Feb. 28, 2018) 24

Thu-Huong Ha, *For Nearly Every Bookstore Barnes & Noble Loses This Year, Amazon Will Open a New One*, Quartz (Mar. 28, 2017), https://qz.com/943870/amazon-amzn-will-replace-nearly-every-bookstore-barnes-noble-bks-closes-in-2017/ 8

Tyler A. LeFevre, *Justice in Taxation*, 41 Vt. L. Rev. 763 (2017) 30

Warby Parker, *Fourteen Hours in New Orleans*, https://blog.warbyparker.com/fourteen-hours-in-new-orleans/ (last visited Mar. 1, 2018) 36

Warby Parker Class Trip,
https://blog.warbyparker.com/the-warby-parker-class-trip/
(last visited Mar. 1, 2018).....36

Wayfair.com, *Ordering Information*,
https://www.wayfair.com/customerservice/ordering_info.php?rtype=7&redir=sales+tax# tax
(last visited Feb. 28, 2018).....7, 14, 22, 31, 34

Wayfair.com, *Wayfair Announces Third Quarter 2017 Results*,
http://s2.q4cdn.com/848638248/files/doc_financials/2017/Q3/Press-Release.pdf
(last visited Feb. 11, 2018).....14, 34

William F. Fox, *Inability to Collect Sales Tax on Remote Sales Still Harms the Economy*, State Tax Notes (Nov. 6, 2017).....6, 9, 12

The World Bank, *Individuals using the Internet (% of population)*,
https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US
(last visited Feb. 28, 2018).....11

INTEREST OF AMICI CURIAE[1]

Amici represent every aspect of the retail industry.

The **Retail Litigation Center, Inc.,** represents many of the country's largest and most innovative retailers, who employ millions nationwide, provide goods and services to millions more, and account for billions of dollars in annual sales.

The **National Retail Federation** is the world's largest retail trade association, representing retailers of all sizes and types and advocates for fairness and opportunity for all sectors of retail.

The **American Specialty Toy Retailing Association** is an international not-for-profit trade organization that serves independent retailers, manufacturers and sales representatives of the specialty toy industry who focus on what the child can do, rather than what the toy can do.

The **American Lighting Association** is a trade association representing over 3,000 manufacturers, manufacturers' representatives, retail showrooms, and lighting designers in the residential lighting, ceiling

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than the *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. On January 31, 2018, and February 5, 2018, respectively, Petitioner and Respondents gave blanket consent to *amicus* briefs.

fan, and controls industries in the United States, Canada, and the Caribbean.

The **American Supply Association** is the national organization that serves more than 330 independent and generational family wholesaler-distributors and manufacturers in the plumbing, heating, cooling, piping, industrial pipe, and valve fittings industry.

The **American Veterinary Medical Association** is the largest veterinary medical association, with more than 91,000 members nationwide who advise pet owners about their choices with respect to pet food, treatments, and related products.

The **Auto Care Association** is a national trade organization with 3,000 members representing more than 150,000 independent businesses that manufacture, distribute and sell motor vehicle parts and accessories and perform vehicle service and repair.

The **Council of State Retail Associations** was organized to improve and advance the retail industry through close cooperation and mutual assistance among state retail association executives and acts as a forum for discussion of important issues on state legislation and regulations affecting the retail industry.

The **Food Industry Association Executives** is a national professional association that represents local, state and regional food association executives, provides a forum for professional growth of the members' employees, and serves as a vehicle for the idea interchange and advancement of the food industry agenda.

The **Home Furnishings Association** represents more than 1,800 members with more than 7,000 store-

fronts globally, ranging from top 100 retailers to smaller local merchants and emerging entrepreneurs.

The **Independent Office Products and Furniture Dealers Association** represents over 900 local and family-owned businesses nationwide and provides office product and furniture dealers with the tools to be successful in today's rapidly changing business environment.

Jewelers of America is the national trade association representing the business interests of jewelers, including approximately 3,000 retailers and suppliers representing approximately 8,000 retail storefronts nationwide.

The **National Association of College Stores**, is the trade association for educational institutions' campus retail stores. Serving nearly 4,000 campuses in the United States, the association represents campus stores that supply course materials, merchandise, and services to campuses across the country.

The **National Grocers Association** is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry, accounting for over $131 billion in annual sales and nearly 1 million American jobs.

The **National Association of Electrical Distributors** is the trade association for the $100+ billion electrical distribution industry operating in more than 6,000 locations nationally and internationally.

The **National Association of Wholesaler-Distributors** is a nonprofit trade association that serves as the national voice of wholesale distribution

and represents businesses of all sizes that engage in the wholesale and distribution trades of every sort of nondurable and durable product.

The **National Ski and Snowboard Retailers Association** is a volunteer-led organization, serving as the voice of specialty retailers and dedicated to growing snow sports participation and to supporting and educating specialty snow sports retailers.

The **National Sporting Goods Association** is the leading voice for sporting goods retailers, representing owners and operators of more than 21,000 storefronts nationwide with a mission to support members to grow their businesses and to advocate on their behalf.

The **North American Retail Hardware Association**'s mission is to help independent hardware stores, home centers and lumberyards become better and more profitable retailers by providing information, communication, training programs and networking opportunities for the industry it serves.

The **Outdoor Industry Association** is the national trade association for more than 1200 suppliers, manufacturers and retailers in the $887-billion outdoor recreation industry, which supports 7.6 million American jobs, contributes $80 million annually in taxes, and makes significant contributions towards health communities and healthy economies across the nationwide.

The **Running Industry Association** represents independent, locally-owned specialty running retailers in the United States, with a mission to promote the health of these businesses through education, collaboration with vendors, financial support, and advocacy.

The **Retail Industry Leaders Association** represents more than 200 retailers, product manufacturers, and service suppliers, accounting for more than $1.5 trillion in sales and millions of jobs.

* * *

All of these *amici* agree that, by distorting the retail market in favor of absentee e-commerce, the physical-presence requirement is "inflicting extreme harm and unfairness" on both "States" and "local retailers." *Direct Mktg. Ass'n v. Brohl (DMA)*, 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J., concurring). That harm continues to grow even as the physical-presence requirement's legal and theoretical bases—articulated in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)—have dwindled to nil. *See Direct Mktg. Ass'n v. Brohl (DMA II)*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

Over the past quarter century, the ubiquity and ease of networked computing has transformed retail commerce in ways unforeseen when *Quill* reaffirmed *Bellas Hess* in 1992. The word "internet" does not appear in *Quill*, which addressed the "goliath" mail-order industry, with sales of about $180 billion. 504 U.S. at 303. Since then, the internet has changed everything. As Justice Kennedy observed: "By 2008, e-commerce sales alone totaled $3.16 *trillion* per year in the United States." *DMA*, 135 S. Ct. at 1135 (emphasis added). By 2015, such sales totaled $5.71 tril-

lion.[2] The mail-order "goliath" has given way to an e-commerce leviathan.

Amici's members have met e-commerce's market forces by incorporating technology into their businesses to provide superior service to their customers at reduced costs. But no amount of ingenuity can overcome the unfair advantage that *Bellas Hess* and *Quill* give to absentee retailers by making their online sales appear duty-free. Thus, *amici* have a vital interest in whether this Court upholds South Dakota's law as a fair and administrable approach to evaluating "substantial nexus" in today's economy.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question before this Court is whether South Dakota may require all companies engaged in substantial in-state retail activity to collect sales taxes. Absentee retailers, *i.e.*, companies with no physical presence in the communities into which they sell their goods, insist that the dormant Commerce Clause categorically exempts them from that "minor ... duty." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). But South Dakota's even-handed approach is perfectly consistent with this Court's usual application of the Commerce Clause to state taxation. Such an economic-presence approach is necessary for sales taxes to work fairly in a retail world increasingly dominated by e-commerce. The Court should uphold South Dakota's law and inter

---

[2] William F. Fox, *Inability to Collect Sales Tax on Remote Sales Still Harms the Economy*, State Tax Notes 575, 576 (Nov. 6, 2017).

once and for all the outmoded *per se* physical-presence requirement of *Bellas Hess* and *Quill*, which is "inflicting extreme harm and unfairness" on both States and "local retailers." *Id.* at 1134-35.

Absentee retailers have fought for the physical-presence requirement not because collecting taxes is a crippling burden, but because being exempt from that obligation gives them "a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). In Respondent Wayfair.com's own words: "One of the best things about buying through Wayfair is that we do not have to charge sales tax."[3] To be clear, use or sales taxes are still owed on those transactions, *DMA*, 135 S. Ct. at 1127, but States struggle to collect them because of logistical challenges and consumer ignorance. Thus, absentee retailers' products appear to be discounted relative to their Main Street competitors'. As even Respondent Overstock.com concedes, this "pricing advantage" is based on a factor (sales-tax collection) that should not "enter the equation of free commerce and competing businesses."[4]

Because the precondition to that "pricing advantage" is physical absence, the sales thus won *necessarily* drain money away from both the private and the public sectors of local communities. Online-only retail-

---

[3] Wayfair.com: Ordering Information, https://www.wayfair.com/customerservice/ordering_info.php?rtype=7&redir=sales+tax#tax (last visited Feb. 28, 2018) ("Ordering Information").

[4] Overstock.com, https://www.overstock.com/downloads/pdf/Benefits_of_Equity_in_Sales_Tax_Collection_Act.pdf (last visited Feb. 28, 2018) ("Benefits of Equity").

ers like Respondents shun Main Street (even when doing so is inefficient) because this "pricing advantage" offsets their increased costs.[5] For instance, Amazon, which began as an online-only bookseller, originally established its headquarters and warehouses far from population centers in order to avoid "collect[ing] sales taxes in the country's most populous states"; it also micromanaged its employees' work travel "to avoid triggering unwanted sales tax liabilities."[6] This gave Amazon a "price advantage against established physical retailers like Barnes & Noble" that had to collect sales taxes.[7] So, when "the only general-interest bookstore in the New York City borough of the Bronx" closed, it was understood that Amazon would "fill the gap" left by that missing Barnes & Noble.[8] And the distortion today goes beyond community bookstores, as the broad range of industries represented by *amici* demonstrates. The tax advantages of absentee retail-

---

[5] *See* Eric T. Anderson, et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. of Mktg. Research 229, 237-239 (April 2010).

[6] Nick Wingfield & Nellie Bowles, *Jeff Bezos, Mr. Amazon, Steps Out*, N. Y. Times (Jan. 12, 2018), https://www.nytimes.com/2018/01/12/technology/jeff-bezos-amazon.html.

[7] *Id.* In 2017, Amazon began collecting taxes on its first-party sales, although not its marketplace sales. David Z. Morris, *Amazon to Collect Sales Tax in Most States Starting April 1st*, Fortune (Mar. 25, 2017), http://fortune.com/2017/03/25/amazon-sales-tax-april-1/.

[8] Thu-Huong Ha, *For Nearly Every Bookstore Barnes & Noble Loses This Year, Amazon Will Open a New One*, Quartz (Mar. 28, 2017), https://qz.com/943870/amazon-amzn-will-replace-nearly-every-bookstore-barnes-noble-bks-closes-in-2017/.

ing are driving all kinds of businesses away from local communities.

The physical-presence requirement arose when a bygone Commerce Clause approach, *see Quill*, 504 U.S. at 317, was applied to a bygone world of mail-order catalogs, *see Bellas Hess*, 386 U.S. at 754-55. At some point the law and the world can change so much that an old *per se* rule, having lost its *ratio decidendi*, also loses its *raison d'être*. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997). That has happened with respect to state taxation of absentee retail. E-commerce has changed not only the scale of absentee retail—a more-than-thirtyfold increase from the $180 billion in *Quill*, 504 U.S. at 303, to the almost $6 *trillion* today[9]—but also its very nature. E-commerce is present *constantly* and active *everywhere*—it is ubiquitous and ultrapersonal—and it operates in ways that blur the supposedly bright line of physical presence.

These changes overcome *stare decisis*. And they have thwarted *Quill*'s pragmatic goals of simplifying legislation and preventing litigation. The premises and promises of the physical-presence requirement have not held true. Under such circumstances, absentee retailers cannot claim reliance interests that outweigh the need for doctrinal consistency, public solvency, and free competition.

South Dakota's law simply requires businesses to collect sales tax when they sell $100,000 in merchandise, or engage in 200 sales, in the State per year. This is a "minor ... duty" for major corporations, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring), one carried

---

[9] Fox, *Inability to Collect Sales Tax*, *supra* note 2, at 576.

out by every brick-and-mortar retailer, from the biggest chain outlet to the humblest mom-and-pop store, whether they are selling in-store or online. To excuse absentee retailers from that duty would perpetuate "a serious, continuing injustice" to local communities and the retailers that serve them. *Id.* at 1134. And imposing the duty is entirely consistent with this Court's Commerce Clause requirement that a State limit its taxation to "activity" that has a "substantial nexus" to the State. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Upholding South Dakota's even-handed law will bring coherence to the Court's doctrine and fair competition to retail.

ARGUMENT

I. RETAIL HAS TRANSFORMED IN WAYS THAT DISPROVE THE ECONOMIC ASSUMPTIONS OF *QUILL* AND *BELLAS HESS*

The physical-presence requirement rests not only on an approach to the Commerce Clause that no longer exists, but also on a series of beliefs about sales tax and the retail economy that no longer hold true. *Bellas Hess* and *Quill* assumed that: (1) if absentee retail (then, mail-order) lost its tax shelter, it would not thrive; (2) if a retailer was not physically present in a State, it would not be persistently active there; (3) if absentee retailers were not required to collect taxes, their sales would be "tax exempt"; and (4) if an absentee retailer were required to collect sales taxes, the burden would be onerous.

As Justice Kennedy explained in his concurrence in *DMA*, these assumptions carried the day in *Quill* because the majority failed "to reevaluate *Bellas Hess* ... in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy." 135 S. Ct. at 1134–35. In deciding *this* case, the Court should not rest on old assumptions but can instead take stock of the "far-reaching systemic and structural changes in the economy" since *Quill*. *See id.* at 1135. Thus, in deciding whether to uphold South Dakota's law, the Court should consider that: (1) e-commerce is huge and robust and does not need a tax shelter; (2) e-commerce is omnipresent even without a physical footprint; (3) sales/use taxes are owed regardless of whether they are collected at the point of sale; and (4) collecting sales/use taxes online is straightforward.

A. E-Commerce Is Huge and Robust

E-commerce has transformed retail since *Quill* was decided. In 1992, less than 2% of Americans had some form of internet access,[10] and Amazon.com did not even exist; today, that number is about 89%,[11] Amazon's market capitalization is greater than Walmart,

---

[10] The World Bank, *Individuals using the Internet (% of population)*, https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US (last visited Feb. 28, 2018).

[11] Internet Live Stats, *United States Internet Users*, http://www.internetlivestats.com/internet-users/us/ (last visited Feb. 28, 2018).

Target and Costco combined,[12] and its CEO, Jeff Bezos, is "the richest person in history."[13]

Not only was this transformation unforeseen in *Quill*, it was unforeseeable. In 1995, three years after *Quill* was decided, *Newsweek* (still a print publication) scoffed at the notion that "[c]ommerce and business will shift from offices and malls to networks and modems" and declared that a "local mall does more business in an afternoon than the entire Internet handles in a month."[14] Three years later, Nobel Prize-winning economist Paul Krugman declared that "[b]y 2005 or so, it will become clear that the Internet's impact on the economy has been no greater than the fax machine's."[15] Today, the internet enables almost $6 trillion in e-commerce a year,[16] a sum more than thirty times the $180 billion for mail-order in *Quill*, 504 U.S. at 303.

---

[12] Shan Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, Los Angeles Times (July 24, 2015, 1:06 p.m.), http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html

[13] Chris Isidore, *Jeff Bezos is the Richest Person in History*, CNN (Jan. 9, 2018, 8:33 a.m.), http://money.cnn.com/2018/01/09/technology/jeff-bezos-richest/index.html.

[14] Clifford Stoll, *Why the Web Won't Be Nirvana*, Newsweek (Feb. 26, 1995, 7:00 p.m.), http://www.newsweek.com/clifford-stoll-why-web-wont-be-nirvana-185306.

[15] Jay Yarow, *Paul Krugman Responds To All The People Throwing Around His Old Internet Quote*, Business Insider (Dec. 30, 2013, 9:06 a.m.), http://www.businessinsider.com/paul-krugman-responds-to-internet-quote-2013-12.

[16] Fox, *supra* note 2, at 576.

The internet defied predictions precisely because it was so revolutionary. E-commerce has become not only vastly larger than mail-order ever was, but also far more robust. In *Quill*, the Court worried that "the mail-order industry's dramatic growth" depended on preferential tax treatment, a *de facto* subsidy and crutch that had become a necessary "part of the [industry's] basic framework." 504 U.S. at 316-17.

Whatever worries there may have been about mail-order's resilience, e-commerce "is here to stay," as Respondent Overstock.com puts it.[17] There is overwhelming evidence that requiring sales tax collection will not change that. To begin with, many of the businesses represented by *amici* operate successful online stores (as well as brick-and-mortar stores), and those online stores collect sales taxes. *Amici* thus speak from experience when they say that collecting sales taxes online is not a crippling burden. If e-commerce success required an exemption from sales tax collections, Wal-Mart would not be expanding its online portal and offering free second-day delivery without any membership fee.[18] Second, Amazon has begun collecting sales tax on its first-party sales nationwide, regardless of its physical presence,[19] and Amazon is

---

[17] Overstock.com: Benefits of Equity, *supra* note 4, at 2.

[18] Alexandra Wolfe, *Marc Lore Looks to the Future of Online Shopping*, Wall St. J. (Jan. 26, 2018, 3:31 p.m.), https://www.wsj.com/articles/marc-lore-looks-to-the-future-of-online-shopping-1516998700.

[19] Kelly Phillips Erb, *Tax Free No More: Amazon To Begin Collecting Sales Tax Nationwide on April 1*, Forbes (March 27, 2017, 4:22 p.m.), https://www.forbes.com/sites/kellyphillipserb/2017/03/27/tax-free-no-more-amazon-to-begin-collecting-sales-tax-nationwide-on-april-1/#5bcf92414e59.

more successful than ever. Third, most absentee retailers *already* collect sales tax in multiple States where they have headquarters, warehouses, distribution centers, and so forth. Respondent Wayfair itself collects sales taxes in *22 States*.[20] And Wayfair is indisputably thriving: for its last reported quarter, "[d]irect [r]etail net revenue, consisting of sales generated primarily through Wayfair's sites, increased $348.8 million to *$1.2 billion*, up 41.9% year over year," yielding profits of $280.3 million.[21]

E-commerce will—indeed, *does*—make ample profit without *Quill*'s subsidy. There is thus no danger of e-commerce coming to an end if absentee, online-only retailers are required to collect sales taxes in more States than those in which they already collect taxes. To the contrary, it is virtually certain that e-commerce will become *cheaper* and *more efficient* once online-only retailers are no longer encouraged to eschew a physical presence to obtain an apparent price advantage. As Amazon's practices confirm, warehouses and distribution centers will be moved closer to population centers, reducing delivery times and cost. In fact, some absentee retailers might even decide to join the local community and open a store on Main Street, as Amazon has.[22]

---

[20] Wayfair.com: Ordering Information, *supra* note 3.

[21] Wayfair.com, *Wayfair Announces Third Quarter 2017 Results*, http://s2.q4cdn.com/848638248/files/doc_financials/2017/Q3/Press-Release.pdf (last visited Feb. 11, 2018) (emphasis added) ("Wayfair.com Q3 2017 Press Release").

[22] Laura Stevens, *Amazon's Cashierless 'Go' Convenience Store Set to Open*, Wall St. J. (Jan. 21, 2018, 10:00 a.m.),

The only thing that will be lost if online-only retailers are required to collect sales tax is a "competitive advantage" that Members of this Court, economists, businesses large and small, and the States all recognize to be unfair. Any absentee retailer whose business model makes economic sense will survive in fair competition without the physical-presence "tax shelter."

B. Online-Only Retailers Are Persistently Active and Economically Present Despite Physical Absence

The "ability to conduct business without physical presence ha[s] created new problems not envisioned by rules developed in another era." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994). "Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Even a decade ago, Americans went online almost exclusively from their computers—typically at home or work—but today, almost 80% of Americans own smartphones.[23] Unsurprisingly, "[m]obile commerce is expected to account for 34.5% of total e-commerce sales this year, and it's further anticipated

---

https://www.wsj.com/articles/amazons-cashierless-go-convenience-store-set-to-open-1516546801.

[23] Pew Research Center, *Mobile Fact Sheet*, http://www.pewinternet.org/fact-sheet/mobile/ (last visited Feb. 28, 2018).

to surpass 50% by 2021."[24] Thus, the entire online retail marketplace is now continuously present in the pockets and purses of the great majority of Americans.

This means that online retailers are actively present even inside the stores of their brick-and-mortar competitors. That presence enables the phenomenon of "showrooming": absentee retailers exploiting competitors' in-community stores as "showrooms" for products that the online-only retailer sells at a lower price—a cut rate often derived from the misleading lack of sales-tax collection. More than two-thirds of Americans aged 18 to 44 use their mobile devices to comparison shop online while in a brick-and-mortar store.[25] Showrooming has become so commonplace that the term was short-listed for "Word of the Year 2013."[26]

The interaction of "showrooming" with *Quill*'s tax distortion turns the best aspects of brick-and-mortar stores into competitive liabilities, as absentee retailers derive the benefit of physical presence without bearing its costs or tax-collection consequences. Online-only retailers are absent in the sense that they put nothing into a local community beyond their sales: they main-

---

[24] Dan O'Shea, *Mobile Commerce to Dominate Online Sales by 2021*, Retail Dive (Oct. 29, 2017), https://www.retaildive.com/news/mobile-commerce-to-dominate-online-sales-by-2021/508403/.

[25] Cecillia Barr, *Growing Impact of Showrooming on Retail Businesses*, BFS Capital Blog (June 19, 2017), https://www.bfscapital.com/blog/impact-of-showrooming-on-retail-businesses/.

[26] https://en.oxforddictionaries.com/word-of-the-year/shortlist-2013 (last visited Feb. 28, 2018).

tain no store on Main Street; pay no rent or taxes; employ no workers; sponsor no little league teams or book talks. But, online-only retailers are deliberately present in another sense—omnipresent, even—through the apps and websites on their customers' desktops, laptops, tablets, and phones. And, when combined with showrooming, this *Quill*-subsidized presence lets absentee retailers leech sales from brick-and-mortar stores.

Community retailers provide a real value to customers, who come to local stores to try the merchandise: to see a necklace catch the light, to sit on a couch, to heft a hammer, to feel the fit of a pair of pants, to compare pictures on side-by-side TVs. They also come to pose questions to experienced sales staff who can direct customers through a maze of competing products to the one that best suits their particular needs, preferences, and budgets. It is all too easy to minimize these customer services—to literally "discount" the value added by the hardworking women and men in retail. But what they provide *is* valuable, whether in finding the right shoes based on a runner's fitness level, goals, injuries, and bone structure, or helping a pet owner choose the right dog food based on her pet's size and health history. Once customers have a chance to handle the wares and learn from trained specialists, they can better decide whether to buy and what to buy. Customers and competition both thrive when this kind of information, which community retailers are uniquely able to provide, is available.

Through showrooming, absentee retailers turn that service against the local stores that provide it. Because online-only retailers are constantly present via smartphones, customers can take their newly informed

decision about *what* to buy and then decide *where* to buy with a few taps and swipes, comparing the in-store price to an online price. That online price need not cover the costs of storefront retailing in rent, wear-and-tear, and salaries. And that online price often appears considerably discounted by purporting to be "tax-free." The online-only retailer can thus undercut the brick-and-mortar "showroom," stealing the sale[27]—a sale that was physically conducted just as it would have been had the customer made the purchase at the cash register.

The Politics & Prose bookstore in Washington, D.C., suffers from such showrooming. Bradley Graham, its co-owner, describes "customers who come into the store, avail themselves of our staff's expertise and recommendations," then "us[e] their phone cameras to take pictures of books" and buy them online—while still *standing in the store.*[28] Physically shopping at Politics & Prose is transformed into physically shopping at an online retailer. Almost all of the retailers represented by *amici* have had similar experiences.

Some brick-and-mortar retailers have tried to combat showrooming by matching the prices of their online competitors[29]—a tall order because online retailers not only avoid costs but also sell products *below* cost as loss

---

[27] PwC, *Total Retail 2015: Retailers and the Age of Disruption* 6 (Feb. 2015), https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf.

[28] Brief of the American Booksellers Association as *Amicus Curiae* in Support of Petition for Writ of Certiorari at 11 (Nov. 2, 2017) ("Booksellers' Brief").

[29] Barr, *supra* note 25.

leaders or to capture market share.[30] Most local businesses lack profit margins that would allow them to slash prices that deeply.[31] But even retailers who can match their online competitors' prices *still* cannot win because of the apparent sales tax differential.[32] The way the physical-presence requirement amplifies showrooming is demonstrated by the fact that showrooming has never been "much of an issue with [booksellers] in Washington State" because Amazon.com has always collected Washington sales taxes.[33]

That *Quill*'s tax advantage distorts retail in an e-commerce economy is not speculative or anecdotal, but proven by data. In 2010, researchers at MIT and Northwestern demonstrated that exempting absentee retailers from sales tax collection has a significant effect on e-commerce, but not on mail-order.[34] While

---

[30] Monica Chin, *Amazon May Soon Launch a National Delivery Service*, Mashable (February 9, 2018), https://mashable.com/2018/02/09/amazon-may-soon-launch-delivery-service/#GUQDOu3.nmql.

[31] NYU Stern School of Business, *Margins by Sector (US)*, (January 2018), http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.

[32] Brad Tuttle, *Best Buy Swears Shoppers Don't Have to Bother Showrooming Anymore*, Time (Feb. 20, 2013), http://business.time.com/2013/02/20/best-buy-swears-shoppers-dont-have-to-bother-showrooming-anymore/; Lance Muzslay, *It's More About Protecting a False Competitive Advantage than Difficulty in Collecting Sales Tax*, 21st Century Retail (June 24, 2015), http://www.efairness.org/blog/2015/06/its-more-about-protecting-a-false-competitive-advantage-than-difficulty-in-collecting-sales-tax/.

[33] Booksellers' Brief, *supra* note 28, at 14-15.

[34] Anderson, *Sales Taxes*, *supra* note 5, at 229-239.

there was no apparent "reaction to sales taxes in the catalog channel," there was a considerable benefit to the apparent tax exemption in e-commerce.[35] Other studies confirm this result.[36] This difference results, at least in part, from the ease of comparison shopping on the internet, which aggregates, organizes, and provides instantaneous access to vast amounts of retail information.[37] In such comparisons, an apparent tax discount can be decisive.

These problems extend beyond retail to wholesale, where e-commerce is also a growing trend.[38] And while States tax wholesale and retail differently, *Quill* and *Bellas Hess* can similarly distort wholesale transactions. As with retail, the result has been a siphoning of community wholesaler business by absentee wholesalers. And here, too, showrooming takes place: 93% of business buyers prefer to purchase online after deciding what products to buy.[39]

---

[35] *Id.* at 236.

[36] Liran Einav et al., *Sales Taxes and Internet Commerce*, Nat'l Bureau of Econ. Research (April 2012), http://www.nber.org/papers/w18018.pdf; Brian Baugh et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* Nat'l Bureau of Econ. Research 4-5 (April 2014, revised, Jan. 2018), http://www.nber.org/papers/w20052.pdf

[37] Anderson, *Sales Taxes*, *supra* note 5, at 235-37.

[38] Andy Hoar et al., *B2B eCommerce: A Trillion Dollars for the Taking*, Forrester Research (July 26, 2016), https://www.forrester.com/report/B2B+eCommerce+A+Trillion+Dollars+For+The+Taking/-/E-RES82102.

[39] Ronak Meghani, *B2B E-Commerce Startups Should Check This Infographic for the Latest Trends* (Jan. 24, 2018),

A decade ago, this Court reversed a long-standing antitrust *per se* prohibition of resale price maintenance because that prohibition had fueled an analogous kind of low-tech showrooming:

> [D]iscounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–91 (2007) (citations omitted). The greater harm of e-commerce "showrooming" warrants reversing the *per se* physical-presence requirement here.

C. Absentee Retail Sales Are Not "Tax Exempt"

---

https://e27.co/b2b-e-commerce-startups-check-trends-2018-infographic-20180124/.

The *Quill* majority described absentee retailers as operating in "a discrete realm of commercial activity that is free from interstate taxation," such that their sales enjoyed an "exemption from state taxation." 504 U.S. at 315-16. This same misconception is fostered by absentee retailers like Wayfair who hold themselves out like airport duty-free stores that are not "subject to a sales tax."[40] In reality, the customers still owe the tax; they just do not know it.

Quill's reasoning and these advertisements conflate two distinct concepts: retailers' obligation to *collect* sales taxes and customers' obligation to *pay* sales taxes. *Quill* likely did so because, when it was decided, it was infeasible for States to identify customers of absentee retailers, and the amount of lost sales taxes—while large—was not yet the "extreme harm" now depriving States of their ability to fund their "education systems, healthcare services, and infrastructure." *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring).

Today, the physical-presence requirement may free large corporations like Wayfair from "some minor tax-collection duty," *id.* at 1135, but it does not free Wayfair's *customers* of their obligation to pay those taxes. "Use taxes are still due, but ... they must be collected from and paid by the customer, not the out-of-state seller." *Id.* at 1134. With great efforts, States today attempt to collect those taxes. Colorado requires absentee retailers to report their customers' purchases. Colo. Rev. Stat. § 39–21–112(3.5). Vermont has sent "close to 20,000 letters to Vermonters telling them they

---

[40] Wayfair.com: Ordering Information, *supra* note 3.

may owe sales tax for online and other purchases."[41] Connecticut did the same.[42] Such cumbersome collection attempts are necessary to recoup some of the billions in tax revenue that otherwise will be lost.

Because absentee retailers cannot claim a legitimate interest in benefiting from customers' failure to pay taxes, the only *legitimate* advantage flowing from *Quill* is the avoided expense of adding a tax-collection widget to their websites. As explained below, that cost is trivial. But the *illegitimate* "competitive advantage," *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring), is substantial: the misimpression that their goods cost less because they are not "subject to a sales tax." That competitive advantage comes in three forms, each worse than the last. First, some customers believe the purchase price is all they owe; later learn of the need to pay the tax; and then pay the tax—what amounts to a bait-and-switch on the price. Second, some customers never learn of the tax and unwittingly violate their States' tax laws. Third, some customers, knowing of the tax, nevertheless do not pay it, cheating their States with the help of absentee retailers. In all of these instances, the absentee retailer exploits an apparent "discount" that does not exist. Justice White

---

[41] Morgan True, *State Sending 20,000 Letters to Collect Alternative Sales Tax*, Brattleboro Reformer (Sept. 4, 2017, 5:33 p.m.), http://www.reformer.com/stories/state-sending-20000-letters-to-collect-alternative-sales-tax,518443.

[42] Mark Davis, *State Finds New Way to Collect Sales Tax for Online Sales*, WTNH (Feb. 15, 2018, 9:49 a.m., updated 8:01 p.m.), http://wtnh.com/2018/02/15/state-finds-way-to-collect-sales-tax-on-online-purchases/.

rightfully denounced this as an illegitimate "tax shelter." *Quill*, 504 U.S. at 329

D. Collecting Sales Taxes Online Is a "Minor Duty," Not a Great Burden

In *Bellas Hess*, 386 U.S. at 759-60, and *Quill*, 504 U.S. at 313 n.6 (quoting *Bellas Hess*), the majorities feared that, without the physical-presence requirement, mail-order retailers would be "entangle[d] ... in a virtual welter of complicated obligations." Now, advances in computer technology and homogenization in tax law have made this burden trivial—a "minor ... duty," *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring), easily carried out by any retailer with the wherewithal to establish a substantial e-commerce presence.

For example, TaxCloud is a free product that calculates sales tax for every tax jurisdiction in the United States based on a customer's address, and continuously updates itself to reflect changes in tax exemptions, rates, and holidays.[43] It is used by over 18,500 online retailers, including many of *amici*'s members, and it comes "integrated with over 85 e-commerce platforms" and offers "[f]ree public sales tax APIs" that work with any system.[44] It is far from the only option.[45]

---

[43] Tax Cloud, *Welcome*, https://taxcloud.net/#Welcome (last visited Feb. 28, 2018).

[44] *Id.*

[45] *See* Brief of National Retail Federation as *Amicus Curiae* in Support of Petition for Writ of Certiorari at 19-24 (Nov. 1, 2017).

Given this technology, there is no plausible explanation for why Wayfair can manage sales-tax collection in 22 States, but not the rest of the Nation. We know Wayfair and other absentee retailers could do so because the fourth defendant in this case, Systemax, "*immediately* began collecting taxes under the law" after settling with the State. Pet. App. 10a (emphasis added). If Systemax could toggle the widget on its website to collect sales taxes, so can other absentee retailers.

II. THE TRANSFORMATION OF THE RETAIL ECONOMY MEANS THAT *STARE DECISIS* CANNOT JUSTIFY RETAINING THE PHYSICAL-PRESENCE REQUIREMENT

By the time of *Quill*, the physical-presence requirement conflicted with numerous dormant Commerce Clause decisions permitting taxation of any business activity that creates a substantial nexus with the taxing State. 504 U.S. at 311-16 (citing *Complete Auto*, 430 U.S. at 279). The *Quill* majority acknowledged this conflict—which has only grown worse, *DMA II*, 814 F.3d at 1150-51 (Gorsuch, J., concurring)—but held that *stare decisis* mandated retaining the requirement. Given the profoundly changed circumstances discussed above, that is no longer true.

Stare decisis is not an inexorable command. When the world changes, it is often appropriate for the law to change as well. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). The Court is particularly willing to reconsider precedent where such changes have made prior dormant Commerce Clause rules obsolete and counterproductive. For instance, in

Granholm v. Heald, 544 U.S. 460, 492 (2005), the Court departed from prior precedent allowing discrimination against out-of-state liquor sellers because "improvements in technology have eased the burden of monitoring out-of-state wineries." Similarly, the Court will not maintain "*per se*" bright-line antirust rules that "remain[] forever fixed" while the "economic realities ... have changed." *Khan*, 522 U.S. at 21.

Even in 1992, *Quill*'s *per se* rule created a sharp division based on "an anachronistic notion of physical presence" that one could not even "attempt to justify ... in economic terms" because "in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax." 504 U.S. at 328 (White, J., concurring in part and dissenting in part). But back then, the majority could claim that "the *Bellas Hess* rule appears artificial [only] at its edges." *Id.* at 315. Today, the rule looks artificial to its very core.

That anachronistic, ill-fitting, and unfair rule cannot be justified based on "settled expectations" and "reliance interests." *Id.* at 316-17. The world and the law have changed too much, and the reliance interests in avoiding the direct costs of sales-tax collection are too slight.

Moreover, brick-and-mortar retailers have powerful reliance interests, too. Over the course of decades, they invested billions of dollars to literally build up local communities, only to discover that this footprint carries a significant competitive tax disadvantage when it comes to retail sales, whether in their own stores *or* via their online portals. Far from vindicating "settled expectations" and "reliance interests," the intersection of *Quill* and e-commerce created an entirely unforesee-

able competitive disadvantage for the businesses that invested in their communities. Indeed, retailers hesitate to expand into new states for that reason,[46] fearing—as Respondent Overstock.com puts it—that it is not "worth the cost of additional sales tax burden to open a new facility in [a new] state."[47] The physical-presence requirement is thus thwarting the Commerce Clause purpose it is meant to advance: economic integration among the States.

The "dramatic changes in factual circumstances" of the retail industry justify "a departure from precedent under the prevailing approach to *stare decisis*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 534 (2009) (Thomas, J., concurring). "It's no secret the retail industry is undergoing a transformational period,"[48] and the Court should not distort that transformation through the physical-presence requirement simply to keep *Bellas Hess* and *Quill* on the books. As Respondent Overstock.com acknowledges, "[r]emoving obstacles to growth and expansion" will mean "more growth," "more jobs," and "a bigger and better economy."[49]

---

[46] *See* Anderson, *Sales Taxes*, *supra* note 5, at 237-39.

[47] Overstock.com: Benefits of Equity, *supra* note 4, at 2.

[48] Corinne Ruff & Ben Unglesbee, *The Running List of 2017 Retail Apocalypse Victims*, Retail Dive (Dec. 13, 2017), http://www.retaildive.com/news/retail-bankruptcies-2017/446086/.

[49] Overstock.com: Benefits of Equity, *supra* note 4, at 2.

III. THE COURT SHOULD UPHOLD SOUTH DAKOTA'S LAW, WHICH FITS WITH THE COMMERCE CLAUSE AND THE RETAIL ECONOMY, WHILE *QUILL'S* PHYSICAL PRESENCE REQUIREMENT DOES NOT

Because backwards-looking *stare decisis* can no longer insulate the physical-presence requirement from review, three forward-looking considerations are before the Court: whether South Dakota's approach better accords with the Commerce Clause (rather than departing from it), better reflects economic reality (rather than distorting it), and better fulfills *Quill*'s practical goals (rather than thwarting them). The answer to all three is yes. As Justices Kennedy and Gorsuch have made clear, the physical-presence requirement is both inconsistent with prevailing Commerce Clause jurisprudence and economically unfounded and unfair. Furthermore, it is causing legislative and litigative uncertainty and instability. Accordingly, the Court should uphold South Dakota's law and the "economic presence" approach on which it rests.

A. South Dakota's Law Accords with the Commerce Clause, While the Physical-Presence Requirement Does Not

South Dakota's law focuses on a retailer's sales *activity*, rather than its physical footprint, and thus accords with decades of Commerce Clause precedent establishing that a State can properly tax "activity" that has a "substantial nexus" to the State. *See Complete Auto*, 430 U.S. at 279. It cannot seriously be maintained that a retailer engaging in over 200 transactions or over $100,000 worth of sales in the relatively small South Dakota market "is not sufficiently con-

nected to the State to justify a tax." *Id.* at 287; *cf. Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) ("It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State."). Indeed, *Quill* itself held that due process did not bar the imposition of tax-collection duties on absentee retailers, 504 U.S. at 308, and "[t]here is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981).

The physical-presence requirement, by contrast, is a vestige of a now-rejected approach to the Commerce Clause, one that *Quill* acknowledged to be outmoded even 25 years ago. *See* 504 U.S. at 317. As Justice Kennedy explained, the "*Quill* majority acknowledged the prospect that its conclusion was wrong." *DMA*, 135 S. Ct. at 1134. And the Court's Commerce Clause approach has continued to move away from *Quill* in the quarter-century that followed, further eroding the already-diminished doctrinal support the rule had in 1992. *See DMA II*, 814 F.3d at 1150-51 (Gorsuch, J., concurring).

B. South Dakota's Law Fairly Reflects Economic Reality, While the Physical-Presence Requirement Unfairly Distorts It

As explained above, the economic reality is that e-commerce—carried out by both community and absentee businesses—is a huge, growing, always present, and highly active retail channel. The ability of absen-

tee e-commerce to skirt sales-tax collection thus "inflict[s] extreme harm and unfairness on the States" and "local retailers and their customers," *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring), thereby undermining necessary government services and venerable American companies alike. States are no longer willing to leave the sales taxes on absentee e-commerce uncollected. The question is whether States may ask large absentee businesses to help collect those taxes at the point of sale (as community retailers have *always* done in States that impose sales taxes) or whether the States must attempt to collect those taxes from each resident customer, one-by-one, at the end of the tax year.

With good reason, South Dakota has opted for the former. Because that approach fits with economic reality, South Dakota's sales tax is fair, transparent, easy to pay, and efficient to collect. This satisfies the four principles of sound taxation known since Adam Smith published *The Wealth of Nations*: (1) like enterprises should be taxed alike (fair); (2) taxes should be clear to the taxpayer (transparent); (3) taxes should be collected at the most opportune moment for the taxpayer (easy); and (4) governments should collect the taxes with the least amount of friction (efficient). *See* Tyler A. LeFevre, *Justice in Taxation*, 41 Vt. L. Rev. 763, 769-70 (2017).

In contrast, the approach dictated by the physical-presence rule is unfair, opaque, tricky, and costly, as demonstrated by comparing that approach to South Dakota's for a hypothetical Wayfair.com sale.

First, under South Dakota's approach, the transaction will be taxed identically whether the retailer is

Wayfair or Walmart. Under the physical-presence approach, the transactions are treated differently: sales tax will not be collected on Wayfair.com because Wayfair has avoided any South Dakota real-estate footprint; but tax will be collected on Walmart.com because, somewhere in South Dakota, Walmart operates a brick-and-mortar store (even though the product was neither sold at, nor shipped from, that store). *See Quill*, 504 U.S. at 328 (White, J., concurring in part and dissenting in part) (noting that under the physical-presence requirement, "an out-of-state seller with one salesperson in a State would be subject to use tax collection burdens on its entire mail-order sales even if those sales were unrelated to the salesperson's solicitation").

Second, under South Dakota's approach, the customer knows at the time of purchase how much sales tax is owed. Under the physical-presence approach, she does not. Instead, she is directed by Wayfair.com to "check your state's regulations before you shop"[50] and figure out for herself the tax calculation that Wayfair claims is too hard for a billion-dollar corporation to manage. That is, assuming she even knows that a tax is owed, something that Respondent Overstock.com admits is the subject of "confusion."[51]

Third, under South Dakota's approach, the tax is collected at the point of sale as part of the transaction. Under the physical-presence approach, the customer must keep records of every untaxed online purchase she has made over the course of the year and set aside

---

[50] Wayfair.com: Ordering Information, *supra* note 3.

[51] Overstock.com: Benefits of Equity, *supra* note 4, at 1.

money to make sure she will be able to pay what is owed come April 15.

Fourth, under South Dakota's approach, the State receives the collected sales taxes in the same routine way it receives them from every other non-absentee retailer, whether the sale was made at a store or online. Under the physical-presence approach, the State must find some circuitous route to collect the taxes owed. For instance, it might compel the absentee retailers to supply lists of customers and their purchases (like Colorado), or send dunning letters to its residents (like Vermont and Connecticut). While understandable as workarounds to *Quill*'s physical-presence requirement, these methods intrude on privacy, significantly burden consumers and retailers, cost the State more, and fare poorly at tax collection—ultimately requiring States to make up for the shortfall with other forms of taxation. *See DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). In a word: inefficient.

These differences should come as no surprise: when the law reflects economic reality, it provides the right tools for the job. When the law ignores and distorts economic reality, it compels States to use inferior tools. And when the wrong tools are used, the result is inefficient and sometimes destructive.

C. South Dakota's Law Is Administrable and Clear, While the Physical-Presence Requirement Is Causing Litigation and Confusion

In *Quill*, the Court hoped that the physical-presence requirement would: (1) provide clear guidance to legislatures regarding the taxation of absentee retailers; (2) "reduce[] litigation concerning those taxes"; and

thereby (3) lead States and business out of a "quagmire" of "controversy and confusion." 504 U.S. at 315. In fact, it is *South Dakota's* approach that fulfills these hopes, while the physical-presence requirement has failed them.

South Dakota's standard is simple for legislatures, easy for courts, and clear for businesses. It establishes a high, bright-line threshold for what constitutes a substantial connection to the state. Unlike under the North Dakota law at issue in *Quill*, no business will need to retroactively collect taxes; no mom-and-pop mail-order company will inadvertently cross the threshold by making "three calls into the State"; and even ingenious lawyers will be hard pressed to read ambiguities into the law. *See id.* at 313 & n.6. Unsurprisingly, South Dakota's approach has already proved popular with other States such as Tennessee (with a $500,000 threshold), Wyoming ($100,000), and Alabama ($250,000).

No doubt the absentee retailers will insist that even if the law at issue in *this* case is bright and clear, other States will aggressively legislate lower and vaguer thresholds. But why? States, too, benefit from certainty and stability in tax collection, and they have every reason to operate consistently with the decades-old "substantial nexus"/economic "activity" approach normally applied to their tax laws. *See Complete Auto Transit*, 430 U.S. at 279. Moreover, at less than $100,000 worth of sales, even States with high sales taxes would hardly recover sums that would merit litigating over exactly what level of business activity and economic presence is too slight "to justify a tax." *Id.* at 287.

What concerns States—and what concerns *amici* and should concern this Court—is not whether a small business selling a few hundred dollars' worth of trinkets online is collecting sales tax but whether a giant corporation with *billions* of dollars in sales is doing so. For instance, whether Wayfair can boast that "[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax"[52] even while "sales generated primarily through Wayfair's sites[] increased $348.8 million to *$1.2 billion*."[53] It is *that* failure to collect sales taxes that is distorting the private retail industry and jeopardizing the public fisc.

South Dakota's even-handed and efficient method for collecting sales tax is superior to the efforts of other States "to find ways of achieving comparable results through different means." *See DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring). States pursue these circuitous approaches *knowing* them to be inefficient, but fearing that there are no better alternatives permissible under *Quill*.[54] Some States have imposed requirements short of collection where physical presence is lacking, "consciously stop[ping] (just) short of doing what *Quill*'s holding forbids." *DMA II*, 814 F.3d at 1148. (analyzing Colo. Rev. Stat. § 39–21–112(3.5)). Others have attempted to stretch what *Quill* permits by employing novel definitions of physical presence.

---

[52] Wayfair.com: Ordering Information, *supra* note 3.

[53] Wayfair.com Q3 2017 Press Release, *supra* note 21, at 1 (emphasis added).

[54] *See, e.g.*, Matthew Nesto, *Conn. Embarks On Aggressive Effort to Collect Online Tax*, Law360 (Feb. 20, 2018, 6:45 p.m.), https://www.law360.com/articles/1013422/conn-embarks-on-aggressive-effort-to-collect-online-tax.

See, e.g., 830 Mass. Code Regs. 64H1.7 (defining "physical presence" to include, *inter alia*, "the use of in-state software (*e.g.*, 'apps') and ancillary data (*e.g.*, 'cookies') which are distributed to or stored on the computers or other physical communications devices of a vendor's in-state customers"). These approaches are prone to practical and legal challenges.

Even without legislative novelties, the physical-presence requirement provides no certainty. As Justice White recognized in *Quill*, there is no clear standard for what suffices the requirement. 504 U.S. at 330 & n.3. And with the rise of ubiquitous and ultra-personal shopping,[55] the task of ascertaining "physical presence" has only gotten more complicated.

For instance, when absentee retailer MM.LaFleur operated a "pop-up" store in the San Jose Fairmont from February 21 through February 25,[56] was it "physically present" in California? If so, must it collect sales taxes during just those five days, or for the whole year? What about the long tail of online sales that will be generated in future years from the "buzz" of its pop-up store?

What about when MM.LaFleur ships a "bento box" of clothes for a customer to try on, which the customer must decide to keep or return within four days?[57] *Quill* avoided that issue because the North Dakota

---

[55] (R)Tech, *Pressures Driving Industry Change*, http://rtech.org/pressures-driving-industry-change/ (last visited Mar. 2, 2018).

[56] MM.LaFleur, Locations, https://mmlafleur.com/locations (last visited Mar. 1, 2018)

[57] MM.LaFleur, *Start a Bento*, https://mmlafleur.com/bento (last visited Mar. 1, 2018).

courts had assumed that title passed to the customer "when the merchandise was received." 504 U.S. at 302 n.1. But if state law holds that the seller retains title until the return period ends, is the "bento box" sufficient physical presence?

In late 2012, Warby Parker—a primarily-online retailer—sent a merchandise-laden bus on a 4,350-mile trip to "bring [its] showroom experience" to "nine cities ... across the country."[58] Was Warby Parker "physically present" in those nine cities? Or was its bus analogous to a semi-trailer carrying Wayfair's products? If it was physically present in States where it stopped, what about States it merely crossed? Does it matter that Warby Parker drummed up sales by advertising the physical presence of its bus and employees even in locations where they never set up shop?[59]

Given these uncertainties, the physical-presence requirement has the harshness of Draconian law but not the stability. *Quill* was thus wrong when it concluded that the "artificiality" of the physical-presence requirement would be "more than offset by the benefits of a clear rule." 504 U.S. at 315. The physical-presence requirement does not, in today's retail economy, "firmly establish[] the boundaries of legitimate state authority to impose a duty to collect sales and use taxes" or "reduce[d] litigation concerning those taxes."

---

[58] Warby Parker, *The Warby Parker Class* Trip, https://blog.warbyparker.com/the-warby-parker-class-trip/ (last visited Mar. 1, 2018).

[59] E.g., Warby Parker, *Fourteen Hours in New* Orleans, https://blog.warbyparker.com/fourteen-hours-in-new-orleans/ (last visited Mar. 1, 2018).

Id. To the contrary, the porous, shifting, and artificial boundaries imposed by *Quill* on state taxing authority have given rise to litigation in Alabama, Colorado, Indiana, Massachusetts, South Carolina, Tennessee, and Wyoming,[60] with more sure to come.

In short, the physical-presence requirement does not prevent legislative confusion, litigative expense, or business uncertainty. It merely gives absentee retailers an unfair and misleading tax advantage. However fervently absentee retailers want to preserve that advantage, it is not a desire this Court should gratify. Instead, this Court should expressly recognize that the "economic presence" standard of South Dakota's law passes constitutional muster.

IV. THE COURT SHOULD NOT EXPECT CONGRESS TO CORRECT THE CONSTITUTIONAL ERROR OF *BELLAS HESS* AND *QUILL*

The Court should not repeat the *Quill* majority's decision to retain the physical-presence requirement, despite the requirement's being "inconsistent with our Commerce Clause jurisprudence," on the theory that "Congress has the ultimate power to resolve" it. 504 U.S. at 318. The *legal* question before this Court—about the Constitution's default allocation of sales-taxing power between the States and Congress—is different from the *political* question that an e-commerce tax bill would put before Congress. The

---

[60] *See* Retail Litigation Center, *eFairness Litigation: Leveling the Playing* Field, http://www.rila.org/enterprise/retaillitigationcenter/efairnesslitigation/Pages/eFairness%20Litigation.aspx (last visited Mar. 1, 2018).

legal question can, and must, be answered by this Court.

Until then, the legal answer provided in the past by *Bellas Hess* and *Quill* will continue to exert outsized influence on the political process. With the physical-presence requirement in place, Congress now must decide whether to pass legislation that could be misinterpreted as levying taxes on a popular "realm of commercial activity that [appears] free from interstate taxation." *Quill*, 504 U.S. at 315. Even if Congress would never consider stripping States of their authority to impose sales-tax-collection duties on highly economically active, but physically absent, retailers, it may nevertheless be reluctant to pass legislation undoing the effects of *Bellas Hess*. A political soundbite cannot capture the benefits of federalism and the distinction between requiring retailers to *collect* taxes and requiring customers to *pay* taxes in the face of simplistic assertions of a "tax hike" on e-commerce.

As this Court has recognized, "it is hard to see how the judiciary can wash its hands of a problem it created." *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008). "[I]n the absence of congressional action[,] this Court has prescribed the rules which determine the power of states to tax interstate traffic, and therefore [this Court] should alter these rules if necessary." *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546 (1950), *abrogated on other grounds by Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990). "[W]hen we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2426 (2014) (Thomas, J., concurring in the judgment). And where the Court

has intervened in interstate commerce with a "fixed" judge-made rule, it has the obligation to intervene again to correct that rule if it is no longer consistent with "economic realit[y]." *See Khan*, 522 U.S. at 21.

Correcting a misinterpretation of the Commerce Clause is the proper role of the Court, not Congress, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

CONCLUSION

The Court should uphold South Dakota's law and eliminate the physical-presence requirement.

Respectfully submitted,

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
donald.verrilli@mto.com
(202) 220-1100

MARK R. YOHALEM
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, California 90071

MARCH 5, 2018

No. 17-494

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,
Petitioner,

–v–

WAYFAIR, INC., OVERSTOCK.COM, INC.,
and NEWEGG, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF AMICUS CURIAE SOUTH DAKOTA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

WILLIAM M. VAN CAMP
COUNSEL FOR AMICUS CURIAE
OLINGER, LOVALD, MCCAHREN,
VAN CAMP & KONRAD, P.C.
117 E. CAPITOL AVENUE
P.O. BOX 66
PIERRE, SD 57501
(605) 224-8851
BVANCAMP@OLINGERLAW.NET

MARCH 2, 2018

SUPREME COURT PRESS • (888) 958-5705 • BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 3

REASONS FOR PETITIONERS REQUEST OF RELIEF 6

I. COMPETITIVE DISADVANTAGE 6

II. WEAKNESS IN SALES TAX REVENUES 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Direct Market Association v. Brohl,
135 S.Ct. 1124 (2015) 5, 7, 12

Quill Corporation v. North Dakota,
112 S.Ct. 1904 (1992) ..... passim

South Dakota v. Wayfair, Inc.,
2017 WL 4051554 (SD 2017) 2, 9, 11

STATUTES

S.D.C.L. § 10-45 4

S.D.C.L. § 10-45-27.3 2

S.D.C.L. § 10-46 *et seq* 4

S.D.C.L. § 10-52 4

S.D.C.L. § 10-64, *et seq* 3

S.D.C.L. § 10-64-1(1) 11

S.D.C.L. § 10-64-1(2) 12

S.D.C.L. § 10-64-1(4) 12

S.D.C.L. § 10-64-2 4

South Dakota SL, Chapter 70, § 9 12

JUDICIAL RULES

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Aaron Smith and Monica Anderson
"Online Shopping and E-Commerce."
PEW RESEARCH CENTER, December 19, 2016 ..... 6, 7

Brian Baugh, et al.,
"Can Taxes Shape an Industry? Evidence from The Implementation of the 'Amazon Tax'" OHIO STATE UNIVERSITY. FISHER COLLEGE OF BUSINESS, January 2018 8

Deloitte, LLP,
2017 Holiday Survey, October 24, 2017 7

Kelly Phillips Erb.,
"Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" FORBES, March 27, 2017 4

Letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee Interim Meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17letter-torevenuedoc2.pdf 10

National Retail Federation,
"National Retail Federation estimates 8-12% US e-commerce growth in 2017."
BUSINESS INSIDER, February 10, 2017 7

South Dakota Comprehensive Annual Financial Report for Fiscal Year Ending June 30, 2016 10

TABLE OF AUTHORITIES—Continued

Page

South Dakota Department of Revenue Presentation to the Interim Joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf 3

South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June, 2016. http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf 5

US Department of Commerce, "Quarterly Retail E-Commerce Sales", August 17, 2017 7

INTEREST OF AMICUS CURIAE[1]

The South Dakota Retailers Association ("SDRA") was founded in 1897 as the South Dakota retail Merchants Association. Eighty-five business owners joined together in the summer of that year to draft a constitution and bylaws for the organization. Today, SDRA exceeds 4,000 members and ranks as one of the largest retail associations in the nation. The members of SDRA operate in over 160 categories of business from single location mom and pop businesses with no employees to multi-unit operations with a national and global reach.

The charter members of SDRA agreed that their aim was to improve and increase the business being done by the merchants of South Dakota. Interestingly, membership was not allowed for catalog houses or anyone doing business with catalog houses as such activities were seen at that early date as a challenge to the retail businesses of South Dakota.

Since its founding days SDRA has maintained that the retailers of South Dakota are not afraid of competition but argue it ought to be fair competition. The July 7, 1897, report of the SDRA's Committee on Press stated:

---

[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

> . . . the merchants of this association are not afraid of competition and do not wish the impression to go forth through the Press of the state that they are endeavoring to secure any legislation which will work to the detriment or disadvantage of any class.

In a 1935 preconvention newsletter W.C. Botkin, the Secretary of SDRA at the time, noted that "(t)he small business enterprise is today the most important business unit. It is the backbone of this nation and mainstay of the community, be it large or small . . . "

The issue presented to the Court by the Petitioner is not a new one to SDRA. Continuing the fight for South Dakota retailers in June 1937 the SDRA board resolved:

> . . . in as much as a measure is now before our national congress, which would compel the collection of sales tax by chain stores and mail order houses, without the state in which the consumer lives and compel a remittance of these sales taxes to the federal government with a return to the state of consumer residence; we ask our South Dakota congressional members to work toward enactment of this law, and that they be advised by our Secretary.

Today, "(s)ellers selling merchandise in South Dakota have an obligation to collect and remit sales tax on each transaction to the [South Dakota] Department of Revenue." SDCL § 10-45-27.3 *South Dakota v. Wayfair, Inc.*, 2017 WL 4051554 (SD 2017).

As a result of *Quill Corporation v. North Dakota*, 112 S.Ct. 1904 (1992), an online retailer without a physical presence in the State of South Dakota is not required to collect or remit sales tax from a South Dakota consumer or customer. For the reason of this disparity, SDRA has a substantial interest in the Court's review of the decision below. The economic playing field for the members of SDRA is not level versus our internet brethren. Overturning *Quill* as the Petitioner seeks is an important step to allow for fair competition amongst all businesses selling to South Dakotans.

INTRODUCTION

It should be noted that over 100 online retailers are voluntarily collecting and remitting sales tax on transactions with South Dakota consumers as a result of the 2016 legislation which led to this appeal.[2] *See*, SDCL § 10-64, *et seq.* This voluntary compliance takes away any argument the Respondent would make on the difficulty of such collection and remission.

Online retailers who have sales of under one hundred thousand dollars per year or do not have two hundred or more transactions with South Dakota customers per year do not have to collect and remit

---

[2] South Dakota Department of Revenue presentation to the interim joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf

sales tax. SDCL § 10-64-2.[3] A South Dakota retailer has no break from sales tax collection and remission based on its online sales.

If an internet retailer without a physical presense in the state chooses not to collect and remit sales tax, a South Dakota consumer is required under SDCL § 10-46 *et seq.* to submit and pay use tax for items purchased online. By *Quill* allowing online retailers to avoid the requirement of collecting sales tax from the consumer, a result has been stagnant sales tax growth in the State of South Dakota even as internet commerce continues to increase. Most consumers, frankly, do not know use taxes may be owed with online purchases. *See*, Kelly Phillips Erb., "Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" FORBES, March 27, 2017.[4] This Court is well aware of

---

[3] SDCL § 10-64-2 states: "Certain sellers located outside of state required to collect and remit sales taxes—Criteria. Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year: (1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions."

[4] Citing as evidence that use tax payments do not keep pace with sales a 2015 International Council of Shopping Centers

the fact that use tax is often not reported and paid by the consuming public. As Justice Thomas stated, "voluntary compliance with the latter requirement (use tax) is relatively low, leading to a significant loss of tax revenue, especially as internet retailers have increasingly displaced their brick-and-mortar kin." *Direct Market Association v. Brohl*, 135 S.Ct. 1124, 1127 (2015).

In attempting to obtain what is owed as use tax, the State of South Dakota issues a use tax information packet decrying "it's a matter of fairness." *See*, South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June, 2016.[5] http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf.

---

poll that found 62% of registered voters were not aware that use taxes were payable with online purchases.

[5] The document states in part, "It's a matter of fairness . . . . With the ease of purchasing over the Internet, online sales have exploded over the years and are increasing every year. Main street businesses, the ones who employ our citizens, pay property tax and support local organizations, are at a 6.5% competitive disadvantage since most out-of-state businesses are not required to pay tax in a state where they have no physical presence. It becomes the purchaser's responsibility to pay the use tax that is due." *Id.*

REASONS FOR PETITIONERS REQUEST OF RELIEF

I. COMPETITIVE DISADVANTAGE

Selling and buying a product in the rural South Dakota marketplace is difficult. South Dakota is a state with a population of 865,454 (2016 estimate)[6] ranking it 46 amongst 50 yet it is 17 amongst 50 in geographical size.[7] With the cost of a good sold in South Dakota subject to the collection of sales tax adding as much as six and one-half percent to the cost of an item versus an identical item sold online, the unfair business advantage of the e-commerce company not collecting and remitting sales tax is obvious. Logic dictates that consumers will buy the less expensive item if they are in fact the same item.[8]

Internet sales nationally, and by logical extension in South Dakota, have continued to grow at a rate much higher than retail industry sales as a whole. *See*, "National Retail Federation estimates 8-12% US e-commerce growth in 2017." BUSINESS INSIDER, Febru-

---

[6] US Census Bureau, Annual Estimates of Resident Population for the United States Region, States and Puerto Rico: April 1, 2010 to July 1, 2015.

[7] US Census Bureau, State Area Measurements (2010).

[8] Not surprisingly, in a Pew Research Survey, when asked, 65% of online consumers stated they would make a purchase based on price in looking at a purchase being made online or in a physical store. *See*, "Online Shopping and E-Commerce." PEW RESEARCH CENTER, at 8, December 19, 2016.

ary 10, 2017.[9] According to the US Department of Commerce, e-commerce sales in the second quarter of 2017 increased 16.2% from the second quarter of 2016. *See*, US Department of Commerce Quarterly Retail E-Commerce Sales, August 17, 2017. Total retail sales increased only 4.1% in the same period. *Id.* In a recent survey by Deloitte, LLP, consumers in 2017 for the first time expected the majority of their holiday spending to occur online. *See*, Deloitte, LLP, 2017 Holiday Survey, at 17, October 24, 2017.

The PEW RESEARCH CENTER, in a June 2000 survey, reported that 22% of Americans indicated they had purchased items online. By 2016 that number had risen to 79% of Americans. PEW RESEARCH CENTER, December 19, 2016, Online Shopping and E-Commerce, at 5. Strikingly, 90% of 18 to 29-year old's buy items online with 77% of them having used their phones to do so. PEW RESEARCH CENTER, December 19, 2016, Online Shopping and E-Commerce, at 6.

Justice Kennedy recognized in his concurrence in *Brohl*, that there is an "unfairness to local retailers and their customers who do not pay taxes at the registers" as a result of e-commerce transactions not subject to point of sales tax collection. *Brohl*, Kennedy concurring at 1135. This avoidance of tax collection in the e-commerce sphere, the outgrowth of *Quill*, causes, "extreme harm and unfairness to the States." *Brohl*, Kennedy concurring at 1134.

---

[9] Citing the National Retail Federation, which expects online retail to grow 8-12% for 2017, which may be up to three times higher than the retail industry in general.

The impact on the ability to sell an item at a competitive advantage due to a lack of sales tax was shown by a recent Ohio State University study analyzing the impact of what it termed the "Amazon tax". Brian Baugh, et al., "Can Taxes Shape an Industry? Evidence from The Implementation of the 'Amazon Tax'" OHIO STATE UNIVERSITY. FISHER COLLEGE OF BUSINESS, January 2018. The survey looked at Amazon purchasing trends done in states in 2012 through 2014 when states began imposing sales tax on sales through Amazon's website due to the company having a physical presence in those 19 states. The study concluded that the imposition of a sales tax on those Amazon transactions made Amazon products less competitive. *Id.* at 7, 23. Looking at transaction data, based on over 275,000 households, the study concludes that Amazon sales fell in the study by 9.4% after implementation of what it termed the Amazon tax. *Id.* at 24. This effect was greater among large purchases in excess of $250.00 which saw a drop of 29.1% after implementation of the Amazon tax. *Id.* Interestingly, the survey did find a sales increase in competitors such as Newegg, who did not collect and remit sales tax, and which saw an average increase in its sales of 13%. *Id.* at 4.

Local retailers are the life blood and bedrock of the communities they serve. Moreover, they provide donations of money and goods for the 4-H rodeo, little league teams, individuals or families with catastrophic needs, and the volunteer fire department just to name a few. Brick and mortar retailers refer to it as sidewalk rent. Remote sellers do not experience this. They are truly remote in every sense of the word. These online-only retailers are removed from the communities they

sell goods into. The disconnect is large: *Wayfair*, Overstock, Newegg and their ilk reap the benefits of sales in these communities but have none of the community responsibility held by brick and mortar. This is a sentiment SDRA has maintained since its founding. In a May 9, 1935 letter from Floyd B. Johnson, President of Johnson & Company, and published in the SDRA's June 1935 preconvention newsletter, he stated:

> Picture, if you please, a good thriving small town in South Dakota, and what you will find—a local bakery, shoe store, men's and boy's clothing store, ladies' dry goods and ready to wear store, several grocery stores, a millinery shop, etc., etc. Every one doing business with his friend or neighbor and at a profit. The result is good business, good schools, good streets, and good future for the whole community. On the other hand, suppose you bought your bread out of town and your merchandise from the catalogues of chain affiliates, penitentiaries, or the East, and your customers bought their goods from chain stores and mail order houses. Perfection in this would result in no business, poor schools, streets, and no future or opportunity for any in the whole community.

The very jobs that retailers create in South Dakota face the competitive disadvantage our businesses deal with in the *Quill* environment. Lower sales due to an unfair tax advantage can only translate to fewer small businesses in South Dakota and therefore fewer jobs available, as well as fewer dollars for civic and charitable projects.

II. WEAKNESS IN SALES TAX REVENUES

A weakness in the growth of sales tax revenues has forced the regulatory authorities in the State of South Dakota to increase their audit activities and efforts at collecting sales and use taxes. With slowing sales tax revenues, the State necessarily must step up its enforcement efforts of businesses that it can regulate and audit to seek out taxes that have not been remitted and may be owed to the State of South Dakota. *See*, Letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee interim meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17letter-torevenuedoc2.pdf. Such efforts bring additional audit risks and costs for SDRA members. Such risks and costs are avoided by online sellers due to *Quill*.

For the fiscal years 2014, 2015 and 2016, the State of South Dakota saw a year over year average increase in sales tax revenues of 1.80 percent.[10] What is interesting in these statistics is that the retail trade industry in South Dakota represents approximately 38% of the reporting filers in the fiscal year ending 2016. But that 38% represents a disproportionately large 52.66% of the taxable sales. *Id.* at 180.

This experience in South Dakota, as witnessed in sales tax collections, clearly does not meet with or

---

[10] *See*, South Dakota Comprehensive Annual Financial Report for fiscal year ending June 30, 2016, at 176. For the year ending June 30, 2014 sales tax revenues were $858,001,000. For the year ending June 30, 2015, they were $871,402,000. For 2016 they were $905,475,000.

coincide with the continued online sales growth. *See* above at 6. Rather, it clearly points to the problem of tax receipts not capturing the growth in internet sales.

Andy Gerlach, the current Secretary of Revenue in the State of South Dakota, acknowledging the problem stated, "Obviously e-commerce is becoming more important every day . . . you see the stores that have closed or downsized . . . if you can't tax e-commerce, it is going to continue to erode the taxes your state is going to take in. We need a tax policy that keeps up with that." Elain S. Povich "With Online Sales Booming, State Struggle to Capture Sales Tax." *The Pew Charitable Trusts-Stateline*, May 22, 2017.

The South Dakota Supreme Court recognized that "South Dakota has no state income tax and relies on retail sales and use tax for much of its revenue . . . (and) (a)s internet sales by these sellers (e-commerce) have risen, state revenues have decreased." *South Dakota v. Wayfair*, 2017 WL 4051554 (SD 2017). The South Dakota Legislature found in 2016 that:

> The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;[11] (t)he harm from the loss of revenue is especially grievous in South Dakota because the State has no income tax, and

---

[11] SDCL § 10-64-1(1).

> sales and use tax revenues are essential in funding state and local services;[12] and (t)he structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.[13]

The South Dakota Legislature further stated that "whereas, this act (SD Senate Bill 106) is necessary for the support of the State government and its existing public institutions, an emergency is hereby declared to exist."[14]

Again, this out flight of unattainable tax revenue due to the increase of e-commerce sales has, as was pointed out by Justice Kennedy, hurt the states. "*Quill* now harms states to a degree far greater than could have been anticipated earlier." *Brohl*, Kennedy concurring at 1135.

As is often the case, your argument is sometimes best made by your opponent. In a press release opposing the market place fairness act, an effort to bring legislation overturning the physical presence requirement found in *Quill*, the National Taxpayers Union ("NTU") stated that for the ten years following 2015, the implementation of such legislation could amount to $340 Billion in additional taxes collected. Douglas Kellogg. NTU press release, October 31, 2014. In a

---

[12] SDCL § 10-64-1(2).

[13] SDCL § 10-64-1(4).

[14] South Dakota SL, 2016, Chapter 70, Section 9, eff. May 1, 2016.

similar release by NTU in June of 2015, the Executive Vice President of NTU commented that consumers would be required, if similar legislation passed, to pay "hundreds of billions of dollars in additional sales tax . . ." Douglas Kellogg. NTU press release, June 15, 2015. Obviously, these additional taxes are simply the amounts that should be captured by use tax and are due and owing the states where the consumers live, work and buy products online. These revenues (taxes) escape collection at the State level due to *Quill's* physical presence test. It is time for that to change.

CONCLUSION

For these reasons, and those stated by the Petitioner, SDRA urges the Court to grant the relief requested by the Petitioner and overturn *Quill.*

Respectfully submitted,

WILLIAM M. VAN CAMP
COUNSEL FOR AMICUS CURIAE
OLINGER, LOVALD, MCCAHREN,
VAN CAMP & KONRAD, P.C.
117 E. CAPITOL AVENUE
P.O. BOX 66
PIERRE, SD 57501
(605) 224-8851
BVANCAMP@OLINGERLAW.NET

MARCH 2, 2018

No. 17-494

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,
Petitioner,

–v–

WAYFAIR, INC., OVERSTOCK.COM, INC., and NEWEGG, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF AMICUS CURIAE SOUTH DAKOTA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

WILLIAM M. VAN CAMP
COUNSEL FOR AMICUS CURIAE
OLINGER, LOVALD, MCCAHREN, VAN CAMP & KONRAD, P.C.
117 E. CAPITOL AVENUE
P.O. BOX 66
PIERRE, SD 57501
(605) 224-8851
BVANCAMP@OLINGERLAW.NET

MARCH 2, 2018

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 3

REASONS FOR PETITIONERS REQUEST OF RELIEF 6

I. COMPETITIVE DISADVANTAGE 6

II. WEAKNESS IN SALES TAX REVENUES 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Direct Market Association v. Brohl,
135 S.Ct. 1124 (2015) 5, 7, 12

Quill Corporation v. North Dakota,
112 S.Ct. 1904 (1992) ..... passim

South Dakota v. Wayfair, Inc.,
2017 WL 4051554 (SD 2017) 2, 9, 11

STATUTES

S.D.C.L. § 10-45 4

S.D.C.L. § 10-45-27.3 2

S.D.C.L. § 10-46 *et seq* 4

S.D.C.L. § 10-52 4

S.D.C.L. § 10-64, *et seq* 3

S.D.C.L. § 10-64-1(1) 11

S.D.C.L. § 10-64-1(2) 12

S.D.C.L. § 10-64-1(4) 12

S.D.C.L. § 10-64-2 4

South Dakota SL, Chapter 70, § 9 12

JUDICIAL RULES

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Aaron Smith and Monica Anderson
"Online Shopping and E-Commerce."
PEW RESEARCH CENTER, December 19, 2016 ..... 6, 7

Brian Baugh, et al.,
"Can Taxes Shape an Industry? Evidence from The Implementation of the 'Amazon Tax'" OHIO STATE UNIVERSITY. FISHER COLLEGE OF BUSINESS, January 2018 8

Deloitte, LLP,
2017 Holiday Survey, October 24, 2017 7

Kelly Phillips Erb.,
"Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" FORBES, March 27, 2017 4

Letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee Interim Meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17letter-torevenuedoc2.pdf 10

National Retail Federation,
"National Retail Federation estimates 8-12% US e-commerce growth in 2017."
BUSINESS INSIDER, February 10, 2017 7

South Dakota Comprehensive Annual Financial Report for Fiscal Year Ending June 30, 2016 10

TABLE OF AUTHORITIES—Continued

Page

South Dakota Department of Revenue Presentation to the Interim Joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf 3

South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June, 2016. http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf 5

US Department of Commerce, "Quarterly Retail E-Commerce Sales", August 17, 2017 7

INTEREST OF AMICUS CURIAE[1]

The South Dakota Retailers Association ("SDRA") was founded in 1897 as the South Dakota retail Merchants Association. Eighty-five business owners joined together in the summer of that year to draft a constitution and bylaws for the organization. Today, SDRA exceeds 4,000 members and ranks as one of the largest retail associations in the nation. The members of SDRA operate in over 160 categories of business from single location mom and pop businesses with no employees to multi-unit operations with a national and global reach.

The charter members of SDRA agreed that their aim was to improve and increase the business being done by the merchants of South Dakota. Interestingly, membership was not allowed for catalog houses or anyone doing business with catalog houses as such activities were seen at that early date as a challenge to the retail businesses of South Dakota.

Since its founding days SDRA has maintained that the retailers of South Dakota are not afraid of competition but argue it ought to be fair competition. The July 7, 1897, report of the SDRA's Committee on Press stated:

---

[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

> . . . the merchants of this association are not afraid of competition and do not wish the impression to go forth through the Press of the state that they are endeavoring to secure any legislation which will work to the detriment or disadvantage of any class.

In a 1935 preconvention newsletter W.C. Botkin, the Secretary of SDRA at the time, noted that "(t)he small business enterprise is today the most important business unit. It is the backbone of this nation and mainstay of the community, be it large or small . . . "

The issue presented to the Court by the Petitioner is not a new one to SDRA. Continuing the fight for South Dakota retailers in June 1937 the SDRA board resolved:

> . . . in as much as a measure is now before our national congress, which would compel the collection of sales tax by chain stores and mail order houses, without the state in which the consumer lives and compel a remittance of these sales taxes to the federal government with a return to the state of consumer residence; we ask our South Dakota congressional members to work toward enactment of this law, and that they be advised by our Secretary.

Today, "(s)ellers selling merchandise in South Dakota have an obligation to collect and remit sales tax on each transaction to the [South Dakota] Department of Revenue." SDCL § 10-45-27.3 *South Dakota v. Wayfair, Inc.*, 2017 WL 4051554 (SD 2017).

As a result of *Quill Corporation v. North Dakota*, 112 S.Ct. 1904 (1992), an online retailer without a physical presence in the State of South Dakota is not required to collect or remit sales tax from a South Dakota consumer or customer. For the reason of this disparity, SDRA has a substantial interest in the Court's review of the decision below. The economic playing field for the members of SDRA is not level versus our internet brethren. Overturning *Quill* as the Petitioner seeks is an important step to allow for fair competition amongst all businesses selling to South Dakotans.

INTRODUCTION

It should be noted that over 100 online retailers are voluntarily collecting and remitting sales tax on transactions with South Dakota consumers as a result of the 2016 legislation which led to this appeal.[2] *See*, SDCL § 10-64, *et seq.* This voluntary compliance takes away any argument the Respondent would make on the difficulty of such collection and remission.

Online retailers who have sales of under one hundred thousand dollars per year or do not have two hundred or more transactions with South Dakota customers per year do not have to collect and remit

---

[2] South Dakota Department of Revenue presentation to the interim joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf

sales tax. SDCL § 10-64-2.[3] A South Dakota retailer has no break from sales tax collection and remission based on its online sales.

If an internet retailer without a physical presense in the state chooses not to collect and remit sales tax, a South Dakota consumer is required under SDCL § 10-46 *et seq.* to submit and pay use tax for items purchased online. By *Quill* allowing online retailers to avoid the requirement of collecting sales tax from the consumer, a result has been stagnant sales tax growth in the State of South Dakota even as internet commerce continues to increase. Most consumers, frankly, do not know use taxes may be owed with online purchases. *See*, Kelly Phillips Erb., "Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" FORBES, March 27, 2017.[4] This Court is well aware of

---

[3] SDCL § 10-64-2 states: "Certain sellers located outside of state required to collect and remit sales taxes—Criteria. Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year: (1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions."

[4] Citing as evidence that use tax payments do not keep pace with sales a 2015 International Council of Shopping Centers

the fact that use tax is often not reported and paid by the consuming public. As Justice Thomas stated, "voluntary compliance with the latter requirement (use tax) is relatively low, leading to a significant loss of tax revenue, especially as internet retailers have increasingly displaced their brick-and-mortar kin." *Direct Market Association v. Brohl*, 135 S.Ct. 1124, 1127 (2015).

In attempting to obtain what is owed as use tax, the State of South Dakota issues a use tax information packet decrying "it's a matter of fairness." *See*, South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June, 2016.[5] http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf.

---

poll that found 62% of registered voters were not aware that use taxes were payable with online purchases.

[5] The document states in part, "It's a matter of fairness .... With the ease of purchasing over the Internet, online sales have exploded over the years and are increasing every year. Main street businesses, the ones who employ our citizens, pay property tax and support local organizations, are at a 6.5% competitive disadvantage since most out-of-state businesses are not required to pay tax in a state where they have no physical presence. It becomes the purchaser's responsibility to pay the use tax that is due." *Id.*

REASONS FOR PETITIONERS REQUEST OF RELIEF

I. COMPETITIVE DISADVANTAGE

Selling and buying a product in the rural South Dakota marketplace is difficult. South Dakota is a state with a population of 865,454 (2016 estimate)[6] ranking it 46 amongst 50 yet it is 17 amongst 50 in geographical size.[7] With the cost of a good sold in South Dakota subject to the collection of sales tax adding as much as six and one-half percent to the cost of an item versus an identical item sold online, the unfair business advantage of the e-commerce company not collecting and remitting sales tax is obvious. Logic dictates that consumers will buy the less expensive item if they are in fact the same item.[8]

Internet sales nationally, and by logical extension in South Dakota, have continued to grow at a rate much higher than retail industry sales as a whole. *See*, "National Retail Federation estimates 8-12% US e-commerce growth in 2017." BUSINESS INSIDER, Febru-

---

[6] US Census Bureau, Annual Estimates of Resident Population for the United States Region, States and Puerto Rico: April 1, 2010 to July 1, 2015.

[7] US Census Bureau, State Area Measurements (2010).

[8] Not surprisingly, in a Pew Research Survey, when asked, 65% of online consumers stated they would make a purchase based on price in looking at a purchase being made online or in a physical store. *See*, "Online Shopping and E-Commerce." PEW RESEARCH CENTER, at 8, December 19, 2016.

ary 10, 2017.[9] According to the US Department of Commerce, e-commerce sales in the second quarter of 2017 increased 16.2% from the second quarter of 2016. *See*, US Department of Commerce Quarterly Retail E-Commerce Sales, August 17, 2017. Total retail sales increased only 4.1% in the same period. *Id.* In a recent survey by Deloitte, LLP, consumers in 2017 for the first time expected the majority of their holiday spending to occur online. *See*, Deloitte, LLP, 2017 Holiday Survey, at 17, October 24, 2017.

The PEW RESEARCH CENTER, in a June 2000 survey, reported that 22% of Americans indicated they had purchased items online. By 2016 that number had risen to 79% of Americans. PEW RESEARCH CENTER, December 19, 2016, Online Shopping and E-Commerce, at 5. Strikingly, 90% of 18 to 29-year old's buy items online with 77% of them having used their phones to do so. PEW RESEARCH CENTER, December 19, 2016, Online Shopping and E-Commerce, at 6.

Justice Kennedy recognized in his concurrence in *Brohl*, that there is an "unfairness to local retailers and their customers who do not pay taxes at the registers" as a result of e-commerce transactions not subject to point of sales tax collection. *Brohl*, Kennedy concurring at 1135. This avoidance of tax collection in the e-commerce sphere, the outgrowth of *Quill*, causes, "extreme harm and unfairness to the States." *Brohl*, Kennedy concurring at 1134.

---

[9] Citing the National Retail Federation, which expects online retail to grow 8-12% for 2017, which may be up to three times higher than the retail industry in general.

The impact on the ability to sell an item at a competitive advantage due to a lack of sales tax was shown by a recent Ohio State University study analyzing the impact of what it termed the "Amazon tax". Brian Baugh, et al., "Can Taxes Shape an Industry? Evidence from The Implementation of the 'Amazon Tax'" OHIO STATE UNIVERSITY. FISHER COLLEGE OF BUSINESS, January 2018. The survey looked at Amazon purchasing trends done in states in 2012 through 2014 when states began imposing sales tax on sales through Amazon's website due to the company having a physical presence in those 19 states. The study concluded that the imposition of a sales tax on those Amazon transactions made Amazon products less competitive. *Id.* at 7, 23. Looking at transaction data, based on over 275,000 households, the study concludes that Amazon sales fell in the study by 9.4% after implementation of what it termed the Amazon tax. *Id.* at 24. This effect was greater among large purchases in excess of $250.00 which saw a drop of 29.1% after implementation of the Amazon tax. *Id.* Interestingly, the survey did find a sales increase in competitors such as Newegg, who did not collect and remit sales tax, and which saw an average increase in its sales of 13%. *Id.* at 4.

Local retailers are the life blood and bedrock of the communities they serve. Moreover, they provide donations of money and goods for the 4-H rodeo, little league teams, individuals or families with catastrophic needs, and the volunteer fire department just to name a few. Brick and mortar retailers refer to it as sidewalk rent. Remote sellers do not experience this. They are truly remote in every sense of the word. These online-only retailers are removed from the communities they

sell goods into. The disconnect is large: *Wayfair*, Overstock, Newegg and their ilk reap the benefits of sales in these communities but have none of the community responsibility held by brick and mortar. This is a sentiment SDRA has maintained since its founding. In a May 9, 1935 letter from Floyd B. Johnson, President of Johnson & Company, and published in the SDRA's June 1935 preconvention newsletter, he stated:

> Picture, if you please, a good thriving small town in South Dakota, and what you will find—a local bakery, shoe store, men's and boy's clothing store, ladies' dry goods and ready to wear store, several grocery stores, a millinery shop, etc., etc. Every one doing business with his friend or neighbor and at a profit. The result is good business, good schools, good streets, and good future for the whole community. On the other hand, suppose you bought your bread out of town and your merchandise from the catalogues of chain affiliates, penitentiaries, or the East, and your customers bought their goods from chain stores and mail order houses. Perfection in this would result in no business, poor schools, streets, and no future or opportunity for any in the whole community.

The very jobs that retailers create in South Dakota face the competitive disadvantage our businesses deal with in the *Quill* environment. Lower sales due to an unfair tax advantage can only translate to fewer small businesses in South Dakota and therefore fewer jobs available, as well as fewer dollars for civic and charitable projects.

II. WEAKNESS IN SALES TAX REVENUES

A weakness in the growth of sales tax revenues has forced the regulatory authorities in the State of South Dakota to increase their audit activities and efforts at collecting sales and use taxes. With slowing sales tax revenues, the State necessarily must step up its enforcement efforts of businesses that it can regulate and audit to seek out taxes that have not been remitted and may be owed to the State of South Dakota. *See*, Letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee interim meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17letter-torevenuedoc2.pdf. Such efforts bring additional audit risks and costs for SDRA members. Such risks and costs are avoided by online sellers due to *Quill*.

For the fiscal years 2014, 2015 and 2016, the State of South Dakota saw a year over year average increase in sales tax revenues of 1.80 percent.[10] What is interesting in these statistics is that the retail trade industry in South Dakota represents approximately 38% of the reporting filers in the fiscal year ending 2016. But that 38% represents a disproportionately large 52.66% of the taxable sales. *Id.* at 180.

This experience in South Dakota, as witnessed in sales tax collections, clearly does not meet with or

---

[10] *See*, South Dakota Comprehensive Annual Financial Report for fiscal year ending June 30, 2016, at 176. For the year ending June 30, 2014 sales tax revenues were $858,001,000. For the year ending June 30, 2015, they were $871,402,000. For 2016 they were $905,475,000.

coincide with the continued online sales growth. *See* above at 6. Rather, it clearly points to the problem of tax receipts not capturing the growth in internet sales.

Andy Gerlach, the current Secretary of Revenue in the State of South Dakota, acknowledging the problem stated, "Obviously e-commerce is becoming more important every day . . . you see the stores that have closed or downsized . . . if you can't tax e-commerce, it is going to continue to erode the taxes your state is going to take in. We need a tax policy that keeps up with that." Elain S. Povich "With Online Sales Booming, State Struggle to Capture Sales Tax." *The Pew Charitable Trusts-Stateline*, May 22, 2017.

The South Dakota Supreme Court recognized that "South Dakota has no state income tax and relies on retail sales and use tax for much of its revenue . . . (and) (a)s internet sales by these sellers (e-commerce) have risen, state revenues have decreased." *South Dakota v. Wayfair*, 2017 WL 4051554 (SD 2017). The South Dakota Legislature found in 2016 that:

> The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;[11] (t)he harm from the loss of revenue is especially grievous in South Dakota because the State has no income tax, and

---

[11] SDCL § 10-64-1(1).

> sales and use tax revenues are essential in funding state and local services;[12] and (t)he structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.[13]

The South Dakota Legislature further stated that "whereas, this act (SD Senate Bill 106) is necessary for the support of the State government and its existing public institutions, an emergency is hereby declared to exist."[14]

Again, this out flight of unattainable tax revenue due to the increase of e-commerce sales has, as was pointed out by Justice Kennedy, hurt the states. "*Quill* now harms states to a degree far greater than could have been anticipated earlier." *Brohl*, Kennedy concurring at 1135.

As is often the case, your argument is sometimes best made by your opponent. In a press release opposing the market place fairness act, an effort to bring legislation overturning the physical presence requirement found in *Quill*, the National Taxpayers Union ("NTU") stated that for the ten years following 2015, the implementation of such legislation could amount to $340 Billion in additional taxes collected. Douglas Kellogg. NTU press release, October 31, 2014. In a

---

[12] SDCL § 10-64-1(2).

[13] SDCL § 10-64-1(4).

[14] South Dakota SL, 2016, Chapter 70, Section 9, eff. May 1, 2016.

similar release by NTU in June of 2015, the Executive Vice President of NTU commented that consumers would be required, if similar legislation passed, to pay "hundreds of billions of dollars in additional sales tax . . ." Douglas Kellogg. NTU press release, June 15, 2015. Obviously, these additional taxes are simply the amounts that should be captured by use tax and are due and owing the states where the consumers live, work and buy products online. These revenues (taxes) escape collection at the State level due to *Quill's* physical presence test. It is time for that to change.

CONCLUSION

For these reasons, and those stated by the Petitioner, SDRA urges the Court to grant the relief requested by the Petitioner and overturn *Quill.*

Respectfully submitted,

WILLIAM M. VAN CAMP
COUNSEL FOR AMICUS CURIAE
OLINGER, LOVALD, MCCAHREN,
VAN CAMP & KONRAD, P.C.
117 E. CAPITOL AVENUE
P.O. BOX 66
PIERRE, SD 57501
(605) 224-8851
BVANCAMP@OLINGERLAW.NET

MARCH 2, 2018

17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

On Writ of Certiorari
to the South Dakota Supreme Court

BRIEF FOR *AMICUS CURIAE* STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER

R. BRUCE JOHNSON
R. BRUCE JOHNSON, LLC
2342 East Wrenhaven Lane
Holladay, Utah 84121
(801) 558-4128
rbrucejohnson@outlook.com

LAURA K. MCNALLY
Counsel of Record
ANDREW R. DEVOOGHT
LOEB & LOEB LLP
321 N. Clark Street
Suite 2300
Chicago, IL 60654
(312) 464-3155
lmcnally@loeb.com

Counsel for Amicus Curiae

17-494

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

BRIEF FOR AMICUS CURIAE STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER 1

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

The Streamlined Sales and Use Tax Agreement Has Eliminated Any Undue Burden on Interstate Commerce 7

A. The Practical Burdens of Compliance Formed the Foundations of *Bellas Hess* and *Quill*. 7

B. The Streamlined States Have Eliminated Any Undue Burdens On Sellers. 8

1. State and Local Taxes Are Administered at the State Level 10

2. Tax Rates Are Standardized at the State Level 10

3. Exemptions Are Standardized at the State Level 11

4. State and Local Tax Bases Are Standardized 12

5. Administrative Requirements Are Standardized Across All Member States 12

a. Uniform Definitions 12

b. Simplified Electronic Returns 13
c. Centralized Registration..... 13
d. Other Uniform Procedures 14
6. Certified Service Providers Are Made Available to Remote Sellers at No Charge ... 14
C. *Stare Decisis* Provides An Insufficient Basis to Uphold Obsolete Precedent..... 15
CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015), (Kennedy, J., concurring) 4, 16

National Bellas Hess v. Department of Revenue of Illinois, 386 U.S. 753 (1967) 3, 4, 5, 7, 8, 9, 10, 12, 15

Quill v. North Dakota, 504 U.S. 298 (1992) 3, 4, 5, 6, 7, 8, 9, 15, 16

Other Authorities

CONTRACT BETWEEN STREAMLINED SALES TAX GOVERNING BOARD, INC. AND THE CERTIFIED SERVICE PROVIDERS, *available at* http://tinyurl.com/CSPContract 5, 15

STREAMLINED STATES STATUS MAP 01-01-17, *available at* http://tinyurl.com/StreamlinedStatesMap 2

STREAMLINED SALES AND USE TAX AGREEMENT, *avaiable at* http://tinyurl.com/SSUTA ..... *passim*

BRIEF FOR *AMICUS CURIAE* STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Streamlined Sales Tax Governing Board (the "Governing Board") is the body that administers the Streamlined Sales and Use Tax Agreement (the "Agreement" or "SSUTA"),[2] a multi-State agreement that "simplifies and modernize[s] sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102.

Forty-four States, the District of Columbia, Puerto Rico, and numerous members of the business community participated in the development of the Agreement. The Governing Board is currently comprised of twenty-four States. Twenty-three of these States (the "Streamlined States") are full members of

---

[1] Petitioners and Respondents filed Blanket Consents to the filing of *amicus* briefs with the Clerk's office on January 31, 2018 and February 5, 2018, respectively. On March 1, 2018, *Amicus* notified the parties of its intention to file this brief. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

[2] The Streamlined Sales and Use Tax Agreement may be found at http://tinyurl.com/SSUTA. This brief describes in general terms certain material provisions of the Agreement. There are of course more detailed elements to all of the provisions described below, and this brief is not intended as a comprehensive summary of all aspects of the Agreement.

the Governing Board. SSUTA § 801.[3] One State, Tennessee, has "achieved substantial compliance with the terms of the Agreement taken as a whole, but not necessarily each provision," and is an associate member. SSUTA § 801.3. In addition, twenty States, the District of Columbia, and Puerto Rico serve the Governing Board as non-voting advisor States. SSUTA § 801.4.[4] The Governing Board is also advised by members of the private sector through the Business Advisory Council, and by representatives of local government through the Local Government Advisory Council. SSUTA §§ 811, 812.[5]

The Streamlined States have all made the sovereign choice to obtain a significant component of their total revenue from sales taxes. Those States, which include Petitioner South Dakota, have enacted the requirements of the Agreement by modifying their sales tax laws and adopting numerous uniform

---

[3] The full member states are Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. A map of the Streamlined States can be found at http://tinyurl.com/StreamlinedStatesMap.

[4] The advisor states are Alabama, Arizona, California, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Mexico, New York, Puerto Rico, South Carolina, Texas, and Virginia.

[5] The members of the Local Government Advisory Council are the Government Finance Officers Association, National Association of Counties, National League of Cities, and U.S. Conference of Mayors.

definitions and administrative provisions. In doing so, these States allow remote and local sellers alike to take advantage of simplified sales tax administration and compliance, overcoming any undue burdens identified by this Court in *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and *Quill v. North Dakota*, 504 U.S. 298 (1992). Streamlined States have also designed and implemented technological solutions to address compliance and enforcement problems, and they work together through the Governing Board to monitor compliance with Agreement. SSUTA § 809.

Since 1999, the group of States that eventually became the Governing Board (including Petitioner), along with numerous members of the business community, have devoted countless hours to developing a program that addresses the practical and pragmatic concerns identified by the Court in *Bellas Hess* and *Quill*. Beyond those concerns, the Governing Board focuses its work on lessening burdens on participating sellers. The Business Advisory Council and Local Government Advisory Council assisted the Governing Board at every step, ensuring that the final Agreement covered the full range of participants in the sales tax system. In turn, the legislatures of Petitioner and the other Streamlined States took the baton from the Governing Board and revised their statutes and regulations to come into compliance with the Agreement.

This enormous undertaking, spanning States from coast-to-coast and border-to-border, has resulted

in a truly streamlined system of calculating, collecting, and remitting sales taxes. With this wealth of experience and full understanding of the modern practicalities of sales tax collection, the Governing Board has a significant interest in this Court reconsidering and rejecting the long-outdated assumptions underlying *Bellas Hess* and *Quill*. In particular, the Governing Board has a strong interest in this Court recognizing that the undue burden envisioned in those cases has been eliminated by the Streamlined States. As Justice Kennedy indicated in *Direct Mktg. Ass'n v. Brohl*, "[a] case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Beyond harming States, *Quill* also harms local businesses and the economies of cities, towns, and villages that support those local businesses by placing a thumb on the competitive scale for remote sellers. *Quill's* foundational premise no longer holds, and the decision of the South Dakota Supreme Court should be reversed.

SUMMARY OF ARGUMENT

As with its namesake writing device, *Quill* belongs to another century and is entirely unsuited to today's business world. When *Quill* and *Bellas Hess* were decided, the thought that retailers in one State could feasibly calculate, collect, and remit sales taxes owing to far-flung jurisdictions was as unthinkable as the idea that we would all soon walk around with supercomputers in our pockets or even on our wrists.

We live in a world where marketing efforts can be tailored to individual consumers on a minute-by-minute basis, where talk of Big Data has long ago replaced talk of Big Brother, and where "free one-day shipping" has become a primary driver in consumer purchasing decisions. It beggars belief to conclude that anything other than a physical presence test is unduly burdensome as a matter of Constitutional law.

Today, thanks to the hard work of State legislators, tax administrators, local government officials, and their partners in the business communities, the Streamlined Sales and Use Tax Agreement has dismantled each of the practical roadblocks identified by this Court in *Quill* and *Bellas Hess*. Through this Agreement, sales tax administration now includes centralized administration, simplified rate and exemption structures, and streamlined recordkeeping. The Agreement also provides remote sellers[6] with the option to use Certified Service Providers, paid for by the participating States, that eliminate the burdens on the sellers related to determining the taxability of products, calculating the appropriate tax, preparing and filing the required returns, making the remittances, and resolving any audits or notices received by those sellers.

---

[6] The term "remote seller(s)" as used in this brief has the same meaning as the term "volunteer seller" as defined in Section D.2.(b) of the contract the Governing Board has with the Certified Service Providers (the "CSP Contract"). The contract may be found at http://tinyurl.com/CSPContract.

As described in detail in the Petitioner's brief, *Quill* is no longer consistent with modern Commerce Clause jurisprudence from this Court. As discussed below, the Streamlined Sales and Use Tax Agreement demonstrates that not even *stare decisis* should provide a basis for reaffirming *Quill*'s anachronistic standard. The practical considerations that provided a foundation for that case have entirely eroded.

In our federal system, the States possess an undeniable sovereign interest in collecting the sales taxes duly enacted by their legislatures. The fairest and most efficient means to collect those taxes is to require all sellers to collect the taxes from their customers at the time of purchase. Through the use of Certified Service Providers, who handle all of the calculation, reporting, and remittance obligations, this process is made easier still. Any burden on interstate commerce arising from such a system pales in comparison to the burden imposed by mandating that tens of millions of individual purchasers track, report, and remit sales taxes on every untaxed purchase they make. As other *amici* have explained, the real-world consequence of this burden is that vanishingly few individuals track and remit these taxes. Indeed, it would not be a stretch to say that a substantial portion of Americans have come to believe, incorrectly, that purchases from remote sellers are always a bargain because they are "sales tax free."

Whatever justification for a physical-presence test may have once existed, its time has long passed. Rather than protecting commerce, it has distorted

markets and created a nation of unwitting tax evaders. Practical, elegant solutions, such as those achieved through the Agreement, demonstrate that *Quill's* physical-presence test has outlived its usefulness. Accordingly, this Court should explicitly hold that physical presence is no longer mandated by dormant Commerce Clause jurisprudence.

ARGUMENT

The Streamlined Sales and Use Tax Agreement Has Eliminated Any Undue Burden on Interstate Commerce.

A. The Practical Burdens of Compliance Formed the Foundations of *Bellas Hess* and *Quill*.

In 1967, with both the postal zip code system and the nationwide direct dial telephone system only a few years old, this Court struck an Illinois law requiring out-of-state mail order companies to collect Illinois sales taxes on sales into Illinois. *Bellas Hess*, 386 U.S. at 759–60. The Court grounded its holding in the practical burdens that would derive from every State and municipality requiring sellers in every other State and municipality to collect their taxes. "The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" *Id.* (footnotes omitted). In light of the many different local and State tax regimes, the Court

held that "if just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable." *Id.* at 759 n.14 (internal quotations omitted).

In 1992, two years before the world's first secure retail transaction over the Web, this Court revisited the issue of cross-State sales tax collection in *Quill*, 504 U.S. 298. Although the Court recognized that modern Commerce Clause jurisprudence might not dictate the same result, it reaffirmed *Bellas Hess* on *stare decisis* grounds. *Id.* at 311, 317. In doing so, it calculated the number of taxing jurisdictions to be more than 6,000 and again noted the burden on sellers that would result from a collection requirement in all of those jurisdictions. *Id.* at 313 n. 6.

B. The Streamlined States Have Eliminated Any Undue Burdens On Sellers.

The forty-four States, the District of Columbia, Puerto Rico, and the members of the business community who participated in the development of the Agreement studied *Bellas Hess* and *Quill*, determined to create a voluntary multi-State agreement that would address the Court's concerns. They recognized that this Court was concerned with the variations in sales tax rates, allowable exemptions, and administrative and recordkeeping requirements in States and local jurisdictions throughout the country. They also realized that a cooperative system of sales tax administration would benefit not only the State

and local economies, but also the nation's consumers and Main Street businesses, who were being forced to shoulder the full weight of tax compliance. Working with input from States, municipalities, and the business community, the Governing Board created the Agreement guided by a statement of purpose that directly answered the Supreme Court's concerns: "It is the purpose of this Agreement to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102.

It is with no small amount of pride that the Governing Board can today say that the Streamlined Sales and Use Tax Agreement has fully addressed the practical problems identified in *Bellas Hess* and *Quill* relating to multiplicity of jurisdictions, rates, exemptions, and record-keeping requirements.[7] For proof that the Agreement, along with technological innovations, has removed the collection and reporting burdens, this Court need look no further than the list of over 3,800 active sellers who, as of February 1, 2018, have voluntarily registered to collect and remit taxes in all of the Streamlined States, regardless of any physical presence in those States. These active sellers hail from every one of the fifty States (including States that do not themselves impose a sales tax), the

[7] All of the provisions discussed below, which remove any undue burdens on sellers, apply fully to remote sellers that voluntarily register under the Agreement and make sales into the State of South Dakota (and all other Streamlined States).

District of Columbia, and several foreign countries. This Agreement is working.

1. State and Local Taxes Are Administered at the State Level.

The keystone simplification required by the Agreement is State-level administration for *all* sales and use taxes imposed by the State or its political subdivisions. SSUTA § 301. Sellers are only required to register with, file returns with, and remit funds to the State-level authority, and can only be audited by that central authority. The central authority, then, is responsible for distributing any applicable local taxes to the appropriate jurisdictions. There is no risk that a seller's interstate business will be subject to "a virtual welter of complicated obligations to local jurisdictions." *Bellas Hess*, 386 U.S. at 760.

2. Tax Rates Are Standardized at the State Level.

The Agreement has reduced the number of sales tax rates in place in each jurisdiction. In selecting its sales tax rate, each State must generally select a single State-wide rate, and the same is true for each local jurisdiction.[8] SSUTA § 308.

The Agreement also requires each State to provide an easily-accessible, searchable, and current

---

[8] The Agreement provides exceptions for food, food ingredients and drugs (State-level only), and other types of products sold by sellers located within that State, such as motor vehicle fuel, electricity, and piped natural gas.

database of all the sales tax rates for all of the jurisdictions levying taxes within the State. SSUTA § 307. Streamlined States agree to provide at least 60 days' notice to sellers (120 days in the case of catalog sellers) of local rate changes and to set the effective date of all changes to the first day of a calendar quarter. SSUTA at § 305.

Critically, Streamlined States relieve sellers from all liability for any errors in the database. SSUTA § 306. In short, the Member States and their local partners have made every effort to relieve retailers' burden in this area.

3. Exemptions Are Standardized at the State Level.

Streamlined States also generally agree to a single statewide set of tax exemptions that apply to both State and local taxes. As a result, rather than hundreds or even thousands of sets of exemptions that vary across municipalities, there is generally only one set of exemptions per State. SSUTA § 316.

For exemptions based on the status of the purchaser (such as an exemption for charitable organizations), or the use of the purchased item (such as an item used in manufacturing), Streamlined States agree that the seller need only require the purchaser to provide an electronic or written exemption certificate. SSUTA § 317. Absent some type of fraud on the part of the seller, if the seller obtains and retains the necessary information, it is absolved of any liability if the customer is later deemed to have

claimed the exemption improperly. *Id.* Thus, the basis for the Court's concern in *Bellas Hess*, 386 U.S. 759 n. 14, that the application of exemptions "especially for the industrial retailer – turns on facts which are often too remote and uncertain for the level of accuracy demanded by the prescribed system" has been eliminated.

Product-based exemptions (such as exemptions for food or health care items) have been similarly standardized State-wide. These exemptions are subject to uniform definitions and are downloadable in a "taxability matrix." SSUTA § 328. As with many other provisions of the Agreement, a retailer who relies on the taxability matrix is absolved of liability for under-collection of tax resulting from erroneous data in the taxability matrix. SSUTA § 328.C.

4. State and Local Tax Bases Are Standardized.

The Agreement requires the tax base for local jurisdictions to be identical to the State tax base unless prohibited by federal law, with very few exceptions. Most of these exceptions relate to products that are only sold by local sellers. SSUTA § 302.

5. Administrative Requirements Are Standardized Across All Member States.

The Agreement also addresses the Court's concern about multiple layers of administrative and recordkeeping requirements.

a. Uniform Definitions. The Agreement requires Streamlined States to adopt uniform definitions of

many administrative terms, such as "bundled transactions,"[9] "delivery charges," "direct mail," "lease or rental," "purchase price," "retail sale," "sales price," "telecommunications nonrecurring charges," and "tangible personal property." SSUTA Appendix C, Library of Definitions.

b. **Simplified Electronic Returns.** Multistate sales tax compliance is also greatly simplified through a simplified electronic return. *See generally* SSUTA § 318. No Streamlined State may require more than one return per State for each reporting period; each State return must include all local taxing jurisdictions in the State; and no State can require the return sooner than twenty days after the close of the reporting period. The return itself is in a uniform format approved by the Governing Board, and no State may require additional data elements. The Streamlined States also must adopt standardized processes for receiving the information returns and for accepting electronic payments. SSUTA § 319.

c. **Centralized Registration.** Each Streamlined State participates in a single central online registration system. SSUTA § 303. Thus, a retailer registers once on one site and is then automatically registered for all the Streamlined States. SSUTA § 401. Any change to a retailer's information, such as changes in address, contact information, or similar items, may be made for all jurisdictions by a one-time

---

[9] A "bundled transaction" is one where two or more items are sold for a single price, but the component items are not all subject to the sales tax. SSUTA § 330.

change on the central site. A retailer no longer has to update the information separately for every jurisdiction. SSUTA § 303.J.

d. Other Uniform Procedures. In addition to the simplifications outlined above, there are myriad other uniform procedures that the Streamlined States have agreed to, including, uniform sourcing rules to prevent double taxation (SSUTA §§ 309, 310, 310.1, 311, 313, 313.1, and 314), uniform rules for the enactment and administration of exemptions (SSUTA §§ 316 and 317), uniform rules for the recovery of bad debts (SSUTA § 320), uniform provisions governing sales tax holidays (SSUTA § 322), uniform limitations on caps and thresholds (SSUTA § 323), uniform rounding rules (SSUTA § 324), and standardized customer privacy requirements (SSUTA § 321).

6. Certified Service Providers Are Made Available to Remote Sellers at No Charge.

In an effort to further alleviate the burden on sellers, the Governing Board has contracted with Certified Service Providers to handle all sales and use tax functions for remote sellers, and the Streamlined States compensate the Certified Service Providers for providing these services to remote sellers.

Certified Service Providers perform all of the remote sellers' sales and use tax functions, other than the sellers' obligation to remit tax on their own purchases. SSUTA § 203 and CSP Contract § B.1. By using a Certified Service Provider, the remote seller is relieved of any burden to determine the taxability of

its products, calculate the rate of applicable tax, prepare and file the return, or respond to audits.

These Certified Service Providers must meet stringent requirements for accuracy, financial stability, and taxpayer confidentiality. SSUTA § 501. Critically, with limited exceptions, the remote seller who uses a Certified Service Provider is relieved of virtually all liability, in the absence of fraud, for any errors in compliance. SSUTA § 502.

C. *Stare* Decisis Provides An Insufficient Basis to Uphold Obsolete Precedent.[10]

The Governing Board is justifiably proud of the value this broad-based Agreement has brought to State and local economies across this country. Affirmation of *Quill* would discourage additional States from joining the Agreement, thereby stagnating the benefits streamlining provides to the States, the participating sellers, and the national economy. Worse, affirmance of *Quill* could well serve to chill these types of cooperative efforts and instead encourage each State and municipality to develop a "go it alone" approach that maximizes revenues in the short term, at the

---

[10] Justice White noted in his *Quill* dissent that "[t]he Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability." 504 U.S. at 332 (White, J., dissenting). As Justice White noted, that conclusion need not follow, and in all events, retroactivity can be addressed directly by the Court. *Id.* Moreover, South Dakota has made every effort to protect sellers from retroactive liability. *See* Pet. Brief at 17.

expense of consistency and administrability. Overruling *Quill*, on the other hand, will be the most effective way to avoid the "welter of inconsistent obligations" that will undoubtedly arise.

Put simply, *Quill* should be overruled. The practical realities that explicitly or impliedly justified the physical-presence test no longer apply. Indeed, in these days of telecommuting, pop-up operations, and electronic commerce, the task of determining "physical presence" (and therefore a *Quill*-based obligation to collect) may well be more pragmatically difficult than simply collecting and remitting taxes through the mechanism set up by the Agreement.

As Justice Kennedy noted in his concurrence in *Direct Marketing Ass'n v. Brohl*, "[a] case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." 135 S. Ct. at 1135 (Kennedy, J., concurring).

The physical presence test can no longer be justified as a practical solution to an impossibly complicated problem. The Agreement demonstrates that fears of undue burdens are misplaced. Even under a system of voluntary compliance, this collection system is working.

For all of these reasons, the Governing Board fully agrees with Petitioner: *Quill* should be overruled, and South Dakota's law should be upheld.

CONCLUSION

The decision of the South Dakota Supreme Court should be reversed.

Respectfully submitted,

R. BRUCE JOHNSON
R. BRUCE JOHNSON, LLC
2342 East Wrenhaven Lane
Holladay, Utah 84121
(801) 558-4128
rbrucejohnson@outlook.com

LAURA K. MCNALLY
Counsel of Record
ANDREW R. DEVOOGHT
LOEB & LOEB LLP
321 N. Clark Street
Suite 2300
Chicago, IL 60654
(312) 464-3155
lmcnally@loeb.com

Counsel for Amicus Curiae

March 5, 2018

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

A. PILAR MATA
Counsel of Record
W. PATRICK EVANS
ELI J. DICKER
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
(202) 464-8346
pmata@tei.org

Counsel for Amicus Curiae

April 4, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF INTEREST	2
SUMMARY OF THE ARGUMENT	3
THE ARGUMENT	5
I. RETROACTIVITY IS AN IMPORTANT ISSUE IN THIS CASE	5
A. Eight States Enacted Economic Presence Laws Without Safeguards Against Retroactivity	6
B. Twenty States Have Existing Laws that Would Permit the Retroactive Application of a Decision Abandoning *Quill*'s Physical Presence Rule	8
C. States Could Enact Retroactive Tax Legislation to Adopt the Court's Standard	11
II. ALLOWING STATES TO RETROACTIVELY APPLY A DECISION MODIFYING *QUILL* WOULD RAISE DUE PROCESS CONCERNS AND SUBVERT PRINCIPLES OF SOUND JUDICIAL AND TAX POLICY	12
A. Modifying *Quill* and Allowing States to Apply the Decision Retroactively Would Undermine the Intended Operation of Sales and Use Taxes	13

TABLE OF CONTENTS—Continued

Page

B. Modifying *Quill* and Allowing States to Apply the Decision Retroactively Would Raise Significant Due Process Concerns 15

C. Principles of Sound Judicial and Tax Policy Require This Court to Address the Retroactivity Issues Described Above if this Court Modifies *Quill* 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES Page(s)

Carey v. Piphus,
435 U.S. 247 (1978) 16

Dot Foods, Inc. v. State of Washington, Dep't of Revenue,
372 P.3d 747 (Wash. 2016) 12

Estate of Hambleton,
335 P.3d 398 (Wash. 2014) 12

Gen. Motors Corp. v. Dep't of Treasury,
803 N.W.2d 698 (Mich. Ct. App. 2010) 12

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993) 16

Int'l Bus. Machs. Corp. v. Dep't of Treasury,
878 N.W.2d 891 (Mich. App. 2016) 12

Int'l Shoe Co. v. State of Washington,
326 U.S. 310 (1945) 16

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 16

McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Florida,
496 U.S. 18 (1990) 15, 16

M'Culloch v. Maryland,
17 U.S. 316 (1819) 12

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of the State of Illinois,
386 U.S. 753 (1967) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Quill Corp. v. North Dakota,
504 U.S. 28 (1992) ..... *passim*

Trinova Corp. v. Michigan Dep't of Treasury,
498 U.S. 358 (1991) 13

LEGISLATIVE MATERIALS

Ala. Code § 40-2A-7(b)(2) 8

Cal. Rev. & Tax. Code § 6203(c) 8

Cal. Rev. & Tax. Code § 6487(a) 11

Colo. Rev. Stat. § 39-26-102(3)(b) 8

Colo. Rev. Stat. § 39-26-125 11

Conn. Gen. Stat. § 12-407(a)(15)(A)(v) 7

Conn. Gen. Stat. § 12-415(f) 8

Fla. Stat. § 95.091(3)(a)(5) 10

Fla. Stat. § 212.0596(2)(l) 9

Ga. Code Ann. § 48-2-49(c) 10

Ga. Code Ann. § 48-8-2(8)(I)(i)(III) 9

Idaho Code § 63-3611 9

Idaho Code § 63-3633 11

Ind. Code § 6-2.5-2-1(c) 7

Ind. Code § 6-8.1-5-2(f) 8

I.R.C. § 501(c)(6) 2

Kan. Stat. Ann § 79-3609(b) 11

Kan. Stat. Ann. § 79-3702(h)(1)(F) 9

TABLE OF AUTHORITIES—Continued

Page(s)

La. Rev. Stat. Ann. § 47:305(E) 9
La. Rev. Stat. Ann. § 47:1580 11
Me. Rev. Stat. Ann. tit. 36, § 141.2.C 8
Me. Rev. Stat. Ann. tit. 36, § 1951-B(7)..... 7
Mass. Gen. Laws ch. 62C, § 26(d) 8
Miss. Code Ann. § 27-65-42..... 8
Nev. Rev. Stat. § 372.724 9
Nev. Rev. Stat. § 360.355(2)..... 11
N.J. Stat. Ann. § 54:32B-2(i)(1)(C)..... 9
N.J. Stat. Ann. § 54:49-6(b)..... 10
N.M. Stat. Ann. § 7-1-18(C) 11
N.M. Stat. Ann. § 7-9-10(A) 9
N.Y. Tax Law § 1101(b)(8)(E) 9
N.Y. Tax Law § 1147(b)..... 10
N.C. Gen. Stat. § 105-164.8(b)(5)..... 9
N.C. Gen. Stat. § 105-241.1(e) 10
N.D. Cent. Code § 57-39.2-15..... 11
N.D. Cent. Code § 57-40.2-01(7) 9
Ohio Rev. Code Ann. § 5703.58..... 8
Ohio Rev. Code Ann. § 5741.01(I)(2)..... 7
Okla. Stat. § 223.E 10
72 Pa. Cons. Stat. § 7201(b)(3.3)..... 9
72 Pa. Cons. Stat. § 7259 10

TABLE OF AUTHORITIES—Continued

	Page(s)
44 R.I. Gen. Laws § 44-18-15(a)(6)	10
44 R.I. Gen. Laws § 44-19-13	11
S.C. Code Ann. § 12-36-1340(4)	10
S.C. Code Ann. § 12-54-85(c)	10
S.D. Codified Laws § 10-45-2	13
S.D. Codified Laws § 10-45-22	13
S.D. Senate Bill 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016)	6
Tenn. Code Ann. 2017 Pub. Acts, c. 452, § 2	6
Tex. Tax Code Ann. § 151.107(a)(4)-(5)	10
Tex. Tax Code Ann. § 151.307(a)	10
U.S. Const., amend XIV.	15
Va. Code Ann. § 58.1-612(F)	10
Va. Code Ann. § 58.1-634	11
2016 Vt. Laws No. § 41(5)	6
Vt. Stat. Ann. tit. 32, § 9701	6
Wis. Stat. § 77.51(13g)	10
Wis. Stat. § 77.59(3)	11
Wyo. Stat. Ann. § 39-15-107(a)(iv)	8
Wyo. Stat. Ann. § 39-15-110(b)	8
Wyo. Stat. Ann. § 39-15-501	7

TABLE OF AUTHORITIES—Continued

REGULATIONS

	Page(s)
Ala. Admin. Code r. 810-6-2-.90.03	7
Colo. Code Regs. § 39-26-102.3(1)	8
830 Mass. Regs. Code 64H.1.7	7
Miss. Admin. Code § 35.IV.3.09(100), (101) and (103)	7
Okla. Admin. Code 710:65-15-3(c)	9
Tenn. Comp. R. & Regs. 1320-05-01-.129	6
34 Tex. Admin. Code § 3.339(a)(2)(B)	10

OTHER

California 540 Form and Instructions: 2017 Personal Income Tax Booklet	14
Hellerstein, Hellerstein & Swain, *State Taxation* (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through Dec. 2017)	13
Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239 (1960)	13
New York State 2017 Instructions for Form IT-201 Full-Year Resident Income Tax Return	14
U.S. Government Accountability Office, GAO-18-114, *Sales Tax – States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (Nov. 2017)	7, 14

IN THE

Supreme Court of the United States

No. 17-494

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTRODUCTION

Amicus curiae Tax Executives Institute, Inc. (TEI) respectfully files this brief in support of the respondents in *South Dakota v. Wayfair, Inc. et al.* (*Wayfair*).[1]

[1] All parties received at least 10 days' notice of TEI's intention to file this brief, and the brief is filed with the consent of all parties. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than TEI, its members, or its counsel made a monetary

In *Wayfair*, Petitioner South Dakota asks this Court to modify the "physical presence" rule established in *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967), and upheld in *Quill Corporation v. North Dakota*, 504 U.S. 28 (1992). TEI does not take a position on whether the physical presence rule should be upheld, modified, or overturned. Rather, TEI files this brief to bring this Court's attention to the injustice and subsequent litigation that would ensue if the ruling requested by South Dakota were to be applied retroactively.

STATEMENT OF INTEREST

TEI is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code. TEI is dedicated to the development of sound tax policy, the uniform and equitable enforcement of tax laws, the minimization of administrative and compliance costs for governments and taxpayers, and the vindication of taxpayers' constitutional rights.

TEI's members are employed by a broad cross-section of the business community. As in-house tax professionals, TEI's members must evaluate tax laws, advise their companies regarding the tax consequences of various transactions and business decisions, and make practical decisions regarding their tax compliance obligations, including determinations regarding which states they must register with for the collection and remittance of sales and use tax. TEI's

---

contribution intended to fund the preparation or submission of this brief.

members thus have a vital interest in ensuring they are provided with adequate notice of their registration, collection, and remittance responsibilities so they can structure their business activities and processes to meet these requirements.

SUMMARY OF THE ARGUMENT

South Dakota asks this Court to reconsider its decision in *Quill*, which bars states from requiring out-of-state retailers to collect and remit sales and use tax on sales made to in-state consumers unless the retailer maintains a "physical presence" in the state.

In response to retroactivity concerns this Court articulated in *Quill*, the South Dakota legislature crafted its economic presence law to take effect prospectively if this Court modifies *Quill* and finds South Dakota's law constitutional. However, retailers that relied upon *Quill* nonetheless remain at risk for potential retroactive application of this Court's decision in other states.

Such a decision could have the effect of retroactively validating or expanding state statutes, regulations, and administrative policies that other states have enacted. For example, eight states have enacted economic presence laws requiring out-of-state retailers to register for the collection and remittance of sales tax—even if they lack physical presence in the state—if such retailers exceed a specified dollar volume of sales or transactions with in-state consumers. Even though these laws contradict *Quill*, some of those states are attempting to enforce these laws now, prior to this Court's decision in *Wayfair*. A decision from this Court modifying *Quill* could effectively validate such assessments if this Court's decision is retroactive.

Twenty states have statutes, regulations, or policies requiring retailers to register for the collection and remittance of sales and use tax to the extent permitted by the Constitution or based on a standard that is broader than *Quill*'s physical presence standard. Unlike states that have enacted economic presence laws, these states are not currently seeking to assert their taxing jurisdiction beyond the bounds set by *Quill*. However, if this Court were to modify *Quill*'s physical presence rule, such statutes would automatically expand their states' jurisdiction over out-of-state retailers. If the Court's decision is retroactive, the scope of these statutes would expand on a retroactive basis.

State legislatures also could enact retroactive tax legislation to take advantage of a retroactive decision. Numerous state legislatures have taken the opportunity to enact retroactive tax legislation in other contexts following a court decision. Thus, the risk of retroactive assessments is not simply limited to states with existing statutes that will be automatically affected.

Allowing a decision modifying *Quill* to be retroactive is problematic for numerous reasons. Such a decision could lead to double taxation, as retailers do not have information regarding which of their consumers complied with their use tax obligations. Retroactive application also would effectively transfer the burden of the tax from consumers to retailers because retailers would have no efficient means of collecting tax from their consumers years after transactions.

The retroactive application of a decision modifying *Quill* thus raises serious due process concerns. *Quill* holds that states cannot compel out-of-state retailers that lack physical presence with the state to register

with the state, collect sales tax from their consumers, and remit the tax to the state. Allowing states to assess and collect tax from out-of-state retailers that relied on *Quill* and were not given advance notice of this potential liability—and thus the need to offset that liability by collecting tax at the time of the transaction—offends traditional notions of fair play and substantial justice, particularly since the tax liability is intended to be borne by consumers. It also cannot be reconciled with principles of sound judicial and tax policy.

Taxpayers should be able to rely upon the laws in effect at the time business transactions and other taxable events occur. This Court may change its standard to determine what activities give rise to substantial nexus under the Constitution but this change should not be retroactive if it has a significant financial effect on taxpayers. Doing so would unfairly penalize out-of-state retailers for relying on this Court's decision in *Quill* and undermine taxpayers' confidence in the judiciary.

This Court has previously held that where it does not reserve the question of whether a newly-announced rule of law should be prospective, the normal rule of retroactivity will apply. Thus, if this Court modifies *Quill*'s physical presence rule, it should affirmatively state that the change is prospective only.

THE ARGUMENT

I. RETROACTIVITY IS AN IMPORTANT ISSUE IN THIS CASE.

The question squarely before this Court is whether *Quill*'s physical presence rule should continue to limit South Dakota's ability to impose sales tax registration, collection, and remittance obligations on out-of-state

retailers. Although this case is predicated upon whether South Dakota's economic presence law, S.B. 106, is constitutional, this Court's decision will directly impact the laws of every other state and locality imposing sales and use taxes.

South Dakota's law was carefully drafted to avoid the "thorny questions concerning the retroactive application" of taxes this Court raised in *Quill* when deciding whether to abrogate the physical presence rule established in *Bellas Hess*. *See, e.g.*, S.D. Senate Bill 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016), §§3, 6, 8; *Quill*, 504 U.S. at 318, n.10. Some states with economic nexus laws have followed South Dakota's example and similarly limited the reach of their laws: Tennessee and Vermont have provisions in their laws that would restrict their ability to apply their economic presence laws retroactively. Tenn. Code Ann. 2017 Pub. Acts, c. 452, § 2; Tenn. Comp. R. & Regs. 1320-05-01-.129; 32 Vt. Stat. Ann. tit. 32, § 9701; 2016 Vt. Laws No. § 41(5). By formulating their laws in this manner, these states ensured that remote sellers could make sales to consumers in these states without gambling on whether this Court would uphold or overturn *Quill*.

Not all states, however, have included similar safeguards. Thus, if this Court were to modify the physical presence rule without addressing whether its decision can be applied retroactively, the "thorny questions" this Court sought to avoid in *Quill* become unavoidable.

A. Eight States Enacted Economic Presence Laws Without Safeguards Against Retroactivity.

Alabama, Connecticut, Indiana, Maine, Massachusetts, Mississippi, Ohio, and Wyoming enacted economic nexus laws providing that an out-of-state retailer will

have substantial nexus, and thus registration, collection, and remittance responsibilities, with their state if the retailer exceeds a certain dollar amount of sales or number of transactions with in-state consumers. *See, e.g.*, Ala. Admin. Code r. 810-6-2-.90.03 (effective Jan. 1, 2016); Conn. Gen. Stat. § 12-407(a)(15)(A)(v) (effective Oct. 1, 2017); Ind. Code § 6-2.5-2-1(c) (effective July 1, 2017); Me. Rev. Stat. Ann. tit. 36, § 1951-B(7) (effective Oct. 1, 2017) (providing for an injunction during litigation challenging provision but only barring retroactive assessments prior to effective date); 830 Mass. Regs. Code 64H.1.7 (effective Sept. 22, 2017); Miss. Admin. Code § 35.IV.3.09(100), (101) and (103) (effective Dec. 1, 2017); Ohio Rev. Code § 5741.01(I)(2)(h) & (i) (effective Jan. 1, 2018); Wyo. Stat. Ann. § 39-15-501 (effective July 1, 2017) (providing for an injunction during litigation challenging provision but not barring retroactive assessments for sellers not subject to the injunction).

Unlike South Dakota, however, those states did not include safeguards against retroactivity. At least three of those states—Alabama, Connecticut, and Massachusetts—have already issued assessments or notices of intent to assess out-of-state retailers under these laws, even though these economic nexus standards are directly contrary to *Quill*'s physical presence rule. *See, e.g.*, U.S. Government Accountability Office, GAO-18-114, *Sales Tax – States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs*, 23 (Nov. 2017); Brief for Respondents 64.

Regardless of whether states have begun issuing assessments, retroactivity is a concern in all economic presence states. In general, a state's ability to issue an assessment is confined by its statute of limitations.

The statute of limitations for the state to issue assessments does not begin to run until a retailer has filed a sales and use tax return in Alabama, Indiana, Massachusetts, Mississippi, and Wyoming, and is extended for ten years past the due date of a return in Ohio. *See* Ala. Code § 40-2A-7(b)(2); Ind. Code § 6-8.1-5-2(f); Me. Rev. Stat. Ann. tit. 36, § 141.2.C; Mass. Gen. Law ch. 62C, § 26(d); Miss. Code Ann. § 27-65-42; Wyo. Stat. Ann. §§ 39-15-107(a)(iv), 39-15-110(b); Ohio Rev. Code Ann. § 5703.58 (10 years). Connecticut does not expressly address whether its statute of limitations is open-ended or extended if a retailer has not filed a return. *See* Conn. Gen. Stat. § 12-415(f). Thus, if this Court were to modify *Quill* and make the decision retroactive, out-of-state retailers that did not file returns in those states would be exposed to potential tax liabilities dating back to the effective date of those states' economic presence laws.

B. Twenty States Have Existing Laws that Would Permit the Retroactive Application of a Decision Abandoning *Quill*'s Physical Presence Rule.

This problem is not confined to states that have enacted economic presence laws. At least twenty states have statutory or regulatory provisions extending the obligation for out-of-state retailers to register, collect, and remit tax to the extent permitted by the U.S. Constitution or using criteria that fall short of *Quill*'s physical presence standard. *See, e.g.*, Cal. Rev. & Tax. Code § 6203(c) (extending to retailers with substantial nexus for purposes of the Commerce Clause of the U.S. Constitution); Colo. Rev. Stat. § 39-26-102(3)(b) (extending to retailers soliciting sales by any communication media); Colo. Code Regs. § 39-26-102.3(1) (extending to retailers soliciting by any

means whatsoever, including advertising by e-mail or the Internet); Fla. Stat. § 212.0596(2)(l) (extending to retailers whose activities have a sufficient connection with this state or its residents to create nexus); Ga. Code Ann. § 48-8-2(8)(I)(i)(III) (extending to retailers advertising or soliciting sales by computer, the Internet, or other communication systems); Idaho Code § 63-3611 (extending to retailers with sufficient contacts with the state under the U.S. Constitution); Kan. Stat. Ann. § 79-3702(h)(1)(F) (extending to retailers with any contact with the state that would allow the state to require the retailer to collect and remit tax under the U.S. Constitution); La. Rev. Stat. Ann. § 47:305(E) (extending to retailers promoting sales through the use of catalogs and other means for which federal legislation or jurisprudence will allow); Nev. Rev. Stat. § 372.724 (extending to retailers with sufficient nexus to satisfy the requirements of the U.S. Constitution); N.J. Stat. Ann. § 54:32B-2(i)(1)(C) (extending to retailers that solicit sales by distributing advertising matter); N.M. Stat. Ann. § 7-9-10(A) (extending to retailers that solicit sales through advertisements transmitted by cable systems); N.Y. Tax Law § 1101(b)(8)(E) (extending to retailers that regularly solicit business if such solicitation satisfies the nexus requirement of the U.S. Constitution); N.C. Gen. Stat. § 105-164.8(b)(5) (extending to retailers that have nexus by purposefully or systematically exploiting the market by any media); N.D. Cent. Code § 57-40.2-01(7) (extending to retailers soliciting sales and advertising via communication systems); Okla. Admin. Code 710:65-15-3(c) (extending to retailers soliciting sales by distributing advertising by newspaper, radio, television, mail or catalog); 72 Pa. Cons. Stat. § 7201(b)(3.3) (extending to retailers whose contacts would allow the Commonwealth to require

the person to collect and remit tax under the U.S. Constitution); 44 R.I. Gen. Laws § 44-18-15(a)(6) (extending to retailers that solicit sales by means of a computer-assisted shopping network or any other electronic media); S.C. Code Ann. § 12-36-1340(4) (extending to retailers that distribute advertising matter); Tex. Tax Code Ann. § 151.107(a)(4)-(5) (extending to retailers that solicit sales by distributing advertising via communication systems or that solicit orders through media and are subject to the jurisdiction of the state under federal law); Tex. Tax Code Ann. § 151.307(a) (exempting sales the state is prohibited from taxing by federal law or the U.S. Constitution); Va. Code Ann. § 58.1-612(F) (extending to retailers to the extent permitted under federal law or an opinion of this Court); Wis. Stat. § 77.51(13g) (extending to retailers unless otherwise limited by federal law).

Laws that allow states to require out-of-state retailers to collect and remit tax to the extent permitted by the Constitution will automatically conform to whatever constitutional standard this Court sets in *Wayfair*. Similarly, laws that would allow states to assert jurisdiction over out-of-state retailers based on activities that do not meet *Quill*'s physical presence requirement (*e.g.*, advertising and solicitation), and which are not currently enforceable, could become enforceable depending upon how this Court decides this case.

In nine of those states, the statute of limitations does not begin to run until a retailer files a sales and use tax return. *See* Fla. Stat. § 95.091(3)(a)(5); Ga. Code Ann. § 48-2-49(c); N.J. Stat. Ann. § 54:49-6(b); N.Y. Tax Law § 1147(b); N.C. Gen. Stat. § 105-241.1(e); Okla. Stat. § 223.E; 72 Pa. Cons. Stat. § 7259; S.C. Code Ann. § 12-54-85(c); 34 Tex. Admin. Code § 3.339(a)(2)(B). This means that an out-of-state

retailer's liability could be unlimited if that retailer, relying on this Court's decision in *Quill*, never filed a sales and use tax return with the state.

In six of those states, the statute of limitations is extended for six to ten years past the due date of the return if a retailer fails to file a return. *See* Cal. Rev. & Tax Code §6487(a) (eight years); Idaho Code § 63-3633 (seven years); Nev. Rev. Stat. § 360.355(2) (eight years); N.M. Stat. Ann. § 7-1-18(C) (seven years); N.D. Cent. Code § 57-39.2-15 (six years); Va. Code Ann. § 58.1-634 (six years). One of those states would apply the normal statute of limitations if a court decision reclassified a transaction from nontaxable to taxable. *See* La. Rev. Stat. Ann. § 47:1580. Four states do not expressly address whether their statutes of limitations are open-ended or extended if a retailer has not filed a return. *See* Colo. Rev. Stat. § 39-26-125; Kan. Stat. Ann. § 79-3609(b); 44 R.I. Gen. Laws § 44-19-13; Wis. Stat. § 77.59(3).

Retailers that relied on *Quill* when determining they did not need to file returns in those states could thus have even greater liabilities in these states than they would in states with more recently-enacted economic presence laws.

C. States Could Enact Retroactive Tax Legislation to Adopt the Court's Standard.

Further, if this Court's decision were to modify *Quill*'s physical presence rule and makes this Court's decision retroactive, states that do not have statutes testing the bounds of *Quill* could be incentivized to enact retroactive tax legislation adhering to the new

standard. Over the past few decades, several state legislatures have engaged in a practice of enacting retroactive tax legislation in response to judicial decisions.

This Court has not granted certiorari in cases challenging retroactive tax legislation in other contexts. *See, e.g.*, *Dot Foods, Inc. v. State of Washington, Dep't of Revenue*, 372 P.3d 747 (Wash. 2016), *cert. denied*, 137 S. Ct. 2156 (2017); *Intl. Bus. Machs. Corp. v. Dep't of Treasury*, 878 N.W.2d 891 (Mich. App. 2016), *cert. denied*, 137 S. Ct. 2180 (2017); *Estate of Hambleton*, 335 P.3d 398 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015) *Gen. Motors Corp. v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. Ct. App. 2010), *cert. denied*, 132 S. Ct. 1143 (2012). The Court's decision not to review this practice of enacting retroactive tax statutes could thus embolden states without automatically expanding economic nexus laws to amend their laws retroactively.

II. ALLOWING STATES TO RETROACTIVELY APPLY A DECISION MODIFYING *QUILL* WOULD RAISE DUE PROCESS CONCERNS AND SUBVERT PRINCIPLES OF SOUND JUDICIAL AND TAX POLICY.

Chief Justice Marshall famously declared that "[a]n unlimited power to tax involves, necessarily, a power to destroy. . . ." *M'Culloch v. Maryland*, 17 U.S. 316, 327 (1819). This now-axiomatic principle would be called into question if this Court were to modify its decision in *Quill* and permit states to retroactively enforce the Court's decision against out-of-state retailers.

A. Modifying *Quill* and Allowing States to Apply the Decision Retroactively Would Undermine the Intended Operation of Sales and Use Taxes.

Sales and use taxes are generally regarded as consumption taxes—taxes not imposed on retailers' activities, but on their consumers' use or consumption of products and services within a state.[2] While the economic incidence of the tax is imposed on consumers, retailers nevertheless play a critical role in administering such taxes: retailers collect the tax from consumers and remit the tax to the states. *See, e.g.*, Hellerstein, Hellerstein & Swain, *State Taxation* ¶12.01 (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through Dec. 2017) (online version accessed on Mar. 22, 2018). However, states cannot compel out-of-state retailers to undertake this obligation or hold them liable for failing to do so unless a retailer has substantial nexus with the state. *Bellas Hess* and *Quill* confirmed that this substantial nexus requirement is met only if out-of-state retailers are physically present in the taxing state.

---

[2] This is also true for states, such as South Dakota, that technically impose the tax upon the privilege of engaging in business as a retailer in the state, *see, e.g.*, S.D. Codified Laws § 10-45-2, because such states authorize retailers to add the tax to the price charged to consumers, *see, e.g.*, S.D. Codified Laws § 10-45-22. This Court has thus examined the nature of taxes and their operation in prior cases rather than relying upon formalistic classifications. *See, e.g., Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991) ("A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." (*citing* Jenkins, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242 (1960))).

If retailers lack substantial nexus with a state and do not collect the tax from consumers, consumers generally have an obligation to remit the corresponding use tax to the state. In practice, not all consumers remit their use tax obligations, and states lack an efficient mechanism to measure or track consumers' use tax liabilities – hence the genesis of this case.

Nonetheless, some consumers—in particular, business consumers—do regularly remit use tax to states. The United States Government Accountability Office estimates that compliance rates for business consumers range from approximately 70 to 90 percent. *See, e.g.*, U.S. Government Accountability Office, GAO-18-114, *Sales Tax – States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs*, 14 (Nov. 2017).

States cannot hold retailers responsible for sales and use tax liability if consumers remit use tax to the state and retailers can prove consumers paid the tax. Retailers, like states, however, lack an efficient mechanism to prove which of their consumers actually complied with their use tax obligations.

Further complicating matters, states such as California and New York allow their residents to estimate their use taxes based upon their federal or state adjusted gross income. *See, e.g.*, California 540 Form and Instructions: 2017 Personal Income Tax Booklet; New York State 2017 Instructions for Form IT-201 Full-Year Resident Income Tax Return at p. 26.[3] This practice, which is designed to make it easier for consumers to comply with their use tax obligations, makes it more difficult to reconcile whether a

---

[3] Available at: https://www.ftb.ca.gov/forms/2017/17_540bk.pdf; https://www.tax.ny.gov/pdf/current_forms/it/it201i.pdf.

consumer paid use tax on a particular transaction. For all of these reasons, states will likely collect tax twice on many sales if they can retroactively assess out-of-state retailers for sales and use taxes.

Finally, just as retailers have no efficient means to verify and prove the payment of use tax by consumers, they also have no efficient means to recover use tax from their consumers if their consumers did not pay it to states. Indeed, the expense of such efforts would make it cost-prohibitive for retailers to attempt to verify the payment of tax or collect tax the consumer did not remit after the transaction for most sales. Allowing states to assess out-of-state retailers for taxes that those retailers were not required to collect because of *Quill*'s physical presence rule would thus have the effect of shifting liability for these indirect consumption taxes from consumers to retailers and penalizing retailers that relied upon the bright line test afforded by *Quill*.

B. Modifying *Quill* and Allowing States to Apply the Decision Retroactively Would Raise Significant Due Process Concerns.

Shifting the economic incidence of sales and use taxes from consumers to out-of-state retailers for periods when *Quill*'s physical presence rule was in effect would raise significant due process concerns. The Due Process Clause of the U.S. Constitution provides that a state shall not "deprive any person of life, liberty or property, without due process of law." U.S. Const., amend XIV. This Court has held that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson Corp. v. Div.*

of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla., 496 U.S. 18, 36 (1990). Procedural due process "protect[s] persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

At its core, the Constitutional requirement of due process exists to prohibit states from exercising their authority in ways that "offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). Requiring out-of-state retailers to bear the financial burden of a tax never intended to be borne by retailers—years after making sales to their consumers—patently offends "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

A fundamental principle of due process—and perhaps a universal understanding of "fairness" and "notice"—is laws must exist before a person can be required to comply with them. This is particularly true in the present case because out-of-state retailers have the ability to mitigate their liability for sales and use taxes by collecting the tax from consumers. After all, the economic incidence of the tax is imposed on the person consuming goods and services, not the person selling them. Holding out-of-state retailers liable for taxes they previously were not required to collect, and could have recovered if they had notice of their need to do so, undoubtedly falls short of this Court's understanding of what satisfies the traditional notions of fair play and substantial justice.

C. Principles of Sound Judicial and Tax Policy Require This Court to Address the Retroactivity Issues Described Above if this Court Modifies *Quill*.

This Court has previously indicated that unless it has reserved the question of whether its holding should be applied prospectively, "it is properly understood to have followed the normal rule of retroactive application in civil cases." *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539 (1991); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). Although retroactivity may not be a concern with respect to South Dakota's statute, if this Court modifies *Quill*, it should state that the change in jurisprudence is prospective only.

Principles of sound judicial and tax policy caution against allowing states to retroactively apply a decision from this Court should it modify *Quill*. In *Quill*, this Court articulated two relevant policy considerations coloring its decision to reaffirm *Bellas Hess*: the physical presence rule "reduces litigation concerning those taxes" and "encourages settled expectations." *Quill*, 504 U.S. at 303. Both of these policy goals would be subverted if this Court were to modify *Quill* and allow states to apply its decision retroactively—either explicitly through an affirmative statement or implicitly through silence.

Litigation seeking to resolve the due process concerns described above would unquestionably arise if this Court allowed retroactive application of a decision modifying *Quill*. Moreover, such retroactive application would eradicate any "settled expectations" that the physical presence rule provided and reduce taxpayers' confidence in the judicial system as a whole. Out-of-state retailers are entitled to rely upon

the physical presence rule unless and until this Court (or Congress) modifies that standard. Requiring out-of-state retailers to bear the cost of defending against retroactive assessments would be unjust even if such retailers ultimately prevailed.

Fairness, certainty, and notice are essential attributes of a sound tax system, particularly a system that relies upon voluntary compliance. Taxpayers must be able to rely upon the rules in existence at the time business transactions occur. While governments have the right to change their laws and policies, fairness demands governments provide taxpayers notice of their obligations and responsibilities, especially when such notice will enable taxpayers to mitigate their tax and compliance burdens.

CONCLUSION

This case has national implications for sales and use taxes. If this Court modifies *Quill*, the Court should state that its decision is prospective only. Such action is necessary to avoid the injustice and consequent litigation that would ensue between states and taxpayers.

Respectfully submitted,

A. PILAR MATA
Counsel of Record
W. PATRICK EVANS
ELI J. DICKER
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
(202) 464-8346
pmata@tei.org

Counsel for Amicus Curiae

April 4, 2018

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA.,
Petitioner,
v.
WAYFAIR, INC., ET AL.,
Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

JOSEPH D. HENCHMAN*
**Counsel of Record*
TAX FOUNDATION
1325 G Street N.W., Ste. 950
Washington, DC 20005
(202) 464-6200
henchman@taxfoundation.org
Counsel for Amicus Curiae

March 5, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, DC 20002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. A STATE TAX ON INTERSTATE COMMERCE IS CONSTITUTIONALLY VALID ONLY WHERE THE STATE'S NEXUS STANDARD SCALES WITH ITS BURDEN, WHERE THE TAX IS NON-DISCRIMINATORY, AND WHERE THE STATE TAXES ONLY ITS FAIR SHARE OF INTERSTATE COMMERCE 5

II. SOUTH DAKOTA'S LAW IS CONSTITUTIONAL, AS ITS NEXUS STANDARD SCALES WITH THE BURDEN IT IMPOSES, IT IS NON-DISCRIMINATORY, AND IT TAXES ONLY ITS FAIR SHARE OF INTERSTATE COMMERCE 10

A. South Dakota is One of 23 States with Simplified Sales Tax Collection That Imposes Minimal Burden on Collecting Businesses. 11

B. South Dakota Requires Uniformity Between State and Local Sales Tax Bases, and Minimizes the Number of Local Sales Tax Rates. 12

C. South Dakota is One of Three States That Tax Nearly All Services Under Its Sales Tax, Minimizing Complexity and Demonstrating the Statute Has No Discriminatory Intent or Purpose. 13

D. South Dakota's Law Adopts a Meaningful De Minimis Threshold Likely to Exclude Interstate Activity Where State Burdens Exceed State Benefits. 16

E. South Dakota's Statute Bars Retroactive Collection. 17

F. South Dakota's Statute Applies Only to South Dakota's Fair Apportioned Share of Interstate Commerce. 18

III. WITHOUT THIS COURT'S GUIDANCE, THE STATES WILL BRING ABOUT A COMPLEX PATCHWORK OF TAX LAWS HARMING INTERSTATE COMMERCE, EXACTLY WHAT THE FOUNDERS SOUGHT TO PREVENT. 19

A. 22 States Have Adopted New York-Style Click-Through Nexus Sales Tax Laws, Which Expand Physical Presence Beyond What This Court Described as Its Furthest Extent. 19

B. Ten States Have Adopted Colorado-Style Reporting Sales Tax Laws, Which Raise First Amendment Issues. 23

C. Three States Have Adopted Economic Nexus Sales Tax Provisions Which Ignore Physical Presence Completely. 26

D. States May Soon Consider Massachusetts-Style Cookie Taxes, Which Expand the State's Sales Tax Nexus to All Sellers Everywhere. 27

E. Three States Have Concluded that Physical Presence is Inapplicable for Business Taxes, Undermining the Spirit of the Quill Decision. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Am. Catalog Mailers Ass'n v. Krupp, Ind. Marion Superior Court, Civil Div. 1 (Commercial Court Docket 49D01-1706-PL-025964). 27

Am. Trucking Ass'n v. Scheiner, 483 U.S. 266 (1987) 7

Am. Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005) 7

Amazon.com LLC v. Lay, 758 F.Supp.2d 1154 (W.D. Wash. 2010) 26

Avnet, Inc. v. Dep't of Revenue, 384 P.3d 571 (Wash. 2016) 29

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 7

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959) 9

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977) 7

Budget Rent-A-Car of Wash.-Or., Inc. v. Dep't of Revenue, 500 P.2d 764 (Wash. 1972) 29

Camps/Newfound/Owatanna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 7

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 17

Complete Auto v. Transit, Inc. v. Brady,
430 U.S. 274, 279 (1977) 2, 6

Container Corp. v. Franchise Tax Board,
463 U.S. 159 (1983) 8

Crutchfield Corp. v. Testa.
No. 2015-0386 (Ohio 2016), 2016 WL 6775765 29

Dep't. of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 7

Direct Marketing Ass'n v. Brohl,
814 F.3d 1129 (10th Cir. 2016) 23

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 17

Exxon v. Maryland,
437 U.S. 117 (1978) 9

Freeman v. Hewit,
329 U.S. 249 (1946) 5

General Motors Corp. v. Romein,
503 U.S. 181 (1992) 18

Gibbons v. Ogden,
22 U.S. 1 (1824) 5

Kassel v. Consolidated Freightways Corp.,
450 U.S. 662 (1981) 9

Leloup v. Port of Mobile,
127 U.S. 640 (1888) 6

Minnesota v. Clover Leaf Creamery,
449 U.S. 456 (1981) 9

Moorman Mfg. Co. v. Bair,
437 U.S. 267 (1978) 8

National Bellas Hess, Inc. v. Dep't of Revenue of Illinois, 386 U.S. 753 (1967), ... 3, 10

New Energy Co. v. Limbach,
486 U.S. 269 (1988) 7

Nw. Airlines v. Minnesota,
322 U.S. 292 (1944) 8

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 8

Overstock.com, Inc. v. New York State Dep't of Taxation & Fin.,
987 N.E.2d 621 (N.Y. 2013), ... 20

Performance Marketing Ass'n, Inc. v. Homan,
998 N.E. 2d. 54 (Ill. 2013) 21

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970). 2, 8

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... passim

Ry. Express Agency v. Virginia,
347 U.S. 359 (1954) 6

Ry. Express Agency v. Virginia,
358 U.S. 434 (1959) 6

Scripto, Inc. v. Carson,
362 U.S. 207 (1960) 19

Simpson Inv. Co. v. Dep't of Revenue,
3 P.3d 741 (Wash. 2000) 29

Southern Pacific Co. v. Arizona ex rel. Sullivan,
325 U.S. 761 (1945) 9

Steven Klein, Inc. v. Dep't of Revenue,
357 P.3d 59 (Wash. 2015) 29

Tax Comm'r v. MBNA America Bank,
640 S.E.2d 226 (W. Va. 2006) 30

Time Oil Co. v. State,
483 P.2d 628 (Wash. 1971) 29

Tyler Pipe Indus. v. Dep't of Revenue of Washington,
482 U.S. 232 (1987) 8, 19

Underwood Typewriter Co. v. Chamberlain,
254 U.S. 113 (1920) 8

United States v. Carlton,
512 U.S. 26 (1994) 17

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 7

Western Live Stock v. Bureau of Revenue,
303 U.S. 250 (1938) 8

Westinghouse Elec. Co. v. Tully,
466 U.S. 388 (1984) 7

Constitutional Provisions

U.S. CONST. art. I, § 8, cl. 3 5

Statutes

2015 NEV. A.B. 380. 21

2015 TENN. H.B. 644 22

2016 LA. H.B. 30, 1st Extra Sess 21

35 Ill. COMP. STAT. 105/2 & 110/2 21

ALA. CODE § 40-2-11 24

ARK. CODE § 26-52-117(d)-(e) 20

CAL. REV. & TAX § 6203(b)(5). 20

COLO. REV. STAT. § 39-21-112(3.5) 23

COLO. REV. STAT. § 39-26-102(e) 20
CONN. GEN. STAT. § 12-407(a)(12)(L) 20
GA. CODE § 48-8-2(8)(M). 21
IND. CODE § 6-2.5-2-1 26
Internet Freedom Act ("ITFA") §1101(a)(2), Pub. L. No. 105-277, § 1105(2) (codified at 47 U.S.C. § 151) 28
KAN. STAT. § 79-3702(h)(2)(C) 21
KY. REV. STAT. § 139.450 24
LA. STAT. § 47:309.1 25
ME. REV. STAT. tit. 36, § 1754-B(1-A)(C). 21
MICH. COMP. LAWS § 205.52(b)(3). 21
MINN. STAT. § 297A.66(4a) 21
MO. REV. STAT. § 144.605(2)(e)-(f) 21
N. Y. TAX LAW § 1101(b)(8)(vi). 19
N.C. GEN. STAT. § 105.164.8(b)(3). 22
N.D. CENT. CODE § 57-40.2-02.3 26
N.J.S.A § 54:32B-2(i)(1). 22
OHIO REV. CODE § 5741.01(I). 22, 28, 29
OKLA. STAT. tit. 68, § 1406.1 25
PA. CODE § 7213.1 25
R.I. GEN. LAWS § 44-18.2-3 25
R.I. GEN. LAWS § 44-18-15(a)(2). 22
S.D. CODIFIED LAWS § 10-45-2 18
S.D. CODIFIED LAWS § 10-63-2 24
TENN. CODE § 67-6-515 25

VT. STAT. tit. 32, § 9701(9)(F) 26
VT. STAT. tit. 32, § 9783(b)-(c). 22
VT. STAT. tit. 32, § 9712 (2017). 25
WASH. REV. CODE § 82.04.220 29
WASH. REV. CODE § 82-08-052 ..... 22, 26
WYO. STAT. § 39-15-501 26

Regulations

830 MASS. CODE REGS. 64H.1.7 27
ALA. ADMIN. CODE r. 810-6-2.90.03 27
MISS. CODE R. § 35.IV.3.09 27
TENN. COMP. R. & REGS. 1320-05-01-.129 27

Other Authorities

Avalara, *How Does Avalara Handle Rounding in Maryland?*, http://goo.gl/YdyA1W 12

Billy Hamilton, "*Remembrance of Things Not So Past: The Story Behind the Quill Decision*," 59 State Tax Notes 807 (Mar. 14, 2011), https://goo.gl/X7xL1J 18

Bloomberg BNA, *State Tax Snapshot: A Dozen States Say Click-Through Nexus Applies, Despite Absence of Legal Authority*, SALT Talk Blog, https://www.bna.com/state-tax-snapshot-b17179890182/m. 20

BNA BLOOMBERG, SURVEY OF STATE TAX DEPARTMENTS (2017 ed.) 30

Brief for Tax Foundation as Amicus Curiae Supporting Petitioners, *Direct Mtkg v. Brohl*, 135 S. Ct. 1124, 2014 WL 6845684 (Sept. 16, 2014)..... 4

Brief for Tax Foundation as Amicus Curiae Supporting Petitioners, *Overstock.com, Inc. v. N.Y. Dep't of Taxation and Fin., et.al*, 134 S.Ct. 682, 2013 WL 5400248 (Sept. 23, 2013 4

City of Chicago, *Tax List*, http://goo.gl/28y3Mj 12

Email from Tricia Schafer-Petrecz, Pub. Relations & Soc. Media Lead, Vertex, Inc., to Joseph Henchman, Exec. Vice President, Tax Foundation. 13

JAMES MADISON, THE FEDERALIST NO. 42 31

Joseph Henchman & Kavya Rajasekar, The Bounds of Retroactive State Taxes, Tax Foundation (Feb. 2017), http://www.taxfoundation.org/retroactive-tax skadden-michigan 18

Nicole Kaeding, *Sales Tax Base Broadening: Right-Sizing a State Sales Tax*, Tax Foundation (Oct. 2017), https://goo.gl/dYfovD 14

Paul H. Frankel & Amy L. Nogid, *The Manifest Justice to the Manifest Injustice Doctrine: The Time Has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases*, Legal Updates & News, Dec. 2008, http://www.jdsupra.com/post/documentViewer.aspx?fid=f54562d8-2a54-49f0-8926aec25cabb3d3..... 18

Pennsylvania Dep't. of Rev., *Sales and Use Tax Bulletin* 2011-01 (Dec. 1, 2011), http://goo.gl/Dh9Lpf 22

South Dakota Department of Revenue, *Municipal Tax Information Bulletin* (Jul. 2017),

http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/MbulletinJuly2017.pdf. 13

TAX FOUNDATION, 2018 STATE BUSINESS TAX CLIMATE INDEX 70-72 (complete list by type of transaction and by state), http://www.taxfoundation.org/publications/state-business-tax-climate-index. 15

TAX FOUNDATION, FACTS & FIGURES 2017: HOW DOES YOUR STATE COMPARE? (table 8), https://goo.gl/AkFKNR 15

Tax Foundation, *State and Local Sales Tax Rates Midyear 2017*, http://goo.gl/UcGQfW 13

Tax Foundation, *State and Local Sales Tax Rates Midyear 2017*, http://www.taxfoundation.org/state-and-local-sales-tax-rates-midyear-2017. 13

The Proper Role of Congress in State Taxation: Hearing Before the U.S. House of Representatives Committee on the Judiciary (testimony of Joseph Henchman), http://goo.gl/wBohQM 30

Transcript of Record at 24:25-34, *Direct Marketing Association v. Brohl*, --- U.S. ----, 135 S.Ct. 1124 (2015) 24

No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA.,
Petitioner,
v.
WAYFAIR, INC., ET AL.,
Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*[1]

The Tax Foundation submits this brief as *amicus curiae* in support of neither party in the above-

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amicus* represents that all parties were provided notice of *Amicus's* intention to file this brief on February 16, 2018. Letters from the parties consenting to the filing of the brief are filed with the Clerk of the Court.

captioned matter.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., we seek to make information about government finance more accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability.

Because *Amicus* has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many state courts considering this issue, and because any decision will significantly impact taxpayers and state tax administration, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

This Court should uphold the South Dakota law as a valid enactment without eviscerating the Constitution's limits on state tax power.

The basis for such a ruling should be that state taxation of interstate commerce is constitutionally valid where (1) the state's nexus standard is scaled, with lower state burdens permitting expanded taxation of interstate activity, and vice versa, (2) it is non-discriminatory, neither taxing nor otherwise burdening activity out-of-state while leaving identical activity in-state untaxed or unburdened, and (3) it taxes no more than the state's fair apportioned share of interstate commerce, as measured by internal consistency. In short, this Court should reaffirm its holdings in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Quill and *National Bellas Hess* used physical presence as a proxy for constitutional nexus, but this has proven both overinclusive and underinclusive. The smallest, most transient, most attenuated physical presence, no matter how burdensome to the economy, subjects economic actors to tax in many states. States that seek to collect sales and use tax on purchases made by their physically present residents, even if done in an unburdensome, non-discriminatory manner that avoids multiple taxation, cannot. And because *Quill* has never been extended to business and income taxes, states and courts have interpreted that as no nexus restraint at all, upholding those taxes on any economic actor.

The result is a situation the Founders sought to prevent: states disrupting interstate commerce with a death by a thousand cuts. This Court will soon be asked over and over and over to consider challenges to a variety of state laws expanding state sales tax authority over interstate commerce. Eighteen states have adopted New York-style click-through nexus sales tax laws, which expand physical presence beyond what this Court described as "the furthest extension" of nexus. Seven states have adopted Colorado-style reporting sales tax laws, which raise First Amendment issues. Three states have adopted economic nexus sales tax laws, which ignore physical presence completely. States may soon consider Massachusetts-style "cookie taxes," which expand state sales tax jurisdiction to essentially any company in the world with a website.

The South Dakota law's nexus standard should be upheld as constitutional because it minimizes the cost of sales tax collection to the extent practicable, by (1)

adhering to interstate standards of sales tax administration, (2) requiring uniformity between state and local sales tax bases, (3) minimizing number of local sales tax rates, which in South Dakota must be either 1 or 2 percent, (4) taxing virtually all final retail transactions under its sales and use tax, without arbitrary exemptions or confusing special tax rates, (5) adopting a meaningful *de minimis* threshold likely to exclude interstate activity where state burdens exceed state benefits, and (6) barring retroactive collection.

We at the Tax Foundation are not a partisan for aggressive or expansive state tax power. Until this case, briefs we have submitted on this issue have always been to urge a ruling against the state. *See, e.g.*, Brief for Tax Foundation as Amicus Curiae Supporting Petitioners, *Overstock.com, Inc. v. N.Y. Dep't of Taxation and Fin., et.al*, 134 S.Ct. 682, 2013 WL 5400248 (Sept. 23, 2013); Brief for Tax Foundation as Amicus Curiae Supporting Petitioners, *Direct Mtkg v. Brohl*, 135 S. Ct. 1124, 2014 WL 6845684 (Sept. 16, 2014). But because the physical presence standard has been almost completely eroded in the last few decades, it is necessary for this Court to resolve an almost universal lack of clarity about the proper scope of state sales taxation of out-of-state entities. We urge the Court to do so, by upholding the South Dakota law at issue here, and adopting a nexus rule that scales state tax authority with the burden placed on interstate commerce.

ARGUMENT

I. A STATE TAX ON INTERSTATE COMMERCE IS CONSTITUTIONALLY VALID ONLY WHERE THE STATE'S NEXUS STANDARD SCALES WITH ITS BURDEN, WHERE THE TAX IS NON-DISCRIMINATORY, AND WHERE THE STATE TAXES ONLY ITS FAIR SHARE OF INTERSTATE COMMERCE.

The people of the United States adopted the Constitution in large part because their existing national government had no power to stop states from imposing trade barriers between each other, to the detriment of the national economy. "[States' power over commerce,] guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures . . ., destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause, that led to the forming of a convention." *Gibbons v. Ogden*, 22 U.S. 1, 224 (1824) (Johnson, J., concurring). Consequently, among the powers granted to Congress by the new Constitution was the power "[t]o regulate Commerce . . . among the several States," a provision known as the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. Congress and the courts thus have the power to strike down laws that discriminate against interstate commerce.

From the Constitutional Convention until the 1950s, states were heavily restricted in their ability to tax individuals, businesses, and sales involving interstate commerce. *See, e.g., Freeman v. Hewitt*, 329 U.S. 249, 252-53 (1946) ("A State is . . . precluded from taking any action which may fairly be deemed to have

the effect of impeding the free flow of trade between States"); *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888) ("No State has the right to lay a tax on interstate commerce in any form.").

In the 1950s, this Court began to ease those restrictions, correctly concluding that involvement in interstate commerce does not completely insulate an individual or business from contributing to providing government services in states where they enjoy the benefits of them. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284-85 (1977) (comparing *Ry. Express Agency v. Virginia*, 347 U.S. 359 (1954) (*Railway Express I*) and *Ry. Express Agency v. Virginia*, 358 U.S. 434 (1959) (*Railway Express II*)). This Court's *Complete Auto* decision gave a comprehensive and workable list of criteria for determining whether a state's tax law violates constitutional limitations on state tax power: a tax (1) must be "applied to an activity with a substantial nexus with the taxing State," (2) must be "fairly apportioned," (3) must "not discriminate against interstate commerce," and (4) must be "fairly related to the services provided by the State." *Id.* at 279.

The Constitution prohibits state taxes which discriminate against interstate commerce, by taxing or otherwise burdening activity out-of-state while leaving identical activity in-state untaxed or unburdened. *See, e.g., Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. ____, 135 S.Ct. 1787 (2015) (invalidating Maryland's denial of a full income tax credit for out-of-state investment, where a full credit was provided for in-state investment, using the internal consistency test); *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564

(1997) (invalidating Maine's denial of the general charitable deduction to organizations that primarily serve non-Maine residents); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (invalidating a Massachusetts general tax on dairy producers where the revenue was then distributed to domestic dairy producers); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (invalidating an Ohio tax credit to all ethanol producers but disallowed for non-Ohio producers); *Am. Trucking Assns. v. Scheiner*, 483 U.S. 266 (1987) (invalidating a Pennsylvania scheme imposing fees on all trucks while reducing other taxes for trucks in-state only); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a Hawaii tax imposed on a category of products but exempting activity in-state); *Westinghouse Elec. Co. v. Tully*, 466 U.S. 388 (1984) (invalidating a New York scheme exempting activity in-state while simultaneously imposing a tax on identical activity out-of-state); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (invalidating a New York tax imposed solely on activity out-of-state while leaving identical activity in-state untaxed). *But see Dep't. of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008) (upholding Kentucky's exclusion from tax of interest earned from its state bonds, but not other states' bonds, on the grounds that Kentucky is acting as a market participant like any other bond issuer).

The Constitution also prohibits state taxes which tax beyond their fair apportioned share of interstate commerce, as measured by the "internal consistency" test of determining if tax burdens would exceed 100 percent if every state adopted the law in question. *See, e.g., Am. Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005) (upholding a fee that

applied only to interstate transactions, after applying the internal consistency test); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) (applying internal consistency test to determine Commerce Clause validity); *Tyler Pipe Indus. v. Dep't of Rev. of Washington*, 483 U.S. 232 (1987) (applying the internal consistency test to determine state gross receipts taxes are imposed on wholly intrastate activity); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983) (applying the internal consistency test); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 276 (1978) (upholding Iowa's single-factor apportionment rule against a challenge based on a speculative claim of duplicative taxation); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938) (holding that a state's taxation of interstate business "be fairly apportioned to the commerce carried on within the taxing state"); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920) (upholding a single-factor property formula because the only competitive disadvantage from it would be to local businesses). *See also Nw. Airlines v. Minnesota*, 322 U.S. 292, 306 (1944) (Jackson, J., concurring) ("The apportionment theory is a mongrel one, a cross between desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce. It is a practical, but rather illogical, device to prevent duplication of tax burdens . . . .").

Nexus has proven trickier, but this Court has correctly focused on the problematic effects of a sizable compliance or tax burden on interstate commerce. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court held that an even-handed state enactment with only incidental effect on interstate commerce is valid unless "the burden imposed on such commerce is

clearly excessive in relation to the putative local benefits." *Id.* at 142. Non-discriminatory, fairly apportioned state enactments have been found invalid in other cases due to excessive burden on interstate commerce. *See, e.g., Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 663 (1981) (invalidating an Iowa law banning 65-foot double tractor trailer trucks as impermissibly burdensome to interstate commerce, after concluding that they were as safe as 55-foot single trucks); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (invalidating an Illinois law requiring use of straight mudguards rather than curved mudguards, after concluding that the resultant mudguard changes at the state line would excessively burden interstate commerce); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (invalidating an Arizona law limiting interstate passenger train lengths after determining only one other state had such a law and it therefore impaired interstate commerce). *See also Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473 (1981) (upholding a state milk packaging requirement for sales in-state after concluding it was only a minor burden on interstate commerce); *Exxon v. Maryland*, 437 U.S. 117, 127-28 (1978) (upholding a state ban on refiner-owned retail stations after concluding that the loss of three refiners from the state was not an impermissible burden on interstate commerce).

In *Quill v. North Dakota*, 504 U.S. 298 (1992), this Court reaffirmed under the Commerce Clause its rule that a state cannot impose a sales tax collection obligation on a business unless that business is physically present in the state. "Undue burdens on interstate commerce may be avoided . . . by the demarcation of a discrete realm of commercial activity

that is free from interstate taxation. [The physical presence rule] create[s] a safe harbor for vendors whose only connection with customers in the taxing State is by common carrier or the United States mail." *Id.* at 314-15; *see also Nat'l Bellas Hess, Inc. v. Dept. of Rev. of Ill.*, 386 U.S. 753 (1967). While North Dakota in *Quill* had argued that borders are irrelevant in our modern economy, this Court recognized that subjecting non-present businesses to state taxation often means that activity out-of-state is being unconstitutionally taxed. The Court used physical presence as a proxy, but the underlying standard remained evaluating the burden placed on interstate commerce by the state enactment.

Taken together, the Constitution permits state taxation of interstate commerce where (1) the state's nexus standard scales, with lower state burdens permitting expanded taxation of interstate activity, and vice versa, (2) it is non-discriminatory, neither taxing nor otherwise burdening activity out-of-state while leaving identical activity in-state untaxed or unburdened, and (3) it taxes no more than the state's fair apportioned share of interstate commerce, as measured by internal consistency.

II. SOUTH DAKOTA'S LAW IS CONSTITUTIONAL, AS ITS NEXUS STANDARD SCALES WITH THE BURDEN IT IMPOSES, IT IS NON-DISCRIMINATORY, AND IT TAXES ONLY ITS FAIR SHARE OF INTERSTATE COMMERCE.

South Dakota's law minimizes the burden of sales tax collection to the extent practicable, by (1) adhering to interstate standards of sales tax administration, (2) requiring uniformity between state and local sales tax

bases, (3) minimizing number of local sales tax rates, which in South Dakota must be either 1 or 2 percent, (4) taxing virtually all final retail transactions under its sales and use tax, without arbitrary exemptions or confusing special tax rates, (5) adopting a meaningful *de minimis* threshold likely to exclude interstate activity where state burdens exceed state benefits, and (6) barring retroactive collection. In addition, the state does not discriminate against interstate commerce, subjecting out-of-state retailers to the same taxes paid by in-state retailers, and the statute's sales and use tax applies only to South Dakota's fair apportioned share of interstate commerce, purchases made by South Dakota residents not taxed by any other state.

A. South Dakota is One of 23 States with Simplified Sales Tax Collection That Imposes Minimal Burden on Collecting Businesses.

South Dakota is one of 23 states to be a full member of the Streamlined Sales Tax and Use Agreement (SSUTA), a multistate effort to adopt simplified administration and remittances, establish uniform definitions of items subject to tax, and require uniformity between state and local sales tax bases.[2] SSUTA was started in large part as a response to this Court's challenge in *Quill*: to achieve simpler and more uniform state sales taxes whose imposition would not be an impermissible burden on interstate

---

[2] The 23 states are Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

commerce. For this reason, SSUTA has been less successful than it could be, due to the non-participation by most states including the large states of Arizona, California, Florida, Illinois, Massachusetts, New York, and Texas. Some states refuse to join to maintain idiosyncratic sales tax practices, such as Maryland's "rounding rule" requiring vendors to round remainders of 4 and above up, rather than the more common practice of only rounding up remainders of 5 and above, or Chicago, Illinois's decision to tax sales of bottled water, soda, non-soda drinks, restaurant meals, candy, and groceries all at different tax rates. *See, e.g.*, Avalara, *How Does Avatax Handle Rounding in Maryland?*, https://goo.gl/YdyA1W; CITY OF CHICAGO, *Tax List*, https://goo.gl/28y3Mj.

It is hard to overstate the hard work and hard decisions that go into being a member of SSUTA. While many states have opted not to undertake this work, and consequently declined to address the issues raised by the Court in *Quill*, South Dakota and its fellow SSUTA members have. While more work can be done, South Dakota's participation in it shows a desire to minimize the interstate tax burden of its sales tax administration and collection mechanisms.

B. South Dakota Requires Uniformity Between State and Local Sales Tax Bases, and Minimizes the Number of Local Sales Tax Rates.

South Dakota permits its municipalities to levy sales taxes, but only by adhering to the state base of transactions and only at uniform rates (either 1 or 2 percent, or 4.5 percent for Indian tribes). *See* SOUTH DAKOTA DEP'T OF REVENUE, *Municipal Tax*

Information Bulletin (Jul. 2017), https://goo.gl/wHCVaB. While most countries have one unified consumption tax for the entire country or for each major region or province, sales taxes in the United States are very decentralized. 38 states authorize local sales taxes with their own rates, and Arizona, Colorado, and Louisiana even permit local sales taxes to have a different base of taxable transactions than the state sales tax. *See* Jared Walczak & Scott Drenkard, *State and Local Sales Tax Rates, Midyear 2017*, TAX FOUNDATION (Jul. 2017), https://goo.gl/UcGQfW.

Nationally there are a total of 10,708 jurisdictions in the United States that impose a sales tax, as of June 30, 2017, ranging by state on the high end from 1,277 in Missouri, 1,153 in Texas, 908 in Iowa, and 800 in Alabama, to just one each in the states of Connecticut, Indiana, Kentucky, Maine, Maryland, Massachusetts, and Michigan. Email from Tricia Schafer-Petrecz, Pub. Relations & Soc. Media Lead, Vertex, Inc., to Joseph Henchman, Exec. Vice President, Tax Foundation. Far from getting fewer, the number of sales tax jurisdictions grows each year, and is up from about 6,000 at the time of the *Quill* decision. South Dakota's decision to require adherence to the state sales tax base, and to establish uniform local tax rates, minimizes sales tax compliance burdens on businesses.

C. South Dakota is One of Three States That Tax Nearly All Services Under Its Sales Tax, Minimizing Complexity and Demonstrating the Statute Has No Discriminatory Intent or Purpose.

Unlike other states that decry the erosion of their

sales tax base while exempting goods and services that total over half their economy, South Dakota taxes it all. Internet sales are the only thing South Dakota does not tax, because they cannot under federal law.

Public finance and economic theory says sales taxes should apply to all final sales of goods and services, and no business inputs. Partly due to historic accident and partly due to policy efforts to exempt some goods, the median state sales tax base covers only 23 percent of final personal income. When states began to levy a sales tax in the 1930s, the tax applied to tangible personal property, items such as clothing, home appliances, and furniture, among other taxable goods. This made the tax relatively easy to administer. It also produced sufficient revenue, as the economy largely consisted of manufacturing and tangible goods. Over time, however, the U.S. economy has changed from a manufacturing-based economy to a service-based economy. Americans are purchasing more services than goods as a percentage of their consumption. In the first quarter of 2017, services accounted for approximately 68 percent of personal consumption expenditures in the United States. *See, e.g.*, Nicole Kaeding, *Sales Tax Base Broadening: Right-Sizing a State Sales Tax*, TAX FOUNDATION (Oct. 2017), https://goo.gl/dYfovD.

Despite the transformation in the economy, states have responded slowly to updating their sales tax bases. The narrow tax bases undermine neutrality, favoring one product or industry over another. While many states decry the forced exclusion of internet sales from their tax bases, they make little effort to address their decision to exclude other goods and services.

South Dakota has chosen not to discriminatorily tax its in-state consumption, instead broadly taxing nearly all categories of transactions under its sales and use tax: South Dakota taxes groceries (taxed in full by only 7 states of the 45 plus the District of Columbia with the tax), clothing (taxed in full by 39 states), non-prescription drugs (taxed by 35 states), personal services such as dry cleaning and haircuts (taxed in full by only 4 states), real estate transactions (taxed by only 3 states), legal transactions (taxed by only 3 states), accounting services (taxed by only 3 states), and even lobbying services (taxed by only 6 states). *See* Jared Walczak, Scott Drenkard, & Joseph Bishop-Henchman, ***2018 State Business Tax Climate Index***, TAX FOUNDATION (Oct. 2017), at 70-72 (complete list by type of transaction and by state), http://www.stateindex.org. South Dakota also relies heavily on its sales tax: in FY 2014, sales tax collections made up 40 percent of South Dakota's state and local revenue, the third highest of any state (behind Washington and Tennessee). *See* TAX FOUNDATION, FACTS & FIGURES 2017: HOW DOES YOUR STATE COMPARE? (table 8), https://goo.gl/AkFKNR. South Dakota has no state individual income or corporate income tax; sales and property taxes are essentially their only taxes and make up three-quarters of total South Dakota state and local tax revenue. *See id.*

These policy choices by South Dakota demonstrate a lack of discriminatory intent or purpose with the law challenged in this case. While many states correctly describe the forced exclusion of internet sales from their sales tax bases as inconsistent with public finance and economic theory, and sound tax policy, they do little to address billions

of dollars of exclusions of goods and services provided primarily by in-state businesses. A hallmark of discrimination under the Commerce Clause is a state taxing or otherwise penalizing activity out-of-state while leaving identical activity in-state untaxed or unpenalized. South Dakota, along with New Mexico and Hawaii, leaves virtually no in-state activity outside its sales tax base. For a clearer consideration of the extent of state tax powers, this Court should decide this statute from South Dakota rather than laws passed in other states that may be less pure in their lack of discriminatory intent or purpose.

D. South Dakota's Law Adopts a Meaningful *De Minimis* Threshold Likely to Exclude Interstate Activity Where State Burdens Exceed State Benefits.

South Dakota's statute minimizes its burden on interstate commerce through establishment of a minimum dollar threshold (of $100,000 in sales) or a minimum number of sales (200). S.D. S.B. 106, § 1. $100,000 or 200 sales in South Dakota, population 865,000, is a lot of sales. This *de minimis* threshold has the effect of excluding those sellers with incidental or purposefully directed sales into the state and where establishing collection mechanisms might outstrip the business's incremental revenue from selling into South Dakota. The inclusion of this provision demonstrates the state's thoughtfulness in preventing unnecessary burdens on interstate commerce associated with its tax collection. If similar provisions were adopted by other states, in proportion to their population or total economy relative to South Dakota's (for example, New York has 22.8 times the population

of South Dakota, so its comparable *de minimis* threshold would be $2.28 million; Massachusetts, with 7.9 times the population of South Dakota, would have a comparable threshold of $787,000 or 4,560 sales), state burdens would be limited to be borne primarily by those enjoying state benefits, comporting with the benefit principle of sound tax policy.

E. South Dakota's Statute Bars Retroactive Collection.

South Dakota's statute also has a provision barring retroactive collection. S.D. S.B. 106 § 5. While this Court has not definitively spoken on the extent of permissible retroactive state tax collection under the Due Process Clause, *compare United States v. Carlton*, 512 U.S. 26, 30 (1994) (upholding retroactive tax laws when "supported by a legitimate legislative purpose furthered by rational means") *with id.* at 38 (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session would raise, in my view, serious constitutional questions.") *and Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (setting out a three-part test on retroactive interpretation of law), numerous precedents, public sentiment, and the principles of sound tax policy look upon retroactive tax collection with disfavor. *See, e.g.*, *Eastern Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership."); *id.* at 558 (Breyer, J., dissenting) ("[A]n unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a

basic objective of law itself."); *General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) ("Retroactive legislation . . . can deprive citizens of legitimate expectations"); Joseph Henchman & Kavya Rajasekar, *The Bounds of Retroactive State Taxes*, TAX FOUNDATION (Feb. 2017), https://goo.gl/7LWSGn; Paul H. Frankel & Amy L. Nogid, *The Manifest Justice to the Manifest Injustice Doctrine: The Time Has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases*, Legal Updates & News, Dec. 2008, https://goo.gl/9uZdm3. Indeed, at least one scholar thinks this Court ruled as it did in *Quill* in part because at oral argument in the case, the state's counsel committed to pursuing retroactive tax collection in response to a question from Justice O'Connor. See, e.g., Billy Hamilton, "*Remembrance of Things Not So Past: The Story Behind the Quill Decision*," 59 STATE TAX NOTES 807 (Mar. 14, 2011), https://goo.gl/X7xL1J.

F. South Dakota's Statute Applies Only to South Dakota's Fair Apportioned Share of Interstate Commerce.

South Dakota's sales tax applies only to sales "at retail in the State of South Dakota to consumers or users." S.D. CODIFIED LAWS § 10-45-2. The South Dakota law therefore limits tax liability to those selling to purchasers within South Dakota. *See* S.D. S.B. 106 § 1. If every state adopted South Dakota's law, no purchaser or seller would be taxed more than once. While other proposals such as Massachusetts's cookie tax would subject companies to multiple taxation, the South Dakota law is internally consistent in this regard.

III. WITHOUT THIS COURT'S GUIDANCE, THE STATES WILL BRING ABOUT A COMPLEX PATCHWORK OF TAX LAWS HARMING INTERSTATE COMMERCE, EXACTLY WHAT THE FOUNDERS SOUGHT TO PREVENT.

This Court expressly endorsed the proposition that a state has the power to exercise its taxing authority against an out-of-state vendor if the vendor has a "physical presence" within the state in *National Bellas Hess* and reaffirmed its applicability twenty-five years later in *Quill*. While this Court has acknowledged that an "attributional nexus" standard is the "furthest extension" of nexus, *Quill Corp.*, 504 U.S. at 306, *citing Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe*, 483 U.S. at 250, many states have interpreted this as a floor rather than the ceiling. As a result, many states have enacted legislation that expands nexus beyond *Quill*, including New York-style click-through nexus, Colorado-style reporting and notification, and Massachusetts-style cookie nexus. Further, several states and courts have declined to apply the physical presence standard to business and individual income taxes.

A. 22 States Have Adopted New York-Style Click-Through Nexus Sales Tax Laws, Which Expand Physical Presence Beyond What This Court Described as Its Furthest Extent.

In 2008, New York was the first state to adopt a "click-through" nexus statute. *See* N.Y. TAX LAW § 1101(b)(8)(vi). This statute expanded the definition of nexus to include (as a rebuttable presumption) any out-of-state seller who "enters into an agreement with

a resident of [the state of New York] under which the resident . . . directly or indirectly refers potential customers . . . to seller" and such sales exceeds $10,000 per year. *Id.* This statute was upheld in *Overstock.com, Inc. v. New York State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013), finding that contracts with in-state non-employees who refer customers for compensation constitutes substantial nexus. *Id.* at 626 ("Active in-state solicitation that produces a significant amount of revenue qualifies as more than a 'slightest presence' . . .").

Following in New York's footsteps, several other states have enacted similar statutes. *See generally*, BLOOMBERG BNA, *State Tax Snapshot: A Dozen States Say Click-Through Nexus Applies, Despite Absence of Legal Authority*, https://goo.gl/Do5tNx.

- Arkansas in 2011 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* ARK. CODE § 26-52-117(d)-(e).
- California in 2012 adopted a statute with the rebuttable presumption, a $10,000 threshold, and a further requirement that the out-of-state seller have national sales of at least $1 million. *See* CAL. REV. & TAX § 6203(b)(5).
- Colorado in 2014 adopted a statute with the rebuttable presumption and a $50,000 threshold. *See* COLO. REV. STAT. 39-26-102(e).
- Connecticut in 2011 adopted a statute with a $2,000 threshold and no rebuttability. *See* CONN. GEN. STAT. § 12-407(a)(12)(L).
- Georgia in 2012 adopted a statute with the rebuttable presumption and a higher $50,000

threshold. *See* GA. CODE § 48-8-2(8)(M).

- Illinois in 2011 adopted a statute with a $10,000 threshold and no rebuttability. *See* 35 ILL. COMP. STAT. 105/2 & 110/2. *See Performance Marketing Ass'n, Inc. v. Homan*, 998 N.E. 2d. 54 (Ill. 2013) (holding the statute was preempted by federal law and violated the commerce clause of the United States Constitution).
- Kansas in 2013 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* KAN. STAT. § 79-3702(h)(2)(C).
- Louisiana in 2016 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* 2016 LA. H.B. 30, 1st Extra Sess.
- Maine in 2013 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* ME. REV. STAT. tit. 36, § 1754-B(1-A)(C).
- Michigan in 2015 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* MICH. COMP. LAWS § 205.52(b)(3).
- Minnesota in 2013 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* MINN. STAT. § 297A.66(4a).
- Missouri in 2013 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* MO. REV. STAT. § 144.605(2)(e)-(f).
- Nevada in 2015 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* 2015 NEV. A.B. 380.
- New Jersey in 2014 adopted a statute with the

rebuttable presumption and a $10,000 threshold. *See* N.J.S.A § 54:32B-2(i)(1).

- North Carolina in 2009 adopted a statute with the rebuttable presumption language and the $10,000 threshold. *See* N.C. GEN. STAT. § 105.164.8(b)(3).
- Ohio in 2015 adopted a statute with the rebuttable presumption and the $10,000 threshold. *See* OHIO REV. STAT. § 5741.01(I)(2).
- Pennsylvania in 2011 issued a revenue bulletin with no rebuttable presumption and no threshold. *See* Pennsylvania Dep't. of Rev., *Sales and Use Tax Bulletin* 2011-01 (Dec. 1, 2011), http://goo.gl/Dh9Lpf.
- Rhode Island in 2009 adopted a statute with the rebuttable presumption language and a lower $5,000 threshold. *See* R.I. GEN. LAWS § 44-18-15(a)(2).
- Tennessee in 2015 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See* 2015 TENN. H.B. 644.
- Vermont in 2011 adopted a statute with the rebuttable presumption and a $10,000 threshold, with a further requirement that it not take effect until similar legislation passes 15 other states. *See* VT. STAT. tit. 32, § 9783(b)-(c).
- Washington in 2015 adopted a statute with the rebuttable presumption and a $10,000 threshold. *See.* WASH. REV. CODE § 82.08.0521(1).

These statutes create physical presence when a retailer uses an independent contractor even if those contractors do not engage in maintaining an in-state market or a substantial flow of goods. While these

statutes provide for an ability to rebut the presumption that solicitation occurred, rebutting such presumption would inherently be futile, as it is hard to prove what has been done by individuals on the internet. As a result, due to the global nature of the internet, these click-through laws apply more broadly and encompass not only retailers who target sales within a given state, but also retailers who may not actually produce a sale in the given state.

B. Ten States Have Adopted Colorado-Style Reporting Sales Tax Laws, Which Raise First Amendment Issues.

In 2010, Colorado enacted a statute requiring non-collecting retailers to: (1) provide Colorado purchasers a "transactional notice" at the time of purchase, informing them that the purchase may be subject to Colorado's use tax; (2) provide an "annual purchase summary" with the dates, amounts, and categories of purchases of all Colorado purchasers with purchases over $500; and (3) file with the Colorado Department of Revenue an annual report listing their customers' names, addresses, and total purchases. COLO. REV. STAT. § 39-21-112(3.5). The transactional notice and annual consumer report informs Colorado purchasers that they are required to pay taxes, while the annual retailer report assists Colorado in determining the tax liability. In *Direct Mktg Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), the Tenth Circuit upheld the Colorado statute after concluding that *Quill's* holding applied to sales and use tax collection and not to the imposition of regulatory requirements.

While the DMA case was presented to this Court on the sole issue of jurisdiction, this Court recognized the potential significance of a ruling upholding the

law. During oral arguments, Justice Scalia stated: "This is certainly a very important case because I have no doubt that if we come out agreeing with [Colorado's State Counsel], every one of the states is going to pass a law like this." Transcript of Record at 24:25-34, *Direct Marketing Association v. Brohl*, --- U.S. ----, 135 S.Ct. 1124 (2015). Justice Alito echoed this conclusion, stating: "If the Colorado law is upheld, as a small internet business, I will have to submit potentially 50 different forms to all of these States reporting that somebody in South Carolina purchased something from me that cost $23.99. . .. [T]hat's where this all could lead, couldn't it?" *Id.* at 32:14-21. Reporting requirements under these notice-and-reporting statutes are deliberately cumbersome so as to compel collection.

Nine other states have these statutes[3]:

- Alabama in 2017 adopted legislation authorizing the Alabama Department of Revenue (DOR) to require non-collecting remote sellers to report Alabama sales to the DOR and notify Alabama customers of their use tax obligations. *See* ALA. CODE § 40-2-11.
- Kentucky in 2013 enacted a statute requiring remote sellers with more than $100,000 in gross sales to Kentucky residents and businesses to provide notice that purchasers must report and pay use tax to the Kentucky Department of Revenue. *See* KY. REV. STAT. § 139.450.

---

[3] South Dakota has enacted a less-drastic requirement that sellers notify purchasers, at the time of purchase on their website, that use tax is due. *See* S.D. CODIFIED LAWS § 10-63-2.

- Louisiana in 2016 enacted a statute including all of the provisions contained in the Colorado one. *See* LA. STAT. § 47:309.1.
- Oklahoma in 2016 enacted legislation requiring non-collecting out-of-state sellers to provide each customer with a statement of all sales made. *See* OKLA. STAT. tit. 68, § 1406.1.
- Pennsylvania in 2017 enacted legislation requiring non-collecting retailers who sell at least $10,000 into the state to send written notice listing each purchase made, effective March 1, 2018. *See* PA. CODE § 7213.1.
- Rhode Island in 2017 enacted legislation requiring non-collecting retailers who sell at least $10,000 into the state to send written notice of all purchases, dollar amounts, dates, and types of purchases, to all in-state customers and to provide a list of customers who owe tax to the division of revenue. *See* R.I. GEN. LAWS § 44-18.2-3.
- Tennessee in 2012 enacted legislation requiring non-collecting retailers to provide purchasers with a link to the Department of Revenue's website and to provide each purchaser with an annual statement of sales during the previous calendar year. *See* TENN. CODE § 67-6-515.
- Vermont in 2017 enacted legislation requiring non-collecting retailers who make at least $100,000 in sales to Vermont buyers, or have 200 or more individual sales transactions with Vermont buyers, to send use tax notifications to buyers and to the Vermont Department of Revenue. VT. STAT. tit. 32, § 9712.

- Washington in 2017 enacted legislation requiring "marketplace facilitators" to either (1) register to collect and remit Washington sales tax or (2) comply with Washington's newly-established notice and reporting regime. *See* WASH. REV. CODE § 82-08-052.

These statutes also raise privacy concerns relating to the requirement to notify state officials about what each customer purchases online. A North Carolina revenue ruling similar to the Colorado statute was struck down on these grounds. *See Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154 (W.D. Wash. 2010). The ACLU joined with Amazon.com to challenge this, noting the danger of unnecessarily requiring disclosure of purchases such as the movie *Lolita* or the book *How to Leave Your Husband*, or even the name of the website as some websites sell embarrassing things. The court held that the First Amendment forbids state tax collectors from knowing what taxpayers are buying. *Id.* at 1170 ("Citizens are entitled to receive information and ideas through books, films and other expressive materials anonymously.").

C. Three States Have Adopted Economic Nexus Sales Tax Provisions Which Ignore Physical Presence Completely.

South Dakota's law has served as the template for laws in Indiana (2017), Maine (2017), North Dakota (2017), Vermont (2016), and Wyoming (2017), with similar thresholds of $100,000 in annual sales or 200 individual transactions in the state. *See* IND. CODE § 6-2.5-2-1; ME. STAT. tit. 36, § 1951-B; N.D. CENT. CODE § 57-40.2-02.3; VT. STAT. tit. 32, § 9701(9)(F); WYO. STAT. § 39-15-501. The Vermont and Wyoming laws

are on hold pending this Court's decision in this case, and the Indiana law is being challenged. *See Am. Catalog Mailers Ass'n v. Krupp*, Ind. Marion Superior Court, Civil Div. 1 (Commercial Court Docket 49D01-1706-PL-025964).

However, three states have adopted more far-reaching abrogation on their tax powers. These regulations require sales tax collection by essentially any economic actor within the state:

- Alabama in 2015 enacted Reg. 810-6-2.90.03, requiring an out-of-state seller to collect and remit sales tax if the vendor has more than $250,000 in Alabama sales and is engaged in an enumerated list of activities. ALA. ADMIN. CODE r. 810-6-2.90.03.
- Mississippi in 2017 enacted a regulation identical to Alabama's. *See* MISS. CODE R. § 35.IV.3.09.
- Tennessee in 2017 enacted a regulation similar to Alabama's, with a $500,000 level of sales, but suspended enforcement pending court challenges. *See* TENN. COMP. R. & REGS. 1320-05-01-.129.

D. States May Soon Consider Massachusetts-Style Cookie Taxes, Which Expand the State's Sales Tax Nexus to All Sellers Everywhere.

On September 22, 2017, Massachusetts proposed Reg. 830, 830 MASS. CODE REGS. 64H.1.7, which would have required vendors with more than $500,000 in sales into Massachusetts from internet transactions and 100 or more transactional sales into the state during the previous twelve months to collect and remit sales and use tax if the vendor: (1) has established a

physical presence through property interests in and/or the use of in-state software (making "apps" available to be downloaded by in-state residents) and ancillary data (placing "cookies" on in-state residents' web browsers), (2) has contracts and/or relationships with content distribution networks, or (3) uses marketplace facilitators and/or delivery companies. Massachusetts subsequently withdrew the regulation but has begun the process of reissuing it. Ohio, however, adopted the standard as law, effective January 1, 2018. *See* OHIO REV. CODE § 5741.01(I)(2)(i). Discussion among state tax administrators suggests other states may consider adopting similar app and cookie nexus provisions.

Under this "cookie nexus" standard, Massachusetts and Ohio have the power to tax any online store on the planet if one of their residents accesses the vendor's website or downloads its app. These "cookie" nexus provisions likely also violate the Internet Tax Freedom Act (ITFA), which prohibits "multiple or discriminatory taxes on electronic commerce." 47 U.S.C. § 151. Advertising in a state has historically not created nexus, or even personal jurisdiction, and the Massachusetts and Ohio provisions create obligations solely for the online equivalent of advertising, cookies and apps. Absent judicial review, many states may follow Massachusetts's and Ohio's lead.

E. Three States Have Concluded that Physical Presence is Inapplicable for Business Taxes, Undermining the Spirit of the *Quill* Decision.

Ohio, Washington, and West Virginia have enacted laws, and courts in those states have upheld them, which impose business taxes without regard to

physical presence.

In 2005, Ohio enacted a "factor presence" law which imposed a tax on any business with at least $500,000 of Ohio gross receipts. OHIO REV. CODE § 5751.01(I). The Ohio Supreme Court concluded that physical presence is a sufficient condition but not a necessary condition when constitutionally imposing business privilege taxes. *See Crutchfield Corp. v. Testa*. No. 2015-0386 (Ohio 2016), 2016 WL 6775765.

Washington imposes a business and occupancy (B&O) tax on the privilege of "engaging in business activities," measured by gross receipts. *See* WASH. REV. CODE § 82.04.220. Washington courts have frequently upheld the application of the tax against businesses with minimal or no physical presence in the state. *See, e.g., Avnet, Inc. v. Dep't of Revenue*, 384 P.3d 571 (Wash. 2016) (applying B&O tax to sales made by an out-of-state company to another out-of-state company if delivery to the ultimate customer is in Washington); *Steven Klein, Inc. v. Dep't of Revenue*, 357 P.3d 59 (Wash. 2015) ("Washington's B&O tax system is extremely broad."); *Simpson Inv. Co. v. Dep't of Revenue*, 3 P.3d 741 (Wash. 2000) (applying B&O tax to receipt of dividends exempt from B&O taxation); *Budget Rent-A-Car of Wash.-Or., Inc. v. Dep't of Revenue*, 500 P.2d 764 (Wash. 1972) (applying B&O tax to casual sales); *Time Oil Co. v. State*, 483 P.2d 628, 630 (Wash. 1971) ("[I]t is obvious that the legislature intended to impose the business and occupation tax upon virtually all business activities carried on within the state.").

In 2005, West Virginia ordered payment of its corporate income tax by credit card companies with customers, but no employees or property, in the state.

The West Virginia Supreme Court found this sufficient for substantial nexus for the tax. *See Tax Comm'r v. MBNA Am. Bank*, 640 S.E.2d 226 (W. Va. 2006). A dissenting judge characterized the decision as "finding tax liability for an out-of-state corporation with no presence, tangible or intangible, in West Virginia on income realized out-of-state by that corporation from accounts kept out-of-state." *Id.* at 236 (Benjamin, J., dissenting).

States increasingly apply business taxes to out-of-state businesses without an in-state physical presence, dragging out-of-state sellers into their taxing regime based on as little as one transaction. *See* BLOOMBERG BNA, SURVEY OF STATE TAX DEPARTMENTS (2017 ed.) (listing various scenarios in which states conclude nexus has been established by non-physically-present businesses); *The Role of Congress in State Taxation: Hearing Before the U.S. House of Representatives Committee on the Judiciary* (testimony of Joseph Henchman), https://goo.gl/wBohQM ("Does shipping in a returnable container versus a common carrier create nexus? Does placing an internet browser cookie on someone's computer create nexus in that someone's state? Does downloading an app in a hub airport while waiting between two interstate flights create nexus in the state of that hub airport? Once established, how long does nexus last? It is not just that we have different answers for different states, but also that many states supply vague or indeterminate non-answers to many of these questions.").

As a result, states are creating the scenario that the Commerce Clause sought to avoid: the voice for sound tax policy, for levying taxes only from those in-

state businesses and residents who benefit from provided services, is overridden by those seeking to use the state tax code to benefit in-state people and businesses. *Cf.* JAMES MADISON, THE FEDERALIST NO. 42 ("[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of impatient avidity for immediate and immoderate gain."). This Court's guidance is needed before the states subject interstate commerce to death by a thousand cuts.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision of the Court below and uphold the South Dakota statute, but also resolve an almost universal lack of clarity about the proper scope of state sales taxation of out-of-state entities.

Respectfully submitted,

JOSEPH D. HENCHMAN*
**Counsel of Record*
TAX FOUNDATION
1325 G Street N.W., Suite 950
Washington, DC 20005
(202) 464-6200
henchman@taxfoundation.org
Counsel for Amicus Curiae

March 5, 2018

No. 17-494

In the Supreme Court of the United States

South Dakota,
Petitioner,

v.

Wayfair, Inc., Overstock, Inc., and Newegg, Inc.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* THE UNITED NETWORK EQUIPMENT DEALERS ASSOCIATION AND THE OWNERS' RIGHTS INITIATIVE IN SUPPORT OF RESPONDENTS

Jonathan Band
Counsel of Record
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

April 4, 2018

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Small Businesses Engaged in Interstate Commerce Are Vulnerable to the Cost of Additional Audits 6

II. Elimination of the Physical Presence Rule Would Significantly Increase the Number of Audits by State Authorities 8

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Kirtsaeng v. John Wiley & Sons, Inc.,
568 U.S. 519 (2013) 2

Impression Products, Inc. v. Lexmark Int'l, Inc.,
137 S. Ct. 1523 (2017) 2

Nat'l Bellas Hess v. Dep't of Rev. of Ill.,
386 U.S. 753 (1967) 3, 5

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Statutes and Legislative Materials

Fla. Stat. § 213.015(10) 13

Fla. Stat. § 213.29 13

Minn. Stat. § 297A.66 Subd. 2(b) 16

Exploring Alternative Solutions on the Internet Sales Tax Issue, Hearing Before the Committee on the Judiciary, House of Representatives, 113 Cong. 72 (2014) (statement of James H. Sutton) 12, 13, 14

Streamlined Sales and Use Tax Agreement, § 502(D) 4, 17

Other Materials

American Legislative Exchange Council, *Unaccountable and Unaffordable* (Dec. 2017) https://www.alec.org/app/uploads/2017/12/2017-Unaccountable-and-Unaffordable-FINAL_DEC_WEB.pdf.....10

Emma Brown, *With state budget in crisis, many Oklahoma schools hold classes four days a week*, Wash. Post (May 27, 2017), https://www.washingtonpost.com/local/education/with-state-budget-in-crisis-many-oklahoma-schools-hold-classes-four-days-a-week/2017/05/27/24f73288-3cb8-11e7-8854-21f359183e8c_story.html?utm_term=.d104b121cae3..... 10-11

Daniel DeSalvo and Jeffrey Kuclik, *How Today's big Supreme Court case on public-sector unions could lead to a fiscal crisis*, Wash. Post (Feb. 26, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/26/heres-whats-at-stake-today-as-the-supreme-court-hears-janus-v-afscme-not-for-unions-but-for-states-balance-sheets/?undefined=&utm_term=.1e96252bb981&wpisrc=nl_politics&wpmm=1 10

Matthew Heller, *Small Firms Pay Bigger Slice of Revenue in Audit Fees*, CFO (Feb. 26, 2015), http://ww2.cfo.com/auditing/2015/02/small-firms-pay-bigger-slice-revenue-audit-fees/.....9

Paul T. Hill and Georgia Heyward, *A troubling contagion: The rural 4-day school week*, (March 3, 2017), https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/03/a-troubling-contagion-the-rural-4-day-school-week/ 11

Terrence P. Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, CNSNews.com (March 22, 2018), https://www.cnsnews.com/news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hit-records-2017 10

National Conference of State Legislatures, *State Constitutional and Statutory Requirements for Balanced Budgets*, http://www.ncsl.org/research/fiscal-policy/state-constitutional-and-statutory-requirements-fo.aspx 11

Suzanne Perez Tobias, *South East Kansas district implements four-day school week*, Wichita Eagle (April 19, 2016), http://www.kansas.com/news/local/education/article72631157.html 11

U.S. Gov't Accountability Office, GAO-18-114, *SALES TAXES: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (2017) 9

INTEREST OF *AMICI CURIAE*[1]

The United Network Equipment Dealers Association ("UNEDA") is an alliance of more than 240 dealers of used network equipment.[2] These secondary market suppliers work together to promote industry best practices, ensure the highest standards of product quality, and eradicate counterfeit and fraud in the secondary market. Although UNEDA members collectively generate over $2 billion in revenue, most UNEDA members are small and medium sized businesses, and would be adversely affected by the overturning of the physical presence rule for collection of state sales tax articulated by this Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). UNEDA has worked in support of enactment of the Online Sales Simplification Act introduced by the Chairman of the U.S. House of Representative Committee on the Judiciary, the Honorable Bob Goodlatte.

The Owners' Rights Initiative ("ORI") is an organization of over 20 companies and trade associations that have joined together to protect ownership rights in the United States.[3] ORI

---

[1] No counsel for any party authored this brief in whole or part, and no person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondents have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by *amici curiae*.

[2] A list of UNEDA board members can be found at http://uneda.com/board-members/.

[3] A list of ORI members can be found at http://ownersrightsinitiative.org/about/. UNEDA is a member of ORI.

members believe in the fundamental premise that **if you bought it, you own it**, and should have the right to sell, lend, or give away your personal property. ORI formed when *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013), was pending before this Court. ORI is now dedicated to preserving that holding, and making sure that it is not undermined in Congress, the executive branch, or the courts. Likewise, ORI supports strong ownership rights in the patent context, as just articulated by the Supreme Court in *Impression Products, Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017), in which ORI submitted an *amicus* brief. ORI members participate in the secondary market, which would be harmed by the burdens on small enterprises that would result from overturning *Quill*.

SUMMARY OF ARGUMENT

In 1992, this Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), affirmed its earlier holding in *Nat'l Bellas Hess v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967), that the dormant commerce clause prohibited a state from requiring that a seller collect sales tax on purchases by buyers in that state unless the seller had a physical presence in that state. This brief focuses on one of the many burdens reversal of *Quill*'s physical presence rule would impose on small and medium size enterprises: exposure to audit by the taxing authorities of 45 states and the District of Columbia.

To bring this burden to life, this brief will first describe in detail four typical members of UNEDA. Then, the brief will explain the burden that exposure to audit by all the jurisdictions that impose sales tax would have on business such as these four UNEDA members. Because state budgets are highly constrained, state taxing authorities would have a strong incentive to audit out-of-state businesses in the hope of recovering additional revenue. Due to the large number of taxing authorities, it is likely that in any given year, a small business engaging in interstate sales could be audited by five taxing authorities. The cost of responding to so many audits would seriously undermine the economic viability of these small businesses.

Further, even if state taxing authorities did not have a strong financial incentive to target out-of-state businesses, elimination of the *Quill* physical presence rule would still result in an increase in the

number of audits. Proper application of a sales tax regime requires careful classification of transactions—a task software does not meaningfully facilitate. States are likely to audit businesses to ensure that they are correctly classifying their transactions; states have a legitimate interest in guaranteeing the correct application of their law. While the Streamlined Sales and Use Tax Agreement limits the audit liability of sellers that use certified service providers to file their taxes, this limitation does not apply to audits relating to the classification of products and transactions.

ARGUMENT

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court reiterated the simple, common sense rule it adopted in *Nat'l Bellas Hess v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967): a state could not require a seller to collect sales tax on purchases by consumers in that state unless the seller had a physical presence in that state. The *Bellas Hess* and *Quill* Courts recognized that requiring out-of-state sellers to collect sales taxes on purchases by in-state buyers would interfere with interstate commerce, in violation of the dormant commence clause. Although *Quill* dealt with catalog sales, the same principle applies in the digital age, where the Internet allows buyers to find sellers throughout the country.

Respondents in their brief describe the burden that overturning *Quill* would place on the thriving interstate commerce the Internet facilitates, particularly commerce involving small and medium sized businesses. Respondents' Br. at 30-38. *Amici* agree that eliminating the *Quill* physical presence rule would impose the significant costs Respondents identify. One set of costs, however, would be particularly burdensome on *amici*'s members: those resulting from exposure to audit by the taxing authorities of 45 states and the District of Columbia. The cost of responding to multiple audits every year would be ruinous to the small and medium sized businesses represented by *amici*.

To show the real-world impact of overturning *Quill*, this brief first profiles four of the members of *amicus* UNEDA. These profiles reveal small

companies with narrow profit margins that are heavily dependent on out-of-state sales. Next, the brief details the high potential cost of exposing small businesses to the possibility of audit by the taxing authorities of all the states where their customers reside. Given the constraints on state budgets, state taxing authorities likely will view out-of-state businesses as revenue sources. Falling within the jurisdiction of 45 additional taxing authorities, a small business could be audited by five or more in any given year. This could cause the business's profits to evaporate.

I. Small Businesses Engaged in Interstate Commerce Are Vulnerable to the Cost of Additional Audits.

The following profiles of four members of *amicus* UNEDA demonstrate that small businesses engaged in interstate commerce often have very narrow profits margins that would be diminished by new costs such as complying with audits.

1. **Duane Whitlow & Co., Inc.**, is based in Addison, Texas. *See* DWC-IT, http://www.dwc-it.com/. It is a family-owned business founded in 1977. The company sells used Cisco products along with new hardware and software products. It has total revenues of approximately $2 million, of which $1.2 million derives from sales outside of Texas. Every year it has roughly 300 out-of-state sales, and it has customers in 45 states. The company has five employees. The president and secretary of the company handle all administrative matters, and an

outside accounting firm takes care of the tax filings. Its profit margin is under five percent.

2. **Pan Atlantic Technology Corporation** is located in Hawthorne, New Jersey. *See* Pan Atlantic Technology Corporation, http://www.panatl.com/. It is a family-owned business started by a married couple in their basement seventeen years ago. It sells refurbished networking equipment such as routers, switches, and telephony, firewall, and wireless devices to customers in all 50 states. Almost all of its $3 million in sales are to customers outside of New Jersey. Last year, it had over 2,700 out-of-state sales. It has six employees, including one bookkeeper. Its net income is under $100,000.

3. **Hula Networks, Inc.**, is based in Sunnyvale California, and has two small sales offices in Colorado and Texas. *See* Hula Networks, https://www.hulanetworks.com/. It was established in 2001 by three former employees of a Cisco value-added reseller. Hula resells new and used network hardware, and provides professional services such as design, installation, and support. It has $12 million in annual revenue, $4.5 million of which is from 24 states other than California, Colorado, or Texas, where it has a physical presence. It has twelve employees, including two who handle administrative matters. Hula retains an outside accounting firm for tax filings. It has profits of approximately $300,000.

4. **Ethos Dynamics** operates out of Suwanee, Georgia. *See* Ethos Dynamics, https://ethosdynamics.com/. It is a partially woman- and Native American-owned family business

established in 2012. Ethos Dynamics is a reseller of refurbished servers and network equipment. It has U.S. sales of $1.3 million in 38 states. It has six employees, including one bookkeeper. Last year, it experienced a net loss of $33,300.

These companies share the following characteristics:

- Much of their revenue derives from sales to a large number of states in which they have no physical presence;
- They do not have large in-house accounting departments; and
- They have very narrow profit margins.

Exposing these companies to the cost of responding to audits by multiple state taxing authorities would have a detrimental impact on their economic viability.

II. Elimination of the Physical Presence Rule Would Significantly Increase the Number of Audits by State Authorities.

1. Under the *Quill* physical presence rule, a company is subject to audit by the federal Internal Revenue Service and the taxing authority of the states where it has a physical presence. If this Court overturns the *Quill* physical presence rule, a company could be subject to audit by the taxing authority of each state where it has customers. A small company like Pan Atlantic Technology Corporation could suddenly be subject to audit by an

additional 44 taxing authorities. Even if any particular taxing authority conducted an audit only once every ten years, on average the small company would be audited five times a year.[4] Responding to any single audit could easily cost over $10,000 in fees to an accounting firm. Matthew Heller, *Small Firms Pay Bigger Slice of Revenue in Audit Fees*, CFO (Feb. 26, 2015), http://ww2.cfo.com/auditing/2015/02/small-firms-pay-bigger-slice-revenue-audit-fees/ (small companies pay $5,000 in audit fees per $1 million in revenue). Five audits would translate into $50,000 in additional annual accounting fees. Moreover, five audits would be disruptive to the operation of thinly staffed companies.[5] GAO Report at 21 (describing the costs of making staff available, developing justifications for tax claims, and complying with document or information requests in response to state tax audits).

2. There is every reason to believe state taxing authorities would aggressively audit out-of-state businesses. Because of policy choices not to increase taxes to match growing expenditures, state

---

[4] According to a Government Accountability Office report, a "representative from the tax department of one company with nexus in most states said that auditors return every few years to audit the company and that they are currently contending with 8 to 10 audits from different tax authorities." U.S. Gov't Accountability Office, GAO-18-114, *SALES TAXES: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* ("GAO Report") 21 (2017). This company expects "audit related costs to grow with exposure to more jurisdictions...." *Id.*

[5] The burden of responding to an audit is not mitigated by the availability of rate calculation software.

governments perennially are short of resources. As of 2016, state governments had a cumulative unfunded liability of $1.1 trillion in health care costs for retired state employees. Daniel DeSalvo and Jeffrey Kuclik, *How Today's big Supreme Court case on public-sector unions could lead to a fiscal crisis*, Wash. Post (Feb. 26, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/26/heres-whats-at-stake-today-as-the-supreme-court-hears-janus-v-afscme-not-for-unions-but-for-states-balance-sheets/?undefined=&utm_term=.1e96252bb981&wpisrc=nl_politics&wpmm=1. This is on top of $6 trillion in unfunded public pension liabilities. American Legislative Exchange Council, *Unaccountable and Unaffordable* (Dec. 2017) https://www.alec.org/app/uploads/2017/12/2017-Unaccountable-and-Unaffordable-FINAL_DEC_WEB.pdf. Many states are experiencing budget shortfalls, even though sales tax revenues continue to grow and the national economy is relatively strong. *See* Terrence P. Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, CNSNews.com (March 22, 2018), https://www.cnsnews.com/news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hit-records-2017. Because of a shortage of funds, public schools in Oklahoma hold classes only four days of week. Emma Brown, *With state budget in crisis, many Oklahoma schools hold classes four days a week*, Wash. Post (May 27, 2017), https://www.washingtonpost.com/local/education/with-state-budget-in-crisis-many-oklahoma-schools-hold-classes-four-days-a-week/2017/05/27/24f73288-3cb8-11e7-8854-

21f359183e8c_story.html?utm_term=.d104b121cae3. *See also* Paul T. Hill and Georgia Heyward, *A troubling contagion: The rural 4-day school week*, (March 3, 2017), https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/03/a-troubling-contagion-the-rural-4-day-school-week/; Suzanne Perez Tobias, *South East Kansas district implements four-day school week*, Wichita Eagle (April 19, 2016), http://www.kansas.com/news/local/education/article72631157.html.[6]

3. In the face of these budget shortfalls, out-of-state businesses would be an obvious target for state taxing authorities to audit.[7] *See* GAO Report at 21 (business representatives "fear...increased audits, should states gain expanded authority to tax remote sales"). State taxing authorities already have enormous leverage over small businesses within their jurisdiction, and this power would grow exponentially against remote businesses that would not be able to push back politically against unreasonable and unjustified audits. James H.

---

[6] Indeed, Petitioner states that "at the very moment it passed the law at issue here, the Legislature felt compelled to raise the sales-tax rate to help increase teacher salaries." Petitioner Br. at 16. Moreover, South Dakota does not have an income tax, so it is particularly dependent on sales tax revenue.

[7] Because of state balanced budget requirements, states cannot engage in deficit spending, unlike the federal government. National Conference of State Legislatures, *State Constitutional and Statutory Requirements for Balanced Budgets*, http://www.ncsl.org/research/fiscal-policy/state-constitutional-and-statutory-requirements-fo.aspx. This means that any budget shortfall must be addressed by cutting spending or raising revenue.

Sutton, a certified public accountant in Florida, testified at a March 2014 U.S. House of Representatives Judiciary Committee hearing concerning the many unfair advantages taxing authorities, such as the Florida Department of Revenue, currently have over small businesses. These include:

- The threat of criminal penalties: $301 of unremitted sales tax over five years is a third-degree felony punishable by up to 15 years in jail and $5,000 in fines. *Exploring Alternative Solutions on the Internet Sales Tax Issue, Hearing Before the Committee on the Judiciary, House of Representatives,* 113 Cong. 72, 76 (2014)(statement of James H. Sutton)("Sutton").

- Burden shifting: Florida has the power to estimate sales tax with the presumption of accuracy, shifting the burden to the business to prove the estimate is incorrect. Sutton at 77. *See* GAO Report at 21 ("[A]ssessments prepared by revenue offices generally carry a presumption of accuracy. In practice, this places the burden of proof on the retailer to rebut claims made by revenue offices."). According to Sutton, Florida often estimates twice the historical average of tax due. Sutton at 77.

- Automated Collection Process: Florida has implemented automatic bank freezes and filing of tax liens with no human intervention. A tax warrant was issued against the Florida Supreme Court because the computer system truncated the

name of the intended defendant, the Florida Supreme Court Historical Society. *Id.*

- Piercing the Corporate Veil: Florida law allows the state to pursue a corporation's officers, directors, and shareholders for sales tax liability. It also authorizes the imposition of a 200% penalty on the owners of a failing business that owes sales tax. *See* Fla. Stat. § 213.29; Sutton at 77.

- Limiting right to payment plan: The Florida Taxpayer Bill of Rights grants taxpayers the right to pay taxes owed on a payment plan. Sec. La. Stat. § 213.015(10). However, the Department of Revenue decided to condition this right on businesses waiving the right to appeal and owners personally guaranteeing past liability as well as twelve months of future liability. Sutton at 78.

- Drawn-out audits: The typical sales tax audit takes between six and twelve months to complete, not including administrative challenges and appeals. *Id. See* GAO Report at 21 (describing a business that "dealt with an expensive audit that lasted 3 years").

- Denying right to appeal: A taxpayer must respond to the Department of Revenue's positions within 20 days of the date of the notice. According to Sutton, the Department often delays mailing the notice letter, thereby effectively shortening the reply period. Sutton at 78. Additionally, states often will not allow a taxpayer to challenge

an assessment in court unless the taxpayer has first paid the tax in full. *Id.*

- Outsourcing audits: Many states contract with third parties to perform audits, which may have a financial incentive to maximize collections from taxpayers. *Id.*

- Lack of Uniform Enforcement: In Florida, local Department of Revenue offices have the discretion to follow their own rules and procedures. Thus, one office may enter into installment agreements for no more than six months, while another office enters into twelve month agreements. *Id.* at 79.[8]

Sutton stressed that the hardships for businesses imposed by existing state audit procedures were "but a drop in the sea of turmoil happening right now to small business owners...." *Id.* at 76. He added that if sales tax collection responsibility, and therefore audits, extended nationally, "this turmoil will be unleashed on business owners all over the country." *Id.*

Small businesses, confronted by the unfair audit procedures of 45 states, and the cost of securing counsel in and travelling to remote jurisdictions, are unlikely to contest remote state tax authorities' interpretation of their tax law. GAO Report at 21. The businesses would be inclined to settle disputes simply to make the taxing authorities go away. *Id.* at

---

[8] In addition to these unfair practices permitted by state law, Sutton documented instances of unauthorized abusive behavior by Department of Revenue agents. Sutton at 79.

22. In short, *amici* expect state taxing authorities to attempt to squeeze needed revenue from out-of-state businesses.[9]

4. Even if state taxing authorities did not have a financial incentive to target out-of-state businesses, it is reasonable to conclude that elimination of the *Quill* physical presence rule would still lead to an increase in the number of audits. Tax law is a complex matter, and states have a legitimate interest in ensuring that their law is applied correctly. While software to calculate the 16,000 different sales tax rates is helpful, a business must still decide how to apply those rates. A sales tax holiday, for example, might apply to purchases by consumers but not by businesses. Much of the equipment sold by UNEDA members could be used by both consumers and businesses. A UNEDA member selling into a particular state during a sales tax holiday must determine whether the transaction is to a consumer, and therefore exempt from the sales tax; or to a business, in which case it is not exempt. The state taxing authority could reasonably

---

[9] The briefs of Petitioner's *amici* Colorado and 40 other states and the National Governors Association ("NGA"), et al., make abundantly clear that the states intend to extract sale tax revenue from remote retailers if this Court abrogates the physical presence rule. NGA, for example, describes in great detail the revenue losses it believes are caused by the physical presence rule, as well as the "severe" effects "of this obstructed revenue stream," NGA Br. at 11, particularly on public education. NGA states that "with the *Bellas Hess* and *Quill* shackles removed, States would once again be ... creating policy that fits their respective sales and use tax revenue needs...." NGA at 6.

wonder whether the out-of-state UNEDA member was making this determination correctly. Similarly, sales to resellers typically are exempt. But a reseller may have failed to renew its reseller's certificate, in which case the sale might not be exempt. Likewise, sales to non-profit entities might be tax exempt, but entities lose their non-profit status. Because the taxing authority appropriately would want to ensure that the out-of-state seller was correctly categorizing transactions and thus properly collecting the sales tax, audits inevitably would proliferate, to the detriment of small businesses.

5. Further complicating matters, if this Court replaces the physical presence rule with an economic nexus requirement, states are likely to establish thresholds for the collection of sales tax. That is, a retailer would be obligated to collect sales tax only if it has sales into that state above a certain threshold, *e.g.*, $10,000 in annual sales. *See* Minn. Stat. § 297A.66 Subd. 2(b) (exempting "marketplace providers" with less than $10,000 in annual sales in Minnesota).[10] A small business might hover near the threshold: one year it could exceed the threshold, and be required to collect sales tax; the next year it could fall below the threshold, and be exempt from the collection obligation. The state taxing authority could be expected to question these fluctuations in collections. In contrast, a large business probably

---

[10] Under the South Dakota statute at issue here, a retailer must collect sales tax if it transacts more than $100,000 of business or more than 200 times annually with state residents. Petitioner Br. at 16. It is safe to assume that if this Court eliminates the physical presence rule, the thresholds most states would adopt would be significantly lower than $100,000.

would always exceed the threshold, and thus would not arouse the suspicions of the taxing authority.

6. Petitioner's *amicus* National Association of Certified Service Providers ("NACSP") suggests that the exposure to audits would not be unduly burdensome in states that have agreed to the Streamlined Sales and Use Tax Agreement ("SSUTA") because "when retailers have Certified Service Providers file their taxes directly, CSPs assume the primary responsibility for any jurisdictional audit inquiries." NACSP Br. at 23. *See also* Streamlined Sales Tax Governing Board Br. at 15. However, the SSUTA expressly states that its audit liability protections "shall not be available for a ... seller that has incorrectly classified an item or transaction into a product category certified by a member state." SSUTA Sec. 502(D). In other words, the SSUTA's audit liability protections do not apply against the most likely cause of audits: misclassification of transactions. Moreover, only 24 states are members of the SSUTA, meaning that its audit liability provision would not shelter businesses from audit by the taxing authorities in the non-SSUTA states.

7. Petitioner's *amici* Multistate Tax Commission ("MTC") and Federation of Tax Administrators similarly argue that "the chance of a smaller seller being subjected to regular audit is extremely small," MTC Br. at 28, because the likely return to a state from auditing a small business is small. This, however, is not the experience of UNEDA and ORI members; they have endured audits triggered by

trivial perceived discrepancies.[11] Furthermore, MTC qualifies its minimization of the risk of audit with the reference to "*regular* audit." The concern of UNEDA and ORI members is not that they would *regularly* be audited every year by every taxing authority. Rather, due to the large number of states, even *irregular* audits—for example, once every ten years by a given state—are sufficient to result in a small business being audited five times or more a year. Such an aggregate volume of audits is sufficient to wreak havoc on the operation of a small business.

CONCLUSION

For the foregoing reasons, the Court should reaffirm the *Quill* physical presence requirement.

Respectfully submitted,

Jonathan Band
Counsel of Record
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

April 4, 2018

---

[11] According to one attorney interviewed by the GAO, sales tax audits of small businesses often produce revenue. GAO Report at 21. Additionally, state revenue departments have low-cost enforcement tools at their disposal, such as a letter audit. *Id* at 22. A revenue office sends a letter to a business stating that the office suspects it owes sales tax, and the "business incurs costs to prove the state wrong to avoid the assessment." *Id.*

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari
to the South Dakota Supreme Court

BRIEF FOR *AMICI CURIAE* WASHINGTON STATE TAX PRACTITIONERS IN SUPPORT OF RESPONDENTS

DIRK GISEBURT
Counsel of Record
Davis Wright Tremaine LLP
1201 Third Avenue, Ste.2200
Seattle, WA 98101
dirkgiseburt@dwt.com
207-757-8049

April 4, 2018

QUESTION PRESENTED

Should this Court abrogate *Quill's* sales-tax only, physical-presence requirement?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTEREST OF THE *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 3
ARGUMENT 7
I. *Complete Auto*'s Background Shows That Nexus With The Activity Is An Individualized Assessment, And This Case Is Not Properly Framed Upon Individualized Facts 7
A. The entire body of law on which *Complete Auto* based its nexus test focused on whether the taxpayer conducted the taxed activity in the State. 7
B. The Court's use-tax collection cases show the collection obligation is dependent on the taxpayer's carrying on a directly taxable activity in the State; mere advertising was not seen as a substantial part of making sales. 17
C. South Dakota's conclusive nexus presumption based on sales volumes does not comport with *Complete Auto*'s as-applied test; if "delivery" is the targeted activity of online retailers, the State needs to

show the particular delivery mechanism can be attributed to the retailer. 22

II. Confusion About The Nature Of The Tax In Question Should Be Avoided..... 25

CONCLUSION..... 29

APPENDIX: List of *Amici Curiae*..... 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Signal, Inc. v. Dir., Div. of Taxation,
504 U.S. 768 (1992) 14, 22, 23

American Oil Co. v. Neill,
380 U.S. 451 (1965) 23

Boston Stock Exch. v. State Tax Comm'n,
429 U.S. 318 (1977) 10

Bowman v. Continental Oil Co.,
256 U.S. 642 (1921) 19

Clark v. Paul Gray, Inc.,
306 U.S. 583 (1939) 10

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 4, 8

Colonial Pipeline Co. v. Traigle,
421 U.S. 100 (1975) 14

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) ..... *passim*

Felt & Tarrant Mfg. Co. v. Gallagher,
306 U.S. 62 (1939) 18, 19, 20

Freeman v. Hewit,
329 U.S. 249 (1946) 13, 16

Gen. Motors Corp. v. Washington,
377 U.S. 436 (1964) 10, 11

Gen. Trading Co. v. State Tax Comm'n of Iowa,
322 U.S. 335 (1944) 20

Henneford v. Silas Mason Co.,
300 U.S. 577 (1937) 18, 25

Hinson v. Lott,
75 U.S. (8 Wall.) 148 (1868) 16

Illinois Cent. R. Co. v. Minnesota,
309 U.S. 157 (1940) 10

Ingels v. Morf,
300 U.S. 290 (1937) 10

Irwin Naturals v. State,
382 P.3d 689 (Wash. Ct. App. 2016),
cert. denied, 138 S. Ct. 238 (2017) 26

McGoldrick v. Berwind-White Coal Mining Co.,
309 U.S. 33 (1940) 15, 16

Memphis Natural Gas Co. v. Stone,
335 U.S. 80 (1948) 12, 13

Miller Bros. Co. v. Maryland,
347 U.S. 340 (1954) 17, 21, 22, 23, 24

Monomator Oil Co. v. Johnson,
292 U.S. 86 (1934) 18, 20

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois,
386 U.S. 753 (1967) ..... *passim*

Nat'l Geographic Soc'y v. California Bd. of Equalization,
430 U.S. 551 (1977) 5, 6, 21, 26

Nelson v. Montgomery Ward & Co.,
312 U.S. 373 (1941) 19, 20

Nelson v. Sears, Roebuck & Co.,
312 U.S. 359 (1941) 19, 20

Northwestern States Portland Cement Co. v. Minnesota,
358 U.S. 50 (1959) 11, 13

Norton Co. v. Dep't of Revenue,
340 U.S. 534 (1951) 23

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 15, 16

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 27

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Scripto, Inc. v. Carson,
362 U.S. 207 (1960) 20, 22

Sonneborn Bros. v. Cureton,
262 U.S. 506 (1923) 16

Spector Motor Serv., Inc. v. O'Connor,
340 U.S. 602 (1951) 13, 16

Standard Pressed Steel Co. v. Washington Dep't of Revenue,
419 U.S. 560 (1975) 11

State v. Wayfair, Inc.,
901 N.W.2d 754, 756 (2016) 6, 27

Trinova Corp. v. Michigan Dep't of Treasury,
498 U.S. 358 (1991) 2, 25

Wisconsin v. J.C. Penney Co.,
311 U.S. 435 (1940) 6, 12, 19

Statutes

Cal. Civ. Code § 1656.1 (2016 and Supp. 2018) 26

Cal. Rev. & Tax. Code § 6051 (2016 and Supp. 2018) 26

S.D. Codified Laws § 10-45-2 (Supp. 2017) 6, 26

S.D. Codified Laws § 10-45-22 (Supp. 2017) 6, 26, 28

S.D. Codified Laws § 10-45-27.3 ..... 7, 27, 28

S.D. Codified Laws § 10-64-2 (Supp. 2017) 27, 28

Wash. Rev. Code § 82.08.020(1) (2016 and Supp. 2017) 26

Wash. Rev. Code § 82.08.050(1) (2016 and Supp. 2017) 26

Wash. Rev. Code § 82.08.120 (2016 and Supp. 2017) 26

Other Authorities

S.B. 106, 91st Legis. Assemb. Session, §§ 1(1), (2) (S.D. 2016) 22, 23, 24

South Dakota Department of Revenue, "Sales and Use Tax Guide" (July 2017), http://dor.sd.gov/Taxes/Business_Taxes/Publications/Sales_Tax.aspx 27

BRIEF OF *AMICI CURIAE*
WASHINGTON STATE TAX PRACTITIONERS
IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici curiae ("Practitioners")[1] are lawyers practicing state and local tax law in Washington State. Practitioners spend parts of nearly every working day applying this Court's Commerce Clause and Due Process Clause precedents in the representation of U.S. and foreign individuals, families, charities, and business organizations of every kind.

Practitioners join this brief solely as individuals and not as representatives of the law firms with which they are affiliated. Each is currently in private practice. Among their number are practitioners who have served in the past as President of the Washington State Bar Association or as chair of the Association's State and Local Taxes Committee. Their experience is not limited to representing taxpayers, some having worked in the past for the Washington State Department of Revenue as a former Assistant Director for Interpretation and Appeals, a second former appeals officer, and a legislative affairs officer. A full list of *amici* appears in Appendix A.

Part of the challenge and satisfaction of

---

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Petitioner and Respondents have filed Blanket Consents to the filing of *amicus curiae* briefs with the Clerk of the Court.

Practitioners' job is explaining to clients and others the not always scrutable ways in which this Court has sought "to accommodate the necessary abstractions of tax theory to the realities of the marketplace." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372 (1991). As the Court itself repeatedly acknowledges, clarity and consistency of doctrinal statements in its opinions are sometimes wanting. Legal advisors to the States, too, experience uncertainty in applying the Court's statements to legislative proposals and legal strategy. *See* Br. of Colorado, et al., at 17.

The Petitioner asks the Court to abrogate a long-standing precedent, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), but the Petitioner's argument is based on a shallow and inaccurate understanding of the doctrinal framework for the case. In particular, while the Petitioner and some supporting *amici* argue that they are seeking a straightforward application of the "substantial nexus" test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), in fact they ask the Court to change the test fundamentally.

The new world of e-commerce clearly poses challenges to public finance, but these challenges do not excuse arguments that obscure the nature of the tax in question or the content of applicable law. Practitioners offer a review, not provided to the same degree in the other briefing, of the development of this Court's relevant case law in order to show what is more broadly at stake in this case.

SUMMARY OF ARGUMENT

1. The Petitioner presents the legal problem in this case as a matter of simple inconsistency between the rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and the fundamental nexus test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Pet'r's Br. at 21-23. This argument is mistaken because it obscures the fact that there are two separate nexus tests at work.

The genealogy of *Complete Auto*'s nexus formulation shows that the test should be read as sustaining a tax "when the tax is applied to an activity [*of the taxpayer*] with a substantial nexus with the taxing State." *Id.* at 279. This test grew out a body of law addressing when a State could impose a tax on a taxpayer itself. By contrast, the core holdings on use-tax collection in *Quill* and *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), are no-nexus counterpoints to a distinct line of cases that upheld a tax-collection obligation as ancillary to an otherwise taxable activity the retailer was conducting within the State. Without saying so expressly, *Quill* reaffirmed that a tax-collection obligation could not be imposed unless the State could already impose a tax on an activity conducted by the business in the State.

Practitioners agree with the Petitioner that the Court should be mindful in this case of Chief Justice Marshall's counsel on how to read "general expressions" in the Court's opinions:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821), *quoted in* Pet'r's Br. at 41. Just so in the case of *Complete Auto*. The Petitioner, unfortunately, betrays that very maxim by omitting discussion of the Court's application of the nexus rule in *Complete Auto* itself as well as the rule's antecedents.

The "general expression" of the Commerce Clause nexus standard in *Complete Auto* is this: a tax will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State." *Id.* at 279. How did this Court apply the "general expression" of its nexus test in *Complete Auto* itself?

First, the Court identified the tax in question in its own words as a "sales tax" imposed, as a statutory matter, as "privilege taxes for the privilege of engaging . . . in business . . . within this state" measured by gross income from the operation of a "transportation business for the transportation of persons or property." *Id.* at 275 (quoting Miss. Code Ann., 1942 § 10105 (1972 Supp.)) (quotation marks omitted). Then the Court observed that the company "did not allege that *its* activity *which Mississippi taxes* does not have a sufficient nexus with the State." 430 U.S. at 277-78 (emphasis added). And indeed the company did engage in transporting property within the State. Hence there was no basis for invalidating the assessment on the nexus ground.

Moreover, every precedent cited in *Complete Auto* as sources for its synthesis of the Commerce Clause tests – every one – concerned a tax *on* the activity *of the taxpayer* in the State.

By contrast, the Court was quite clear in the opinions upholding tax-collection obligations that it distinguished in *Nat'l Bellas Hess, Inc. v. Dep't of*

Revenue of Illinois, 386 U.S. 753 (1967), that the Court was not evaluating a tax imposed *on* the business itself. Instead, that line of cases established that, if a use-tax collection obligation could be imposed, it was because the State *already* had a predicate right to impose a tax on an activity of the business in that State. In other words, if the *Complete Auto* standard is satisfied, then it follows that a use-tax collection obligation can be imposed. This analytical template was followed by the Court in *Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977).

Complete Auto does not authorize imposing a tax on a business because of someone else's activity in the State. Because *Complete Auto* nexus is properly understood as an individualized question based on the taxpayer's activities, as to South Dakota's sales tax – the only tax in question in this case – the issue under *Complete Auto* is whether a specific remote retailer's activity, in selling at retail, has a "substantial nexus with the taxing State." Does a sufficient part of the retailer's activity occur in the State? It appears the record is insufficient to resolve that issue.

Given that the Petitioner acknowledges the Court can retain the specific holdings of *Bellas Hess* and *Quill*, Pet'r's Br. at 42, what is really at stake (though not acknowledged by the Petitioner) is whether the nexus test of *Complete Auto* should be revised. Because the Petitioner has not come to grips with the real import of *Complete Auto*, and because South Dakota's conclusive presumption of in-state activity based on transaction volumes is inconsistent with *Complete Auto*, the Petitioner's argument should be rejected.

2. Deciding this case requires first deciding whether the *Complete Auto* test or the *Bellas Hess/National Geographic* framework applies. For this purpose, the Court should exercise skepticism about the ways Petitioner, its supporting *amici*, and the South Dakota Supreme Court have characterized the tax in question. *See Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443 (1940) ("[T]he descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction.").

Here, the concept of "sales tax" propounded by the Petitioner is any "tax collected or remitted by the seller," regardless whether the legislature imposed the tax on sellers or consumers or on sales or use. Pet'r's Br. at 3 n.1. This abstracted approach is not faithful to South Dakota's own sales tax enactment, let alone the diverse transactional and consumption taxes enacted by the various States. South Dakota's tax is imposed "upon the privilege of engaging in business as a retailer . . . upon the gross receipts from all sales." S.D. Codified Laws § 10-45-2 (Supp. 2017). Seeking reimbursement from the customer is optional at the discretion of the retailer. *Id.* § 10-45-22. The tax is imposed on the seller and is paid by the seller, whether or not the tax amount is added to the selling price. This means *Complete Auto*'s nexus formula applies, and this formula asks whether a particular taxpayer is engaged in retailing activity in South Dakota.

Notwithstanding the text of South Dakota's statute, the South Dakota Supreme Court said below, "Generally, sellers selling merchandise in South Dakota have an obligation to collect and remit sales tax on each transaction." *State v. Wayfair, Inc.*, 901

N.W.2d 754, 756 (2016) (citing S.D. Codified Laws § 10-45-27.3). However, this statute does *not* require tax collection by the retailer. Instead, it says any "person whose receipts are subject to the tax . . . shall . . . file a return, and pay any tax due . . . ." Nothing in the opinion suggests that the Court was intentionally construing the statutory text rather than simply misunderstanding it.

Having reached this critical pivot-point in Commerce Clause jurisprudence, when the Petitioner asks the Court to abrogate a long-standing precedent affecting billions of dollars, the Court should take even more than ordinary care in describing what the object of South Dakota's sales tax is and which taxes are governed by the Court's resolution of this case.

ARGUMENT

I. *Complete Auto*'s Background Shows That Nexus With The Activity Is An Individualized Assessment, And This Case Is Not Properly Framed Upon Individualized Facts.

A. The entire body of law on which *Complete Auto* based its nexus test focused on whether the taxpayer conducted the taxed activity in the State.

1. When a petitioner asks the Court to abrogate one of its decisions, consideration of the deeper background of that decision in the Court's precedents is essential. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is an excellent example of such a historical

review. *See id.* at 279-87. The Petitioner in this case obscures the background of both *Quill* and *Complete Auto* by taking the *Complete Auto* formula as a simple and encompassing doctrinal starting point.

The Petitioner asks the Court to reject the rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), simply by applying the nexus test of *Complete Auto* as written. If "*an* activity" has substantial nexus with the taxing State, as the Petitioner alleges a sale consummated by delivery to the purchaser in the State does, it supposedly does not matter whether the taxpayer has a substantial nexus with the taxing State. *See* Pet'r's Br. at 22-23 (quoting *Quill*, 504 U.S. at 311 (quoting *Complete Auto*, 430 U.S. at 279)) (emphasis altered). Certain supporting *amici curiae* follow this line of argument.[2]

This position does not accurately reflect the substance of the *Complete Auto* test in light of either the Court's analysis in that case or the legacy of case law on which the test was based. The Petitioner, in other words, betrays Chief Justice Marshall's counsel to take the "general expression" of the *Complete Auto* nexus test "in connection with the case in which [that] expression[is] used." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

---

[2] *See* Br. of National Governors' Association, et al., at 20 (Court should "simply apply the *Complete Auto* test as it was originally articulated"). *See also* Br. for Colorado, et al., at 1 (urging Court to adhere to *Complete Auto*); Br. of Brill, et al., at 17 (agreeing with Petitioner that the tax satisfies nexus test of *Complete Auto*). *Contra* Br. of Retail Litigation Center, et al., at 28 ("South Dakota's law focuses on a *retailer's* sales activity.") (emphasis altered).

In *Complete Auto*, the tax was imposed on the privilege of doing business measured by gross income, specifically under a subsection applicable to providing transportation of persons or property between points within the State. 430 U.S. at 275. The taxpayer admitted providing such transportation but claimed it could not be taxed because it "was but one part of an interstate movement." *Id.* at 277. Before getting to *Complete Auto*'s oft-cited four-prong test, the Court articulated how the test applied to the taxpayer in question. The taxpayer—

> did not allege that *its activity* which Mississippi taxes does not have a sufficient nexus with the State; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the State.

Id. at 277-78 (emphasis added) (footnote omitted). In other words, in this sentence the Court articulated what the taxpayer must allege in order to plead a Commerce Clause violation. As to nexus, it must allege and then show that *its own* activity, being the object of the tax, is not conducted in the State. This is an "as-applied" test.

Then, having recited the gaps in the taxpayer's pleading, the Court proceeded to synthesize the relevant precedents relied upon by Mississippi in almost exactly the same terms. This synthesis has become the foundational "general expression" of Commerce Clause requirements:

> *These decisions* have considered not the formal language of the tax statute but

> rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Id. at 279 (emphasis added; footnote omitted).

In this way, the "general expression" of Commerce Clause requirements was explicitly grounded on the decisions of the Court that had been brought to the argument by the State of Mississippi, cited in footnote 8 of the *Complete Auto* opinion. So, too, did the Court ground its description of what Complete Auto Transit failed to plead to show a Commerce Clause violation in specific prior opinions, cited in footnote 6 of the opinion. These prior decisions show that the "general expression" of the nexus test focuses not on a disembodied "activity" without an actor, but on whether the taxpayer's activity, to which the tax is applied, is conducted in a substantial way within the State.

Taking the nexus decisions in footnote 6 first:[3]

- *Gen. Motors Corp. v. Washington*, 377 U.S. 436 (1964), involved a gross receipts tax on

---

[3] In footnote 6, the Court also cited two discrimination cases, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), and two "fair relationship" cases, *Illinois Cent. R. Co. v. Minnesota*, 309 U.S. 157 (1940); *Ingels v. Morf*, 300 U.S. 290 (1937). Each of these taxes or fees was imposed on in-state activities or property of the burdened taxpayer.

wholesaling. The Court held there was a sufficient "local incident" to support the tax, because General Motors had "employees who were residents of the State and who performed substantial services in relation to General Motors' functions *therein*, particularly with relation to the establishment and maintenance of sales, upon which the tax was based." *Id.* at 477 (emphasis added).

- *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975), involved the same gross receipts tax. In its due process analysis, the Court held the taxpayer's "*in-state activities*" were sufficient to uphold nexus to tax, "[f]or appellant's employee, Martinson, with a full-time job *within the State*, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." *Id.* at 562 (emphasis added).

Taking next the nexus cases cited in footnote 8:

- *General Motors* (see above).
- *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 50 (1959), involved the State's corporate net income tax. The Court held that such a tax is generally permissible if, among other things, it "is properly apportioned to local activities *within the taxing State* forming sufficient nexus to support the same." *Id.* at 452 (emphasis added). The Court then found the imposition in question permissible because the taxpayer had "activities in Minnesota consist[ing] of a

regular and systematic course of solicitation of orders for the sale of its products" through four employed salespersons. *Id.* at 454.

- *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948), involved a franchise or excise tax on doing business in the State levied on capital employed within the State. *Id.* at 81-82. The taxpayer operated a gas pipeline running through Mississippi. The Court relied on the state supreme court's interpretation that the local incidents of the tax were maintaining, keeping in repair, and otherwise attending to the pipeline facilities in the State and held these local activities validated the tax because they could not form the basis for taxation by another State. *Id.* at 86, 88.
- *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), involved a due process challenge to a tax on the privilege of declaring dividends out of income derived from property located and business transacted in Wisconsin. *Id.* at 439 & n.1. Notwithstanding the fact that the tax was formally triggered by an action (declaring dividends) that, in this case, occurred outside Wisconsin, the Court upheld the tax because the "substantial privilege of carrying on business in Wisconsin," *id.* at 444-45 – "within its borders," *id.* at 442 – supported it.

In sum, all of the cases relied on by the Court in *Complete Auto* as the sources of its Commerce Clause template rested their nexus holdings on the local activities *of* the taxpayer *in* the State.

The balance of the *Complete Auto* opinion traced the themes of practicality and realism evoked in the Court's prior opinions in order, ultimately, to justify overruling *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951). These opinions, too, focused *only* on situations where the tax was imposed on activities of the taxpayer in the State.

In *Freeman v. Hewit*, 329 U.S. 249 (1946), the tax was imposed on the gross income of residents and domiciliaries. In this case it was imposed on the sale of stock by an estate trustee domiciled in Indiana. *Id.* at 250. Justice Rutledge's concurrence, discussed in *Complete Auto*, 430 U.S. at 280-81, highlighted that the Indiana domiciliary's activity in selling the stock had sufficient factual connections to Indiana to satisfy due process. 329 U.S. at 271.

The Court then rehearsed the facts and analysis of *Memphis Natural Gas*, which it had already cited as a source of its Commerce Clause synthesis in footnote 8 of the *Complete Auto* opinion. 430 U.S. at 281-82. The Court reiterated that it had found reasonable the state court's position that Mississippi had not sought to "secure anything from the corporation by this statute except compensation for the protection of" the taxpayer's "enumerated local activities." *Memphis Natural Gas*, 33 U.S. at 93.

The Court in *Complete Auto* then identified the significant nexus factor in *Northwestern States* as the fact that the tax was properly apportioned "to local activities within the taxing State" (i.e., the taxpayer's systematic solicitation of sales) that formed the basis for nexus to support the tax. 430 U.S. at 285 (citing *Northwestern States*, 358 U.S. at 464).

Finally, the Court recited a prior summary of its own cases in the opinion in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), where it said its decisions had "sustained . . . state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to *a corporation's* local activities," among other criteria. *Complete Auto*, 430 U.S. at 287 (quoting *Colonial Pipeline*, 421 U.S. at 108) (quotation marks omitted) (emphasis added).

To repeat, all the decisions on which *Complete Auto* relied for the oft-cited nexus formulation, in finding a sufficient nexus, rested on the fact that the tax was justified by a consequential, local activity *of the taxpayer* in the State. None of them said or even implied that the Court would uphold a tax in the absence of a "local" activity *of the taxpayer*. In light of how *Complete Auto* applied its "general expression" of the nexus prong in *Complete Auto* itself, and in light of the entire history behind it, the "general expression" necessarily implies that a tax will be sustained "when the tax is applied to an activity [of the taxpayer] with a substantial nexus with the taxing State," and this "substantial nexus" rests on the fact that a consequential element of the taxpayer's activity occurs in the State.[4]

---

[4] *See also Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768 (1992). In that case, the Court observed that the Commerce Clause nexus limitation is grounded in part on the understanding that "to permit each State to tax activities *outside* its borders would have drastic consequences for the national economy." *Id.* at 777-78 (emphasis added). This concern is allied, said the Court, to Due Process Clause jurisdictional limitations, and "we have not abandoned the requirement that, in the case of a tax *on an activity*, there must be a connection to the activity itself,

2. The Petitioner's claim that *Complete Auto* is satisfied in this case appears based on the idea that the "sale" itself is the activity taxed by South Dakota's statute, and the "sale" itself has the necessary nexus with the State. The Petitioner's brief draws support from another "general expression," this one in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995): "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Id.* at 184, *quoted in* Pet'r's Br. at 22. However, the Court in *Jefferson Lines* obviously did not mean by this statement to undermine *Quill*, as the *Jefferson Lines* opinion itself cited *Quill* as representing its dormant Commerce Clause jurisprudence. *See* 514 U.S. at 179.

The facts in *Jefferson Lines* and in the lineage of cases that lay behind the Petitioner's quotation are entirely consistent with reading *Complete Auto* as allowing a tax *on* a seller only when the seller is conducting at least some portion of the taxable activity in the State. As the Court said, the facts justifying nexus in *Jefferson Lines* were that Oklahoma was the State where Jefferson Lines originated service to customers who bought tickets there. 514 U.S. at 184.

The Petitioner's brief does not identify the case *Jefferson Lines* cited in support of its general expression, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). That case involved a New York City sales tax, and the Court noted, Berwind-White maintained a sales office in New York City, and

---

rather than a connection only to the actor the State seeks to tax." *Id.* at 778 (citing *Quill*, 504 U.S. at 306-08) (emphasis added).

"[a]ll the sales contracts with the New York customers in question were entered into in New York City." *Id.* at 44. But in that case, the tax was imposed expressly upon the purchaser, *id.* at 42, and not on the activity of the seller.

The Court in *Berwind-White* cited a number of prior decisions in support of the principle that a sale is a local event notwithstanding that the goods had an out-of-state origin. *See id.* at 50. For example, *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1868), involved an Alabama tax imposed on an Alabama merchant with respect to liquors brought into the State for sale from elsewhere. *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923), involved a Texas tax on wholesale dealers in oil measured by sales within the State. It was upheld against a New York corporation, having an office in Dallas and warehouses elsewhere in Texas, on oil imported from outside the State for sale and delivery in Texas. *See id.* at 507-08.

In most if not all of these cases, the Court upheld the tax, in the face of arguments that the tax was imposed unlawfully upon interstate commerce, because the sales were sufficiently "local" events. Thus, the "general expression" in *Jefferson Lines* arose directly from the now-obsolete concern to distinguish taxes on local events from taxes on "interstate commerce" itself, which had animated the position of the Court in *Freeman v. Hewitt* and *Spector Motor Service*. Neither the "general expression" in *Jefferson Lines* nor its origins in prior opinions impeach the understanding of *Complete Auto* discussed above.

B. The Court's use-tax collection cases show the collection obligation is dependent on the taxpayer's carrying on a directly taxable activity in the State; mere advertising was not seen as a substantial part of making sales.

In *Quill*, this Court said that "*Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases." 504 U.S. at 311. Further, as to *Complete Auto*'s nexus test, the Court said *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967)—

> stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.

Id. A look "under the hood" at the case law distinguished by *Bellas Hess* shows what this meant.

The Illinois tax at issue in *Bellas Hess* was a use tax. The State sought to enforce the use-tax collection obligation against National Bellas Hess because it fit the statutory definition of a "retailer doing business in this State" by virtue of "[e]ngaging in soliciting orders within this State from users by means of catalogues or other advertising." 386 U.S. at 754, 755 (quoting Ill. Rev. Stat. c. 120, § 439.2 (1965)) (quotation marks omitted).

The Court in *Bellas Hess* ultimately rejected what it called "advertising nexus," *id.* at 758 n. 11, partly in reliance on the facts and holding of *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). *See id.* at 758-59. In doing so, the Court distinguished five other precedents, making clear that use-tax collection

obligations were not considered "direct" taxes on the seller and that the power of the State to enforce such an obligation had to be based on some activity of the seller in the State – not consumption by the customer – that established a baseline nexus.

- In *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939), the Court addressed whether California could compel a retailer "to serve as an agent for collecting the [use] tax." *Id.* at 64. The seller hired two "general agents" to solicit sales and leased an office in the State for their use in the business. The Court did not rely expressly on the seller's activities in the State in upholding the obligation, but rather upon a prior decision having the same flavor, *see id.* at 66-68:
  - In *Monomator Oil Co. v. Johnson*, 292 U.S. 86 (1934), Iowa imposed a use tax on motor fuel. The corporation in question bought and sold, manufactured and blended gasoline and similar products, including at a refinery in Iowa. *Id.* at 90-91. "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement." *Id.* at 93 (citations omitted). The Court concluded that "the statutes properly construed lay no tax whatever upon distributors." *Id.* at 95.[5]

[5] The Court in *Felt & Tarrant* also relied, in points not germane to the argument, on *Henneford v. Silas Mason Co.*, 300

- In *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941), the taxpayer had retail stores in Iowa and also conducted mail-order sales by use of a catalogue. Like California's statute in *Felt & Tarrant*, Iowa imposed a use-tax collection obligation on retailers that maintained a place of business in the State. *Id.* at 361. Per the Court, "the nub of the controversy centers on the use of respondent as the collection agent of Iowa." On the facts, the Court held that the mail orders "are still part of respondent's Iowa business," and because Iowa had extended Sears the privilege of conducting business within the State, "Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business." *Id.* at 364 (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940)). The Court distinguished pure mail-order houses as "not doing business in the state as foreign corporations." *Id.* at 365.
- *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941), was a companion case to *Sears, Roebuck* and involved the same Iowa tax. Given that employees at local stores conducted activities in Iowa "pursuant to its permit to do business in that state," the fact that other employees outside Iowa handled mail-order sales did "not permit respondent to escape the burden which Iowa has exacted as a price of enjoying the full

---

U.S. 577 (1937), and *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921).

benefits flowing from its aggregate Iowa business." *Id.* at 375 (citing *Sears, Roebuck*). An additional factor was present – the placement of advertisements *by the local stores* regarding mail-order products as well as in-store merchandise. To the Court, this fact meant that Montgomery Ward solicited mail-order sales "in Iowa" through "local advertising" that was no different, in constitutional terms, from local-agent solicitations as in *Felt & Tarrant*. *Id.* at 376.

- *Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335 (1944), involved the same use-tax collection statute as in *Sears, Roebuck* and *Montgomery Ward*, but in this case the corporation had not qualified to do business in Iowa and solicited orders via traveling "salesmen." *Id.* at 337. The Court observed that the *Felt & Tarrant* case was "indistinguishable" – "nothing [could] turn on" variation in the means of soliciting orders within the State. *Id.* at 337. "To make the distributor the tax collector for the State is a familiar and sanctioned device." *Id.* at 338 (citing *Monamotor* and *Felt & Tarrant*).
- Finally, in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), Florida imposed the use-tax collection duty on dealers who solicited business either by representatives or by the distribution of advertising matter. *Id.* at 207 & n.1 (citing and quoting Fla. Stat. § 212.06). Scripto solicited sales through 10 broker/salespersons operating in the State

> designated as independent contractors. *Id.* at 209. Noting that the company "is charged with no tax—save when, as here, [it] fails or refuses to collect it from the Florida customer," *id.* at 211, the Court held that the test for compelling use-tax collection "is simply the nature and extent of the activities of the appellant *in* Florida." *Id.* at 211-12 (emphasis added). The Court distinguished *Miller Bros.* on this fact: "Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales." *Id.* at 212.

In all these situations, this Court said in *Bellas Hess*, "the out-of-state seller was plainly accorded the protection and services of the taxing State." 386 U.S. at 757.[6] In other words, had the State framed a tax imposed directly on the out-of-state sellers in these cases on account of their own activities in the State (as it had done in some of the cases), it could have enforced that tax, too – so the potentiality of a State tax consistent with *Complete Auto* existed. The absence of such a potentiality in *Bellas Hess* – given that the Court did not accept the validity of an "advertising nexus," *id.* at 758 n.11 – defeated Illinois's attempt to enforce the use-tax collection obligation.

---

[6] *See also Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977) (advertising sales activity at two offices in the State established "a relationship or 'nexus' between the Society and the State," which rendered derivative use-tax collection obligations constitutional).

C. South Dakota's conclusive nexus presumption based on sales volumes does not comport with *Complete Auto*'s as-applied test; if "delivery" is the targeted activity of online retailers, the State needs to show the particular delivery mechanism can be attributed to the retailer.

1. South Dakota enacted a conclusive presumption of a "substantial nexus" between the State and the selling activities of remote retailers based on sales volumes – either an annual level of gross revenue from sales "delivered into" the State of $100,000 or more, or an annual number of taxable transactions "for delivery into" the State of 200 or more. S.B. 106, 91st Legis. Assemb. Session, §§ 1(1), (2) (S.D. 2016). This "economic nexus" approach may have an attractive simplicity, but it does not comport with the requirement of *Complete Auto*, properly understood, that the tax be applied to an activity *of the taxpayer* conducted in consequential part in the State.

The reason the nexus prong of *Complete Auto* is properly conceived as an as-applied test is that, if the State is not taxing an activity of the taxpayer *in* the State, it is improperly taxing an activity occurring somewhere else. *See Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777-78 (1992).

South Dakota's approach attempts to avoid the fundamental factual question underlying this Court's cases about nexus over selling activities. The opinion in *Scripto* captured the issue most clearly in distinguishing that case from *Miller Bros.* In *Miller Bros.*, the Court said, "Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales." *Scripto*, 362 U.S. at 212. The same question obtains for sales on the Web: did the South Dakotan

go to the retailer to make a purchase, or did the retailer go to South Dakota to make the sale? This question is not answered by arbitrary volume thresholds.

What is at stake in adopting a conclusive economic nexus presumption is therefore not only overthrowing *Quill* but also whether the Court will discard the meaning of the "activity" test of *Complete Auto* and push aside the underlying concern of the Commerce Clause about the consequences of allowing one State to tax activities that take place in other States, as exemplified by *Miller Bros.* and *Allied-Signal*.

2. The South Dakota statute might be interpreted as trying to meet the *Complete Auto* test by attributing the activity of "delivery" of tangible personal property, electronically transferred property, and services "into South Dakota" to the seller. *See* S.B. 106, §§ 1(1), (2) (Pet'r's Br. App.1a) (limiting the gross receipts or transactions counting toward the conclusive-presumption thresholds to products delivered into South Dakota). That is, should the statute be understood as ascribing the delivery process to the remote seller and treating the delivery process, part of which necessarily occurs in South Dakota, as an integral component of making sales at retail?

Treating a remote seller's management of delivery mechanisms in a State as a "local incident" of retailing, sufficient to serve as a "substantial nexus" with the retailing activity, would not be consistent with this Court's tradition, as shown by *Bellas Hess* and such cases as *American Oil Co. v. Neill*, 380 U.S. 451 (1965), and *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951). Regardless whether it might be a legitimately debatable question within the *Complete*

Auto framework, the text of the statute does not support a finding that South Dakota's legislature intended to base its taxing authority on a "delivery nexus" apart from sales volumes, and the issue was not argued or decided below.[7]

Moreover, delivery methods for tangible personal property, electronically transferred property, and services are diverse. The latter two classes, in particular, raise the *Miller Bros.* question whether South Dakotans went "to" the seller to make their purchases. In any event, Practitioners are not aware of adequate data in the record about Respondents' delivery methods that could support a conclusion at this stage that they are engaged "in business as a retailer" *in* South Dakota.

3. The question presented by the Petitioner is not well framed. Rather than "abrogate" *Quill*, the Petitioner now tells this Court that it can retain *Quill*'s holding as far as it goes. Instead, the Petitioner asks the Court to validate a conclusive nexus presumption for e-commerce based on sales volumes. This request actually asks the Court to abrogate the more fundamental, as-applied nexus test of *Complete Auto*. To be faithful to *Complete Auto* and the body of law it represents, the Court should reject the Petitioner's argument and affirm the decision below.

---

[7] Also, nothing in S.B. 106 indicates any intent by South Dakota to rely on an "advertising nexus," *cf. Bellas Hess*, 386 U.S. at 758 n.11, by treating advertising in the State as an integral component of making sales at retail. The South Dakota Supreme Court also said nothing about considering advertising or delivery as in-state components of the retail business in the decision below.

II. Confusion About The Nature Of The Tax In Question Should Be Avoided.

The Petitioner asks the Court to rest its decision in this case on a new, nationwide abstraction of the diverse taxes that may be implicated by conclusive economic nexus presumptions. Ostensibly "[f]or clarity," the Petitioner uses "sales tax" to mean "a tax collected and remitted by the seller" and "use tax" to mean "a tax remitted by the consumer." Pet'r's Br. at 3 n.1.

Reimagining state taxes with this typology undermines the "substantial nexus" test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), because it necessarily confuses the issue whether "the tax *is applied to* an activity" of the taxpayer. *Id.* at 279 (emphasis added). Each tax, whether well framed by the legislature or not, has an object or incident. It is "applied" to an object or incident. Fashioning a constitutional rule based on abstracted mechanisms of collection and remittance rather than concrete state legislative enactments would step away from the "realities" the Court is trying to reflect. *See Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372 (1991). A use tax, even if collected by a retailer, is typically applied to "the privilege of use after commerce is at an end." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937). What good would it accomplish suddenly to call use taxes "sales taxes," when the Court has been clear for many decades that it is not the case?

According to the statutory text, South Dakota "applies" its sales tax to the retailer alone. The tax is imposed "upon the privilege of engaging in business as a retailer . . . upon the gross receipts from all sales."

S.D. Codified Laws § 10-45-2 (Supp. 2017). Seeking reimbursement from the customer is optional at the discretion of the retailer. *Id.* § 10-45-22. This means *Complete Auto*'s nexus formula asks whether the particular person is engaging in retailing activity in South Dakota.

A different model is exemplified by Washington State, where the "sales tax" is imposed "on each retail sale in this state" of specified goods and services, Wash. Rev. Code § 82.08.020(1), and the statute requires the tax "must be paid by the buyer to the seller." *Id.* § 82.08.050(1). Indeed, in contrast to South Dakota, Washington generally *prohibits* sellers from directly or indirectly paying the tax owed by the buyer, on pain of a misdemeanor. *Id.* § 82.08.120.[8]

The Court does not need to treat these different models the same way in order to sustain a coherent Commerce Clause framework. *Complete Auto* controls the one (South Dakota) and the seller's obligation to collect the tax in the other (Washington) is not treated as a direct tax but instead can be triggered by *non*-retailing activities of the seller in the State. *See Irwin Naturals v. State*, 382 P.3d 689, 695-96 (Wash. Ct. App. 2016) (relying on *Nat'l Geographic Soc'y v.*

---

[8] The differences in how these state legislatures have selected the object of taxation are not merely a matter of "formal language," *cf. Complete Auto*, 430 U.S. at 279, but instead they have real-life consequences. For example, California's sales tax is generally in the South Dakota model – a tax imposed on a retailer's gross receipts for the privilege of selling tangible personal property, Cal. Rev. & Tax. Code § 6051 (2016 and Supp. 2018) – except that a California retailer's right to obtain reimbursement of the sales tax from a customer depends on the customer's express or implied consent as a matter of contract. *See* Cal. Civ. Code § 1656.1 (2016 and Supp. 2018).

California Bd. of Equalization, 430 U.S. 551 (1977)), *cert. denied*, 138 S. Ct. 238 (2017).

The South Dakota situation is confused, however, by the South Dakota Supreme Court's apparent error in stating that state law requires the retailer to collect sales tax from the purchaser. *See State v. Wayfair, Inc.*, 901 N.W.2d 754, 756 (2016) (citing S.D. Codified Laws § 10-45-27.3). However, this section does *not* require tax collection by the retailer. Instead, it says any "person whose receipts are subject to the tax . . . shall . . . file a return, and pay any tax due . . . ." Nothing in the opinion suggests that the Court was construing the statutory text rather than simply misunderstanding it.

The website of the State's Department of Revenue contains statements also indicating the Court's statement was a casual error. Per the Department of Revenue's Sales and Use Tax Guide, "South Dakota law *allows the seller to add the tax* to the price of the product or service. However, the seller is liable for the sales tax due, whether or not it is collected." "Sales and Use Tax Guide" at 3 (July 2017) (emphasis added), http://dor.sd.gov/Taxes/Business_Taxes/Publications/Sales_Tax.aspx (last visited April 3, 2018).

These facts are inconvenient also for the argument of the United States as *amicus curiae* supporting the Petitioner. It argues that *Complete Auto* does not control this case, but instead the Court should apply the Commerce Clause balancing framework of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Br. of United States at 8. It claims that "[t]his case concerns the application of the dormant Commerce Clause to a state tax-collection requirement." *Id.* at 1. Perhaps based on the section title of S.D. Codified Laws § 10-64-2

(Supp. 2017),[9] it argues that remote sellers are required "to collect taxes on the sales of goods or services into the State." *Id.* at 6. In fact, the cited statutory text does not impose this requirement, but instead requires remote sellers to "*remit* the sales tax and [to] follow all applicable procedures and requirements of law as if the seller had a physical presence in the state." S.D. Codified Laws § 10-64-2 (Supp. 2017) (emphasis added). This remittance requirement, as noted above, is in fact a payment requirement, with no obligation to seek any kind of reimbursement from the customer. *Id.* §§ 10-45-22, 10-45-27.3.

It may be tempting to say South Dakota's sales tax is a sales tax like any other (according to the Petitioner) or is a tax-collection obligation like any other (according to the United States), but these positions are rather like calling an apple a banana. Unless the Court wants to fundamentally alter the scope and meaning of the nexus text of *Complete Auto*, it should treat the tax as imposed on the retailer's retailing activity, just exactly as the statute says. South Dakota's conclusive nexus presumptions do not establish the fact of an in-state activity of the retailer, as required by *Complete Auto*, and should be rejected by this Court.

---

[9] The brief for the United States does not cite to the South Dakota Supreme Court decision.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Washington State Tax Practitioners respectfully request that the Court affirm the decision below.

Respectfully submitted,

DIRK GISEBURT*
Counsel of Record
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
dirkgiseburt@dwt.com
206-757-8049

* Counsel of Record

April 4, 2018

APPENDIX

APPENDIX A

LIST OF *AMICI CURIAE* WASHINGTON STATE TAX PRACTITIONERS

Norman J. Bruns, Garvey Schubert Barer P.C., Seattle, Washington

Michelle DeLappe, Garvey Schubert Barer P.C., Seattle, Washington

Garry G. Fujita, Eisenhower Carlson PLLC, Tacoma, Washington

Dirk Giseburt, Davis Wright Tremaine LLP, Seattle, Washington

David Maas, Davis Wright Tremaine LLP, Seattle, Washington

George C. Mastrodonato, Carney Badley Spellman, P.S., Seattle, Washington

Michele G. Radosevich, Davis Wright Tremaine LLP, Seattle, Washington